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**Service Contract Act: An Overview,  
Section 4(c) and Federal Enclaves**

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## **I. Overview and History of the Service Contract Act**

### **A. Provisions and Applicability of the Act**

The McNamara-O’Hara Service Contract Act of 1965, as amended (*SCA*), 41 U.S.C. §§ 6701 et seq. (formerly 41 U.S.C. §§ 351 et seq.), was enacted for the purpose of protecting prevailing labor standards by preserving the wages and benefits of service employees working for contractors or subcontractors under federal service contracts. The Act applies to any contract or bid specification for a contract in excess of \$2,500 made by the United States or the District of Columbia with the principal purpose of furnishing services through the use of service employees. 41 U.S.C. § 6702. The Act is primarily enforced by the Department of Labor (*DOL*) and is interpreted and administered in federal agencies through Federal Acquisition Regulations (*FAR*) Subpart 22.10 and Title 29 of the Code of Federal Regulations (*CFR*) Parts 4, 6, 8, and 1925. The statute gives the Secretary of Labor the authority to administer and enforce its provisions. 41 U.S.C. §§ 6707, 6505, 6507.

The SCA applies only to contracts whose “principal purpose,” taken as a whole, is to furnish services through the use of service employees; “incidental” furnishing of such services will not subject a contract to the provisions of the Act. 41 U.S.C. § 6702; *J.L. Associates, Inc.*, Comp. Gen. Dec. B-236698.2, Jan. 17, 1990, 90-1 CPD 60. The SCA only covers “service employees,” which are defined by statute as any employees engaged in performance under a federal service contract, whether or not that person has any contractual relationship with the contractor or subcontractor, but specifically excluding any person “employed in a bona fide executive, administrative, or professional capacity”. 41 U.S.C. § 6701.

Other statutory exemptions from the Act include contracts to be performed outside of the United States; construction and manufacturing contracts; contracts for the carriage of freight or

persons where published tariff rates are in effect (excluding mail haul contracts); contracts for services of communications companies subject to the Communications Act of 1934; contracts for public utility services; employment contracts under which an individual provides direct services to a federal agency; and contracts with the U.S. Postal Service for operation of postal contract stations. *See* 41 U.S.C. § 6702.

According to FAR 22.1007, the provisions of the SCA apply to the following types of federal contracts and solicitations:

- (a) Each new solicitation and contract in excess of \$2,500.
- (b) Each contract modification which brings the contract above \$2,500 and—
  - (1) Extends the existing contract pursuant to an option clause or otherwise; or
  - (2) Changes the scope of the contract whereby labor requirements are affected significantly.
- (c) Each multiple year contract in excess of \$2,500 upon—
  - (1) Annual anniversary date if the contract is subject to annual appropriations; or
  - (2) Biennial anniversary date if the contract is not subject to annual appropriations and its proposed term exceeds 2 years--unless otherwise advised by the Wage and Hour Division.

48 C.F.R. § 22.1007. By statute and regulation, service contracts subject to the SCA may not exceed five years in duration. 41 U.S.C. § 6707(d); 48 C.F.R. § 22.1002-1.

As stated above, the main purpose of the SCA is to protect labor standards for service employees under federal contracts. This is accomplished mainly by requiring that various provisions be included in any service contracts. In its current, amended form, the SCA requires any covered contract to

contain a provision specifying the minimum wage to be paid for each class of service employee . . . in accordance with prevailing rates in the locality, or, where a collective-bargaining agreement covers the service employees, in accordance with the rates provided for in the agreement, including prospective wage increases provided for in the agreement as a result of arm's length negotiations.

41 U.S.C. § 6703. The contract must similarly specify fringe benefits based on prevailing rates or bargained-for rates included in collective bargaining agreements (*CBAs*), and include provisions regarding working conditions and notice to employees. *Id.*

Where wage and benefit rates have not been established through collective bargaining, they are to be “determined by the Secretary [of Labor] or the Secretary’s authorized representative.” *Id.* This is accomplished through a wage determination, which the regulations define as:

any determination of minimum wage rates or fringe benefits made pursuant to the provisions of sections 2(a) and/or 4(c) of the Act for application to the employment in a locality of any class or classes of service employees in the performance of any contract in excess of \$2,500 which is subject to the provisions of the Service Contract Act of 1965. A wage determination is effective upon its publication on the WDOL Web site or when a Federal agency receives a response from the Department of Labor to an e98.

29 C.F.R. § 4.1a

Previously, the contracting officer for any service contract would submit a form designated as Standard Form (*SF*) 98 to the DOL Employment Standards Administration to request a wage determination. Recently, however, the process has been streamlined, and the FAR now requires that contracting officers obtain prevailing wage determinations from the Wage Determination Online (*WDOL*) website, available at [www.wdol.gov](http://www.wdol.gov). *See* FAR 22.1008-1(a). This interactive website allows a contracting officer or any other individual to search by state, county, and services rendered and/or class of service employee, in order to determine the prevailing wage rate for a particular locality.

However, because a wage determination has not already been issued for every service in every county across the United States, contracting officers may still submit an e98 form electronically, available at <http://www.dol.gov/whd/govcontracts/sca/sf98/sf98.asp>. *Id.* at

22.1008-1(a)-(b). The contracting officer for an agency must make several determinations regarding the contract in order to obtain a wage determination, including whether Section 4(c) of the SCA, which is discussed in detail in Section II, *infra*, applies to that contract. *Id.* at 22.1008-1(e)(3). After a request has been made through the submission of an e98 form, the DOL attempts to process most requests immediately, although some requests take longer due to the necessity of Department research. *See* Wage Determinations Online, e98 – Overview, available at [www.wdol.gov/e98.aspx](http://www.wdol.gov/e98.aspx) (last accessed March 31, 2015). Once the wage determination has been received, “[t]he contracting agency may rely upon the Department of Labor response as the correct wage determination for the contract.” FAR 22.1008-1(d).

A wage determination must be obtained by the contracting officer for any service contract valued at more than \$2,500, regardless of the number of service employees involved. However, because contracts with five or less employees contemplated to be employed are exempt from the provisions of the SCA under the regulations, the DOL is only obligated to issue a wage determination for those contracts under which more than five service employees are to be employed. *See* 41 U.S.C. § 6707(f); 29 C.F.R. §§ 4.3-4.4.

The Bureau of Labor Statistics does periodic surveys of certain job categories to set prevailing wages for various titles. However, the job categories surveyed are not necessarily related to the job titles for which the prevailing wages are listed. For example, the DOL uses the BLS’s survey of General Laborers to determine the prevailing wage rate for Food Service workers. In some areas of this country, that may lead to higher wage rates than if the survey was of Food Service workers; but in other areas, it might bring them lower. Because Food Service workers are not included in the survey, there is no increase in the resulting wage to take account of tips which some food service workers would receive at most restaurants and some cafeterias.

The results of these area-wide surveys are incorporated into what are called Area-Wide Wage Determinations. These Area-Wide Wage Determinations also include certain benefits such as health and welfare contributions, holidays and vacations. Almost any other benefit will only be due to collective bargaining.

The U.S. Department of Labor issues a determination each year, usually in June but delayed until August in 2014, setting forth a nationwide hourly health and welfare rate with which contractors are to purchase benefits for their employees. In the Area-Wide Wage Determinations, this hourly sum can be used for a variety of benefits as long as the contribution is to a bona fide benefit plan or is paid directly to the employees. With collective bargaining, unions can often get that amount used solely for health benefits with additional amounts being paid into a pension plan and/or used for sick leave and other benefits.

Along with provisions for wages and fringe benefits, the SCA further establishes that service contractors may not pay service employees less than the federal minimum wage. 41 U.S.C. § 6704. The SCA and its corresponding regulations set out recordkeeping and posting requirements, as well as safety and health provisions. *See id.* at § 6703(3)-(5). The Act also establishes liability and penalties for violations of its provisions. Any party responsible for violating one of the required contract provisions is liable for backpay “equal to the sum of any deduction, rebate, refund, or underpayment of compensation due any employee engaged in the performance of the contract.” *Id.* at § 6705(a). Such amounts may be withheld from payments owed to the contractor by the federal government; and if the withholdings are insufficient, the government may bring a civil action against the contractor in any court of competent jurisdiction to recover the remaining amount. *Id.* at § 6705(b).

Furthermore, upon any violation of a contract stipulation, the federal contracting agency may cancel the contract, then make arrangements for a new contract or a new contractor to complete the original contract, with any incidental costs charged to the violating contractor. *Id.* at § 6705(c). And anytime a contractor is found to have violated these provisions, it must be blacklisted for three years and not awarded any federal government contract “[u]nless the Secretary recommends otherwise because of unusual circumstances”. *Id.* at § 6706.

### **B. Legislative History of the Act**

Legislation covering labor standards for federal contracts began in 1931 with the passage of the Davis-Bacon Act, which created minimum wage rates and fringe benefits for laborers and mechanics working under federal construction contracts. 40 U.S.C. §§ 3141 et seq. (formerly 40 U.S.C. §§ 276a et seq.) Then, in 1936 Congress passed the Walsh-Healey Public Contracts Act, which set special minimum wage requirements for manufactured goods in excess of \$10,000. 41 U.S.C. §§ 6501 et seq. (formerly 41 U.S.C. §§ 35 et seq.) Finally, in 1965 Congress created similar requirements for the last major category of federal contracts – service contracts – with the passage of the SCA through Public Law 89-286 (Oct. 22, 1965).

The House Report on the SCA explained why it was necessary to expand these wage protections to service employees:

Many of the employees performing work on federal service contracts are poorly paid. The work is generally manual work and in addition to craft work, may be semiskilled or unskilled . . .

The Federal Government has added responsibility in this area because of the legal requirement that contracts be awarded to the lowest responsible bidder. Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it almost impossible to compete for government service contracts with those who pay wages to their employees at or below the subsistence level. When a government contract is awarded to a service

contractor with low wage standards, the government is in effect subsidizing subminimum wages.

H.R. Rep. So. 918, 89th Cong., 1st Sess. 2 (1965). Thus, Congress sought to both close the gap in labor standards protection for service contract employees and to remove wages as a bidding factor in the competition for federal service contracts.

Although the SCA sought to bring compensation for service employees in line with that of construction and manufacturing employees, the language as originally drafted was largely ineffective. One of the main goals of the SCA was to set a minimum wage level based on prevailing wages of localities as determined by the DOL. However, the statute originally gave liberal discretion to the Secretary of Labor regarding variations, tolerances and exemptions from the Act. For this reason, the DOL failed to make wage determinations in over two-thirds of all federal service contracts between 1966 and 1972. H.R. Rep. So. 1251, 92d Cong., 2d Sess. 3 (1972). Additionally, the original statute gave no consideration to wage levels which had been set by the terms of CBAs, so the lower wage rates paid by nonunionized employers were generally the “prevailing” rates. Therefore, while the incumbent contractor had to bid using the terms in the CBA, its competitors could always underbid it by basing their bids on the lower “prevailing” wage rate. The union would then have the extremely difficult task of trying to bargain with the new contractor to get it to increase wages and benefits.

It was because of these and other deficiencies in the original language of the SCA that Congress passed Public Law 92-473 in 1972 to amend the Act. Regarding the DOL’s failure to issue wage determinations, the following language was inserted into Section 4(b):

The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act (other than section 10), but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious

impairment of government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards.

Public Law 92-473 (Oct. 9, 1972), then codified at 41 U.S.C. § 353(b) (new language underlined). These more demanding requirements created a greater impetus for the DOL to perform its statutory duty in issuing wage determinations.

The 1972 amendments also took a radically different approach to the role CBAs would play in determining prevailing wage rates. Under the original statute, as discussed above, only prevailing wage rates in a particular locality determined the minimum wage floor that contractors were required to pay their employees. Since the passage of the 1972 amendments, the DOL is also required to consider the rates of wages paid under CBAs when setting wage determinations. The amended Section 2(a)(1) provided that contracts under the SCA must include wage rates set in accordance with prevailing rates in the locality,

or, where a collective bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations, In no case shall such wages be lower than the minimum specified in subsection (b).

*Id.*, then codified at 41 U.S.C. § 351(a)(1) (new language). The amended Section 2(a)(2) used this same language to require fringe benefit provisions to reflect those set under applicable CBAs. *Id.*, then codified at 41 U.S.C. § 351(a)(2).

Finally, CBA wage and benefit rates also came into play under the newly-drafted Section 4(c), which required an employer under a successor service contract to pay its employees not less than the wages and benefits, including prospective wages and benefits, that were paid under the predecessor contract pursuant to a CBA, if those rates were higher than the prevailing local rates. *Id.*, then codified at 41 U.S.C. § 353(c). Section 4(c) is discussed in greater detail below.

The SCA was again amended in 1976, with the principal purpose of clarifying what qualifies as a “service employee.” Public Law 94-489 (Oct. 13, 1976). In 2011, the Act was amended to consolidate and simplify its text, and its provisions were moved from §§ 351 et seq. to §§ 6701 et seq. of the U.S. Code, Title 41; but there was little if any change to the substance of the law. Public Law 111-350 (Jan 4, 2011).

## **II. Section 4(c) of the Service Contract Act**

The inclusion of Section 4(c) into the 1972 amendments to the SCA has had a tremendous impact on the ability of service contract employees to preserve their wages and benefits, especially in the context of unionized workforces. Unions generally view the contracting agency as their “customer,” since the actual company employing the bargaining unit members under a service contract may change frequently based on contract bidding. Thus, the most important long-term relationship, indirect though it may be, is between the union and the agency. Section 4(c) helps to ensure that terms bargained for by the union survive this sometimes unpredictable relationship.

### **A. The Successorship Rule Under Section 4(c)**

The original language of Section 4(c), as adopted in 1972, provided:

No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm’s-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: Provided, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

Public Law 92-473 (Oct. 9, 1972), then codified at 41 U.S.C. § 353(c).

As the Comptroller General has explained: “The purpose of section 4(c) of the Act is to eliminate wage busting, the practice where competing firms propose to hire and actually hire a predecessor contractor's employees at reduced wages and benefits in order to be the low bidder on a government service contract.” *Aleman Food Service, Inc.*, Comp. Gen. Dec. B-216143, Nov. 15, 1984, 84-2 CPD 537 (citing *Echelon Service Co.*, Comp. Gen. Dec. B-208720.2, July 13, 1983, 83-2 CPD 86). This Section was included in the Act in order to prevent contractors from cutting wages or fringe benefits in subsequent bids because “[w]hen a Government contract is awarded to a service contractor with low wage standards, the Government is in effect subsidizing subminimum wages.” *Fort Hood Barbers Ass'n v. Herman*, 137 F.3d 302, 309 (5th Cir. 1998) (citing H.R. Rep. No. 89-948, at 2-3 (1965); S. Rep. No. 89-798, at 3-4 (1965), reprinted in 1965 U.S.C.C.A.N. 3737, 3739).

The language of Section 4(c) changed somewhat when the Act was re-codified in 2011, though its substantive provisions remain the same. It now reads:

(c) Preservation of wages and benefits due under predecessor contracts—

(1) In general.—Under a contract which succeeds a contract subject to this chapter, and under which substantially the same services are furnished, a contractor or subcontractor may not pay a service employee less than the wages and fringe benefits the service employee would have received under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations.

(2) Exception.—This subsection does not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that wages and fringe benefits under the predecessor contract are substantially at variance with wages and fringe benefits prevailing in the same locality for services of a similar character.

41 U.S.C. § 6707(c).

The Secretary of Labor is given the authority to interpret and enforce the SCA, and his interpretation has controlling weight unless plainly inconsistent with the language of the Act. *See* 41 U.S.C. § 353; *Serv. Employees Int'l Union, AFL-CIO v. Gen. Servs. Admin.*, 830 F. Supp. 5, 8 (D.D.C. 1993). The DOL has implemented various regulations to clarify the labor standards required under Section 4(c). 29 CFR § 9.2 defines “same or similar service” with respect to successor contracts as “a service that is either identical to or has one or more characteristics that are alike in substance to a service performed at the same location on a contract that is being replaced by the Federal Government or a contractor on a Federal service contract.” This is a subjective analysis without any established formula, so the Secretary of Labor’s discretionary interpretation of the nature of the services rendered will generally be controlling.

Although Section 4(c) does not explicitly establish a rule for the place of performance of the service contract, the regulations provide that the successorship requirements apply to all contracts for substantially the same services furnished “in the same locality.” 29 C.F.R. § 4.163(i). However, the wage and benefit levels will remain applicable even if a successful contractor subsequently changes the place of the contract’s performance, or if the prime contractor subcontracts any part of the work to another company which performs the work in a different locality. *Id.* The inclusion of the requirement that any CBA to which Section 4(c) applies be the result of “arm’s-length negotiation” is intended to preclude arrangements by parties to a CBA who, either separately or together, act with an intent to take advantage of the wage determination scheme provided for in sections 2(a) and 4(c) of the Act. 29 C.F.R. § 4.11; *see also Trinity Services, Inc. v. Marshall*, 593 F.2d 1250 (D.C. Cir. 1978). *See* discussion *infra*.

The successor contractor rule under Section 4(c) is a self-executing obligation. *Lear Siegler Servs., Inc. v. Rumsfeld*, 457 F.3d 1262, 1267 (Fed. Cir. 2006); *see also Guardian*

*Moving & Storage Co. v. Hayden*, 421 F.3d 1268, 1270 (Fed. Cir. 2005) (“[The successor-contractor rule] is a direct statutory obligation and requirement placed on the successor contractor . . . and is not contingent or dependent upon the issuance or incorporation in the contract of a wage determination based on the predecessor contractor’s collective bargaining agreement.” (citing 29 C.F.R. § 4.163(b)). Other than the requirements that “substantially the same services be furnished, the requirement for arm’s-length negotiations and the provision for variance hearings, the Act does not impose any other restrictions on the application of section 4(c).” 29 CFR § 4.163(h).

**B. Which Contracts Are Successors Under Section 4(c)**

The statutory provisions of Section 4(c) of the SCA are often referred to as the “successor contractor provisions.” However, this term can be somewhat misleading. In the general context of labor law, whether a new company is a “successor” to a predecessor company, and therefore required to recognize a previously-recognized union and/or apply the terms of a CBA negotiated by the predecessor company, is determined under the framework of *N.L.R.B. v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272 (1972), and its progeny. Under that line of cases, a new employer is a successor if there is a “substantial continuity” between its enterprise and the previous employer’s enterprise, focusing on whether business operations and the workforce remain sufficiently similar. *See Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27 (1987).

*Burns*-type successorship comes into play when a new company takes over the business operations or acquires the assets of a different company, for example, through merger or acquisition. However, that analysis is in no way related to successorship under Section 4(c). This is because the SCA looks to the work covered by the contract itself to determine whether a successor *contract* exists, rather than looking to the business operations and employees of a

company to determine whether a successor *contractor* exists. *See* 29 C.F.R. § 4.163(e) (“The operative words of section 4(c) refer to ‘contract’ not ‘contractor’”). Accordingly, the determination of Section 4(c) successorship requires only a finding that the contract itself furnishes substantially similar services. *See* 41 U.S.C. § 6707(c)(1). It is the responsibility of the agency’s contracting officer to determine whether a contract qualifies as a successor before requesting bid proposals.

It follows that an employer can be subject to the provisions of 4(c) without conducting business operations similar to its predecessor, and it need not employ a similar workforce. Indeed, there is no requirement that a successor contractor hire any of the employees who provided services under the predecessor contract. *Service Emp. Intern. Union, Local Union No. 36 v. General Services Administration*, 443 F. Supp. 575 (E.D. Pa. 1977). Furthermore, a contractor may become its own successor. *See* 29 C.F.R. § 4.163(e) (“[T]he statute is applicable by its terms to a successor contract without regard to whether the successor contractor was also the predecessor contractor. A contractor may become its own successor because it was the successful bidder on a recompetition of an existing contract, or because the contracting agency exercises an option or otherwise extends the term of the existing contract, etc.”); *see also Guardian Moving and Storage Co., Inc. v. Hayden*, 421 F.3d 1268 (Fed. Cir. 2005).

This Section 4(c) successorship analysis will normally arise when a government agency requests bids on a new contract which appears to cover work that is similar to a previous contract in that locality. However, it also applies in instances where a service contract is reconfigured, restructured, reorganized, or consolidated:

As a result of changing priorities, mission requirements, or other considerations, contracting agencies may decide to restructure their support contracts. Thus, specific contract requirements from one contract may be broken out and placed in a new contract or combined with requirements from other contracts into a

consolidated contract. The protections afforded service employees under section 4(c) are not lost or negated because of such contract reconfigurations, and the predecessor contractor's collectively bargained rates follow identifiable contract work requirements into new or consolidated contracts, provided that the new or consolidated contract is for services which were furnished in the same locality under a predecessor contract . . .

29 CFR § 4.163(g).

Additionally, Section 4(c) still applies to a successor contract even if there is an interruption of contract services creating a delay between the completion of the predecessor contract and the commencement of services under the successor. *Id.* at § 4.163(h). Its application is not negated if the contracting authority changes and the successor contract is awarded by an entirely different government agency. *Id.* Finally, even if the successor contractor negotiates its own CBA with its employees under the successor contract, this “does not negate the clear mandate of the statute that the wages and fringe benefits called for by the predecessor contractor's collective bargaining agreement shall be the minimum payable under a new (successor) contract”, so the wage floor in any future negotiations will be set by the wages under the predecessor CBA. *Id.* at § 4.163(d).

### **C. Which CBA Terms Are Inherited by a Section 4(c) Successor Contractor**

Section 4(c) requires an employer under a successor contract to provide not less than the wages and fringe benefits previously provided under the predecessor's CBA. Examples of “wages” under this section include:

- Established straight time hourly rate;
- Established salary rate;
- Cost-of-living allowance; and
- Any shift, hazardous or other pay differentials.

Examples of “fringe benefits” under this section include:

- Life, accidental death, disability, medical and dental insurance plans;
- Retirement and/or pension plans;

- Compensation for injuries or illness resulting from occupational activity;
- Supplemental unemployment benefits;
- Vacation pay;
- Holiday pay;
- Costs of apprenticeships or other similar programs;
- Sick leave pay;
- Savings and thrift plans;
- Stock option plans;
- Funeral leave;
- Jury/witness leave; and
- Military leave.

See 41 U.S.C. § 6703. These also include “other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor.” *Id.*

However, it is important to note that a finding of successorship under Section 4(c) does not require the contractor to adopt any other terms of a predecessor’s CBA, or even to recognize or bargain with a previously-recognized labor union. Therefore, successors are not obligated to recognize job security or seniority rights which were established under a predecessor CBA. *N.L.R.B. v. Cleveland Pressed Products Corp.*, 493 F.2d 1250 (6th Cir. 1974); *Clark v. Unified Services, Inc.*, 659 F.2d 49 (5th Cir. 1981). Successors are also not required to follow the predecessor CBA’s grievance or arbitration procedures. *Service Emp. Intern. Union, Local Union No. 36*, 443 F. Supp. 575. In this same respect, Section 4(c) does not apply to several other bargained-for terms of employment like work rules and overtime provisions.

In *Trinity Services, Inc. v. Marshall*, 593 F.2d 1250 (D.C. Cir. 1978), the D.C. Circuit Court attempted to define what qualifies as a “bona fide fringe benefit” under the SCA. There, the court held that any fringe benefits covered by the Act “require the employer who extends such a benefit to his own employees to incur a present cost or the risk of a future cost.” *Id.* at 1257. Thus, this language only covers benefits for which (1) the predecessor makes a payment for the employee’s present or future use, such as a retirement plan; (2) the predecessor allows the

employee to accrue some deferred compensation, such as vacation time or sick leave; or (3) the predecessor incurs the risk of granting a benefit to the employee at some future time, such as compensation for injuries or illness from work-related activity. *Id.*

In *Trinity Services*, the D.C. Circuit applied this reasoning and held that severance payment was not a fringe benefit covered by the SCA, reversing the district court's ruling. There, the predecessor contractor's CBA had included a provision which would require a successor contractor to make a payment to any employees of the predecessor contractor which it chose not to hire. *Id.* at 1254. The court reasoned that this was not a fringe benefit "to which such service employees would have been entitled if they were employed under the predecessor contract" because, by definition, those employees could never have received that payment under the predecessor contract, so the predecessor contractor incurred no risk of payment. *Id.* at 1258-59. The court then noted that, unfortunately, the SCA was enacted only to preserve wage and benefit rates, not to "enhance employment security", stating that "the Act is designed to protect service employees by preserving the benefits gained under prior employers. It is ironic and unfortunate that the employees may lose their jobs when the incumbent contractor is replaced." *Id.* at 1261. However, some severance pay provisions may be enforceable under Section 4(c), as long as they relate directly to a cost or risk incurred by the signatory employer and which are effective during the term of the predecessor CBA.

The application of Section 4(c) regarding a particular CBA may also be determined by the date upon which the predecessor CBA became effective, since this section only requires the continuance of wage and benefit rates that were actually paid under the predecessor's CBA. Thus, if the predecessor contractor entered into a CBA for the first time which did not come into effect until after the expiration of the predecessor contract, its terms would not be applied under

Section 4(c). *See* 29 C.F.R. § 4.163(f). The same is true regarding CBAs that do not come into effect until the beginning of the next option period of a contract. Furthermore, wage and fringe benefit provisions in a CBA based on contingencies, such as agency acceptance of the CBA's rates and terms, are prohibited and will be rejected by the DOL.

The SCA does not require a successor employer to pay the same fringe benefits as the predecessor nor, if some benefits are provided under a benefit plan, to the same plan. Its requirement is only to pay the dollar equivalent in wages and fringes, in total, which the employer, absent a CBA, can allocate at its will. The only issue in such a situation would be whether the money is actually being used to benefit the employees.

#### **D. Arm's-Length Negotiations**

As mentioned above, wage and benefit rates under a predecessor CBA will only be upheld under Section 4(c) if that CBA was reached as a result of arm's-length negotiations. *See* 41 U.S.C. § 6707(c). The purpose of this requirement is to prevent collusion between contractors and unions that would take advantage of Section 4(c)'s protections. As stated in the SCA's corresponding regulations, the arm's-length provision "precludes arrangements by parties to a collective bargaining agreement who, either separately or together, act with an intent to take advantage of the wage determination scheme provided for in sections 2(a) and 4(c) of the Act." 29 C.F.R. § 4.11(a).

The D.C. Circuit Court explained in *Trinity Services* that this requirement is necessary because, in its absence, "it would be a simple matter for an employer who, for example, expects to leave the business at the end of the contract term to promise his employees massive wage increases, full well knowing he will never pay them, in the hope of binding the successor employer for his employees' benefits." 593 F.2d at 1259 (footnote omitted). *See also Kentron*

*Hawaii, Ltd. v. Warner*, 480 F.2d 1166, 1179-1180 (D.C. Cir. 1973). Such tactics could be used by a contractor during CBA negotiations in order to secure current wage reductions or other union concessions by promising much greater future wages or benefits, which that contractor has no intent of paying; or in order to defraud the government by claiming higher labor costs than are actually incurred.

The regulations establish procedures by which a hearing on arm's-length status may be requested by "a contracting agency or other person affected or interested, including contractors or prospective contractors and associations of contractors, representatives of employees, and interested Governmental agencies." 29 C.F.R. § 4.11(b)(1). The DOL's Administrative Review Board has stated: "The purpose of an arm's-length proceeding is to determine whether a CBA containing negotiated wage and fringe benefit rates was reached by willing signatories, avoiding 'collusive arrangements intended to take advantage of the SCA scheme.'" *In the Matter of: U.S. Dept. of State*, ARB Case No. 98-114, 2000 WL 424186, at \*3 (Feb. 16, 2000) (quoting 48 Fed. Reg. 49740 (Oct. 27, 1983)). A determination on this matter may be made by the Administrator of the DOL's Wage and Hour Division, Employment Standards Administration, after receiving a request for determination, or on her own motion. 29 C.F.R. § 4.11. The basic regulations regarding arm's-length hearing procedure are supplemented by 29 C.F.R. §§ 6.50-6.57.

The party challenging a predecessor CBA under these provisions carries the burden of making a "clear showing" that the CBA's terms were not reached as a result of arm's-length negotiations. *In re Big Boy Facilities, Inc.*, 1989 WL 549943, slip op. at 3-4, 88-CBV-7 (L.B.S.C.A. Jan. 3, 1989). If such a showing is made, then Section 4(c) becomes inapplicable, and the successor contractor is not be required to provide the wage and benefit rates under the predecessor contract.

One important factor in determining whether a CBA was negotiated at arm's length is the nature of the bargaining relationship itself. In *In re Raymond Richardson*, 1994 WL 897725, BSCA No. 93-03 (L.B.S.C.A. May 6, 1994), the Board of Service Contract Appeals looked to the parties' relationship, noting that it "lacked the formalities which usually attend a bona fide collective bargaining relationship." Specifically, the employer had selected one of its three employees to act as its representative in negotiations. Additionally, the parties' bargaining resulted in fictional wages that were higher than the actual wages received by the employees, creating a windfall for the employer. The board concluded that this was not an arm's-length CBA, stating: "this case lacks even the most basic element of a collective bargaining relationship – that is, that the representatives of management and of labor have 'at least theoretical parity necessary to represent, respectively, the independent interests of the employer and the independent, collective interests of the workers.'" *Id.*

#### **E. Variance Hearings**

As noted within the SCA regulations, other than the requirements that "substantially the same services be furnished, the requirement for arm's-length negotiations and the provision for variance hearings, the Act does not impose any other restrictions on the application of section 4(c)." 29 CFR § 4.163(h). The variance hearings provision of Section 4(c) establishes that the successor contract rule does not apply "if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that wages and fringe benefits under the predecessor contract are substantially at variance with wages and fringe benefits prevailing in the same locality for services of a similar character." 41 U.S.C. § 6707(c)(2).

Much like hearings on arm's-length negotiations, a variance hearing may be requested by any "person affected or interested," including the contracting agency, contractors and

prospective contractors, unions and other interested government agencies. 29 C.F.R. § 4.10(b)(1). Because any of these parties may request a variance hearing, it would logically follow that a hearing request could involve an allegation that wages and benefits are substantially higher than the prevailing local rates, or an allegation that they are substantially lower than the prevailing rates. Nonetheless, the Fourth Circuit Courts of Appeals has concluded that Section 4(c) does not give the DOL the authority to convene a hearing and to adjust wages or benefits if she finds that a predecessor CBA's wage and benefit rates are below the prevailing rates. *Gracey v. Int'l Bhd. of Elec. Workers, Local Union No. 1340, AFL-CIO*, 868 F.2d 671 (4th Cir. 1989).

In *Fort Hood Barbers Ass'n v. Herman*, the Fifth Circuit cited the Fourth Circuit's decision in dicta, explaining that it was based on the reasoning that Section 4(c) "was enacted not to protect workers under an unfavorable CBA by enforcement of prevailing wage rates but simply to assure the maintenance of negotiated wage rates and benefits—even if they are lower than the prevailing rates." 137 F.3d 302, 311 (5th Cir. 1998). Admittedly, if the DOL has the authority to step in and adjust bargained-for wage and benefit levels because they are too low, this creates the potential for interference with employers' and unions' rights under the NLRA and under basic contract law to freely decide the terms of their contract. However, the same is true regarding variance hearings in which the DOL decides to lower those rates. And because the statute allows for modification of wage and benefit rates anytime they are "substantially at variance," rather than "substantially higher" than the prevailing rates, the Fourth Circuit's decision is inconsistent with the plain text of the Act.

That decision also conflicts with the D.C. District Court's explanation of the SCA's variance hearing provisions in *United Gov't Sec. Officers of Am., Local 52 v. Chertoff*, 587 F. Supp. 2d 209, 213 (D.D.C. 2008) (noting that when a variance hearing takes place, "[a]fter the

contracting agency incorporates the new rates for wages and fringe benefits, the contracting company may request an increase in the payment for its services to offset any increase that may be imposed by the increased wage and fringe benefit rates,” which would only be necessary if the DOL had determined that predecessor CBA wage and benefit rates were substantially lower than prevailing rates). It is likely that this question has not been addressed by more courts because unions normally succeed in negotiating wages for their unit members that are higher than nonunionized workers. Indeed, a union negotiating wage rates lower than the rates of similarly situated but nonunionized employees would be an invitation for decertification.

Section 4.10 of the regulations sets out the procedure and requirements for such a request. 29 C.F.R. § 4.10. As is the case with arm’s-length proceedings, these regulations are supplemented by 29 C.F.R. §§ 6.50-6.57. As a general rule of thumb, the Wage and Hour Administrator will *not* direct a variance hearing if the wage rates are no more than ten percent above the Area-Wide Wage Determination rates; and will not direct a variance hearing on fringes absent the complaining party conducting its own valid survey which shows a clear variance. If the application for a variance hearing is accepted by the DOL, it is up to the requesting party to prove at hearing by a “clear showing,” rather than by the preponderance of the evidence, that the predecessor contract’s terms are substantially at variance with the locality’s prevailing wage and benefit rates. *Matter of Big Boy Facilities, Inc.*, No. 88-CBV-7 (Jan. 3, 1989). If this showing is made, then the Wage and Hour Division Administrator shall order the determination and issuance of a new wage determination. 29 C.F.R. § 4.163.

As the regulations explain, “[s]ince ‘it was the clear intent of Congress that any revised wage determinations resulting from a section 4(c) proceeding were to have validity with respect to the procurement involved’, the solicitation, or the contract if already awarded, must be

amended to incorporate the newly issued wage determination.” *Id.* (internal citations omitted). Such changes in wage or benefit rates become applicable at the time of the Administrative Law Judge’s decision, or if appealed, the date of the Administrative Review Board’s decision; the variance decision is not applied retroactively to the beginning of the contract term. *Id.*

Despite the heightened burden of proof in variance hearings, numerous requesting parties have succeeded in making the necessary showing. For example, variances have been proven in cases involving armored transport service employees, *Matter of Armed Transportation of New Currency*, No. SCA-CBV-21 (Dec. 19, 1979); bus drivers, *Matter of Reynolds Electrical & Engineering Co.*, No. 86-CBV-1 (June 24, 1988); custodians, *Matter of Northern Virginia Service Corp.*, No. 87-CBV-3 (Aug. 18, 1988); mess attendants, *Matter of Big Boy Facilities, Inc.*, No. 88-CBV-7 (Jan. 3, 1989); and public warehousemen, *Matter of Independent Freezer*, No. 85-CBV-1 (July 28, 1986).

#### **F. Timing of CBAs**

The timing of the submission of the collective bargaining agreement to the procurement office is confusingly stated in the DOL’s regulations at 29 C.F.R. §4.1b(b). There is one timeframe for contracts which are subject to a bidding process and another for those which are being negotiated. This regulation begins with the negative premise and states that CBAs negotiated during the prior contract period will *not* be effective for the next contract period if:

(1) In the case of a successor contract for which bids have been invited by formal advertising, notice of the terms of such new or changed collective bargaining agreement is received by the contracting agency less than 10 days before the date set for opening of bids, provided that the contracting agency finds that there is not reasonable time still available to notify bidders; or

(2) Notice of the terms of a new or changed collective bargaining agreement is received by the agency after award of a successor contract to be entered into pursuant to negotiations or as a result of the execution of a renewal option or an extension of the initial contract term, provided that the contract start of

performance is within 30 days of such award or renewal option or extension. If the contract does not specify a start of performance date which is within 30 days from the award, and/or performance of such procurement does not commence within this 30-day period, any notice of the terms of a new or changed collective bargaining agreement received by the agency not less than 10 days before commencement of the contract will be effective for purposes of the successor contract under section 4(c) . . .

So our first job as union lawyers is to try to explain to our clients just what this means.

When there is a new procurement contract being awarded based on bids, the CBA has to be in the hands of the procurement officer at least 10 days before the bids are opened. That does *not* mean 10 days before the service contract is awarded, but 10 days before the federal agency opens the bids and begins the process of reviewing them. But how does a union know when that bid opening date will be? The agency is supposed to provide the union timely notice of all the procurement dates. If it does not – which probably happens more often than when it actually does provide notice – this time limit does not apply. 29 C.F.R. §4.1b(b)(3) sets out this exception to the time limitations:

(3) The limitations in paragraph (b)(1) or (2) of this section shall apply only if the contracting officer has given both the incumbent (predecessor) contractor and his employees' collective bargaining representative written notification at least 30 days in advance of all applicable estimated procurement dates, including issue of bid solicitation, bid opening, date of award, commencement of negotiations, receipt of proposals, or the commencement date of a contract resulting from a negotiation, option, or extension, as the case may be.

Thus, if the procurement agency fails to give notice to the union of the procurement dates, whether they involve bids or negotiation for the next option year under a multi-year contract, the time limits do not apply.

That is particularly helpful when the union is negotiating for wages and benefits for the following procurement year when the same employer will be continuing under its multi-year procurement contract, since the language in 29 CFR §4.1b(b)(2) is exceptionally counter-

intuitive. If the government and the contractor have reached agreement on a new procurement contract MORE than 30 days before it goes into effect, the union and the employer can get their new economic terms to the procurement office 10 days before the new procurement contract date and it is timely. However, if those negotiations between the agency and the contractor drag over to within those 30 days, the union has to get the signed agreement to procurement before those negotiations are completed. For example, if the contractor and the agency complete their negotiations 28 days before the new procurement date, the signed agreement between the union and company has to be delivered to the agency's procurement office before that occurs - i.e., at least 29 days before completion of the agency-contractor negotiations. The union, of course, has no idea as to when those agency-contractor negotiations might be completed unless the contractor-employer keeps it informed - and you cannot depend on that ever happening. Thus, in reality, the union must try to get the economic terms for that next procurement year worked out with the employer at least 30 days before the next procurement date. Again, there is that huge exception that those due dates do not apply if the government has not given the union notice of the procurement date. However, even if it does not do so, it will on far too many occasions try to wiggle out of having to honor those negotiated rates and the union will be engaged in a long process of trying to educate the agency's procurement office.

If the union is having a problem getting the procurement office to comply with its obligation in this regard, it may want to contact the agency's Labor Relations Advisor, who is supposed to make sure that the agency is aware of its obligations under the SCA and to act as a bridge between the agency and the unions representing its contractors' employees. A list of Labor Relations Advisors for various agencies can be found at <http://www.wdol.gov/ala.aspx>.

Depending on the person in that slot and of the orders from above in that agency, the Labor Relations Advisor can sometimes be helpful in resolving a problem.

#### **G. Enforcement of Economic Terms of CBAs**

In addition to the traditional use of contractual grievance and arbitration policies, unions and their members can turn to the U.S. Department of Labor's Wage & Hour Division to assure that SCA contractors comply with the economic terms of a CBA **if** the CBA was timely submitted to the procurement office and its economic terms incorporated into the procurement contract.

There are, however, too many Wage & Hour investigators who are reluctant to work on Service Contract Act violations when a union is present. It does not appear to be a priority in many Wage & Hour offices. The union should emphasize that all it is requesting is that they enforce the statute. In many instances, it is important that they do so quickly before that employer ceases to be the contractor at that location, since one of the most effective avenues of persuasion is to have Wage & Hour direct the procurement agency to hold back sufficient funds from the contractor to pay its delinquency. Also, once the employer is gone from that contract, it is very difficult to get Wage & Hour to cross-withhold from another procurement contract.

Please note that if an employer deducts dues from employees and fails to remit them to the union, it is effectively an underpayment of wages; and Wage & Hour is supposed to proceed against the contractor to collect that money. At this point, the investigator will almost unfailingly state that Wage & Hour is not the union's collection agency. If that should occur, simply and politely – again – remind the investigator that the union is only asking Wage & Hour to do its job; and (true or not) that it does not really care if the money is paid to the employees or to the union, but that it cannot be permitted to remain in the employer's pocket.

If the area Wage & Hour office is still balking at enforcing the SCA, the union may want to contact someone at DOL's Washington, DC, headquarters. At this time, the best person to contact is Michael Lazzeri, Assistant Administrator for Government Contracts, (202) 693-0051, <http://www.dol.gov/whd/whdkeyp.htm>.

### **III. Federal Enclaves and Labor Law**

#### **A. The Creation of Federal Enclaves**

A federal enclave is a territory, transferred to the United States by a state through cession or consent, over which the federal government has acquired exclusive jurisdiction. Once the federal government has exerted jurisdiction over a federal enclave, it has the authority to decide whether state or federal law will govern that territory. This power comes from the Constitution's "Enclave Clause," Article I, Section 8, Clause 17, which provides:

Congress shall have power . . . to exercise exclusive Legislation in all Cases whatsoever over such District[s] . . . as may, by Cession of particular States and the acceptance of Congress, become the Seat of the government of the United States, and to exercise like authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings.

U.S. CONST. art. I, § 8, cl. 17.

Types of federal enclaves include military bases, some federal office buildings and residential complexes, some federal courthouses, post offices, and national forests and parks. See Charles F. Wilkinson, *Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands*, 2 UCLA J. Envtl. L. & Pol'y 145, 152 (1982) (discussing different types of federal enclaves). It is estimated that "more than a million Americans—probably several million—live and work" in federal enclaves. Chad DeVeaux, *Trapped in the Amber: State Common Law, Employee Rights, and Federal Enclaves*, 77 Brook. L. Rev. 499, 500 (2012).

Congress has created more than 5,000 federal enclaves. *Id.* at 502. These enclaves encompass “[r]oughly thirty percent of land in the United States”, or more than 659 million acres. Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 Geo. Wash. L. Rev. 305, 362 (2008). Congress created the vast majority of these federal enclaves between 1840 and 1940; few have been created since the end of the Second World War. Wilkinson, *Cross-Jurisdictional Conflicts*, 2 UCLA J. Envtl. L. & Pol’y at 152 n.12. The ceded land remains legally part of the state in which it sits. *Howard v. Comm’rs of Sinking Fund of Louisville*, 344 U.S. 624, 626 (1953). Further, citizens of an enclave retain their right to vote in state elections. *Evans v. Cornman*, 398 U.S. 419, 425-26 (1970).

With the consent of a surrounding state, Congress may establish a federal enclave for any “legitimate governmental purpose.” *Kleppe v. New Mexico*, 426 U.S. 529, 542 n.11 (1976) (citing *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 528-30 (1938)). However, it is important to note that not all federal territories are federal enclaves. In order for a territory to be considered a federal enclave, the U.S. government must have purchased the territory "by the Consent of the Legislature of the State." U.S. CONST. art. I, § 8, cl. 17. If the land was not purchased with the state’s consent, then the federal government and, by implication, a private employer employing workers on that federal property, does not receive any of the benefits of the federal enclave doctrine. Instead, the territory’s possession is then one of an "ordinary" proprietor. *Paul v. United States*, 371 U.S. 245, 264 (1963).

## **B. The Federal Enclave Doctrine**

The federal enclave doctrine is important in the context of labor law because it determines whether federal law will trump any state legislation and regulation in the field. This

can provide opportunities for unions to attempt to organize on territory that is surrounded by a state in which organization is normally restricted, and it can prevent the application of harsh anti-union laws. Because federal enclaves are often locations where contracted-out service work is performed, the federal enclave doctrine is also particularly relevant in the context of the SCA.

When a federal enclave is created, “the jurisdiction theretofore residing in the State passes to the United States.” *Surplus Trading Co. v. Cook*, 281 U.S. 647, 657 (1930). All state regulatory authority over the ceded property ceases and the federal government’s authority becomes “exclusive.” *United States v. State Tax Comm'n*, 412 U.S. 363, 370 (1973). This “grant of ‘exclusive’ legislative power to Congress by its own weight, bars state regulation without specific congressional action.” *Id.* (quoting *Paul v. United States*, 371 U.S. 245, 263 (1963)). From a regulatory standpoint, federal enclaves “are to [the surrounding state] as the territory of one of her sister states or a foreign land.” *Id.* at 378 (internal quotations omitted).

Although the creation of a federal enclave ends the surrounding state’s regulatory authority, “[t]he Constitution does not command that every vestige of the laws of the [state] must vanish.” *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 99 (1940). In order to ensure “that no area will be left without a developed legal system,” state laws “existing at the time of the [state's] surrender of sovereignty” continue in force indefinitely until “abrogated” by Congress. *Id.* at 99-100. Thus, a state law that was enacted before the cession generally continues to apply after enclave status is granted. On the other hand, a state law enacted after the creation of the enclave generally will not apply to that territory. Post-cession changes in state law “are not a part of the body of laws” because “[c]ongressional action is necessary to keep [the enclave's law] current.” *Id.* at 99.

Federal courts have held that this framework also applies to state common-law rules. *See, e.g., Cooper v. S. Cal. Edison Co.*, 170 F. App'x 496, 497-98 (9th Cir. 2006) (common law action for wrongful termination of whistleblower and common law tort of intentional infliction of emotional distress not available on federal enclave established before the California Supreme Court recognized cause of action); *Sundaram v. Brookhaven National Laboratories*, 424 F. Supp. 2d 545 (E.D.N.Y. 2006) (plaintiff's two common law claims – breach of contract based on an employee handbook and unlawful discharge tort – were not actionable in federal enclave because claims were not recognized by New York courts until long after federal government purchased property in 1933).

There are three main exceptions to this framework regarding the applicability of state laws in federal enclaves. First, neither the federal government nor a private employer may rely upon the enclave doctrine if, at the time the territory was purchased or ceded, the state expressly reserved the right to legislate the activity at issue within the enclave. To this end, some states have reserved jurisdiction over federal enclaves within their borders to the fullest extent possible under the Constitution. *See, e.g., Md. Code Ann., State Gov't § 14-102* ("With respect to land that the United States or any of its units leases or otherwise holds in the State, the State reserves jurisdiction and authority over the land and over persons, property, and transactions on the land to the fullest extent that is permitted by the United States Constitution and that is not inconsistent with the governmental purpose for which the land is held."). On the other hand, some reservations are more limited. *See, e.g., Mont. Code Ann. § 2-1-202* (only reserving jurisdiction over legislating civil and criminal service of process within federal enclaves).

Second, state statutes or regulations that were enacted prior to the creation of the enclave but which require ongoing changes or revisions after that date may continue to have force,

despite changes occurring after the date of cession or sale. In *Paul v. United States*, the U.S. Supreme Court addressed California state regulatory schemes regarding milk price controls that were in place when the state legislature ceded sovereignty over territory used for federal military installations, but which were subject to ongoing revisions by regulators. 371 U.S. 245. The Supreme Court held that any changes in the milk pricing regulations would be enforceable within the enclave "provided the basic state law authorizing such control had been in effect since the times of these various acquisitions" of the territory. *Id.* at 269. Thus, only minor revisions will be applied within an enclave; major overhauls of state laws will likely be preempted by federal jurisdiction.

Finally, state laws will still apply if Congress provides "clear and unambiguous" authorization for such state regulation over its federal enclave. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988). It is not always immediately apparent, however, what constitutes "clear and unambiguous" authorization. Some courts have found clear and unambiguous authorization for state regulation based on the plain language of a federal statute. In *Goodyear Atomic Corp.*, the U.S. Supreme Court addressed whether Congress had authorized states to enforce their workers' compensation laws in federal enclaves. The relevant statute provided:

Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

40 U.S.C. § 290. The Court found clear authorization because the statute gives an official charged with enforcing a state's laws "the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession". *Goodyear Atomic Corp.*, 486 U.S. at 182.

The Clean Air Act, 42 U.S.C. § 7401 et seq., which provides that federal enclaves "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity", has been described as using the preferred language for explicit authorization of state authority within federal enclaves. 42 U.S.C. § 7418(a); *Bouthner v. Cleveland Const. Inc.*, No. CIV.A. RDB-11-244, 2011 WL 2976868, at \*3 (D. Md. July 21, 2011). But when such language is not included and the statute is more ambiguous, courts have not agreed as to whether a federal statute reserves any regulatory authority for the states through clear and unambiguous authorization. One federal statute plagued with this ambiguity is the Service Contract Act.

### **C. The Service Contract Act: Authorizing State Regulation in Federal Enclaves?**

Few federal courts have addressed whether Congress has allowed for the application of state wage and hour legislation and claims within federal enclaves, and those courts that have are split on the issue. Regarding the SCA, the central question is whether the Act contains clear and unambiguous authorization for the state regulation of wage and hour laws. The SCA requires federal contractors to provide service employees with wages and fringe benefits based on prevailing rates in the locality or based on CBA rates, and its definition of "fringe benefits" includes "bona fide fringe benefits *not otherwise required by Federal, State, or local law* to be provided by the contractor or subcontractor." 41 U.S.C. § 6703(2) (emphasis added). Courts have

not agreed on whether congressional intent of authorization for state regulation may be inferred from this language.

In *Lebron Diaz v. General Security Services Corp.*, employees of a contractor who provided security services at a federal courthouse brought a lawsuit for unpaid bonuses and sick leave under Puerto Rico law. 93 F. Supp. 2d 129 (D.P.R. 2000). The contractor claimed that, because the courthouse was a federal enclave, any such state law claims were precluded; and the employees claimed that the language in the SCA provided clear congressional intent to allow for local regulation of employee benefits. *Id.* The District Court for the District of Puerto Rico observed that the "question is admittedly close", then quoted the SCA's definition of "fringe benefits" and concluded:

While it is true that the statute does not explicitly state that local laws will apply, no fair reading of the emphasized phrase makes possible any other construction of the language. A message does not have to be *in haec verba* to be 'clear and unambiguous.' The only reasonable inference to be drawn from the SCA is that local and state laws were to provide the foundation upon which the SCA was to be built, to insure that contract employees received certain minimum benefits. The application of local law providing separate and independent employment benefits, such as the law of Puerto Rico here, was unambiguously assumed.

*Id.* at 141-42. The *Lebron Diaz* court relied on dicta from the earlier case of *Kelly v. Lockheed Martin Services Group*, where the court stated that the SCA "requires service contractors working for the United States to comply with local minimum wage, fringe benefit, safety and notification laws." 25 F.Supp.2d 1, 6 (D.P.R. 1998).

However, other courts have not been convinced that the SCA provides such clear and unambiguous authorization. In *Manning v. Gold Belt Falcon*, the New Jersey District Court held:

Nothing in the Service Contract Act evinces congressional intent to apply state minimum wage laws to federal enclaves, nor is the application of state law to federal property even mentioned. Furthermore, Congress clearly enacted the Service Contract Act for a specific purpose: to ensure workers employed by federal employers were paid no less than workers employed by private or state

employers in the same area. There is no explicit intent to abrogate the Federal Enclave Doctrine, but rather a desire to ensure protection for service contracts.

681 F. Supp. 2d 574, 577 (D.N.J. 2010). The court further noted: "The distinction between the statute in *Goodyear* [extending workers' compensation to property of the federal government] and the SCA is obvious: one clearly applies state law to federal land, while the other does not." *Id.*

Similarly, in *Bouthner v. Cleveland Construction, Inc.*, the District Court of Maryland addressed whether the Davis-Bacon Act (a precursor of the SCA which applies to federal construction workers), whose relevant language is similar to the above-cited language from the SCA, allowed for state claims for minimum wage and overtime pay to be brought within a federal enclave. No. CIV.A. RDB-11-244, 2011 WL 2976868. There, the court held that with the Davis-Bacon Act, Congress did "not explicitly authorize state wage and benefit laws to apply to contractors working on public works projects", because "Congress has shown that it is capable of including language in statutes expressly stating that states have the power to apply the statute to land ceded to the United States" and therefore "the lack of an explicit authorization will often suggest that a statute is not clear and unambiguous." *Id.* at \*5.

The court in *Bouthner* went a step further and stated that "even if this Court accepted Plaintiffs' interpretation of the Davis-Bacon Act [as authorizing state regulation of labor laws], state and local law would only apply to claims for bona fide fringe benefits. There, "Plaintiffs' allegations that they were not paid minimum wage, were misclassified as independent contractors or exempt persons, and were not timely paid their wages, do not directly relate to 'fringe benefits.'" *Id.* at \*6. The court continued: "Plaintiffs' allegations that they were not paid overtime also does not amount to a claim for fringe benefits, at least within the meaning of the Davis-Bacon Act." *Id.* Notably, the *Lebron Diaz* court was addressing the availability of unpaid

bonuses and sick leave, both of which qualify as fringe benefits under the SCA. 93 F. Supp. 2d 129; *see* list of fringe benefits under the SCA, *supra* Section II.C. Therefore, if and when this matter is addressed by circuit courts or the Supreme Court, it will almost certainly involve a claim for state-mandated fringe benefits as defined by the SCA, rather than overtime, minimum wage or another similar state employment statute.

The state's minimum wage could, of course, impact the determination of the "prevailing" wage rate in the locality of the federal enclave, regardless of whether the minimum wage law applies within the enclave. For example, if the state's minimum wage were \$8.00 per hour, any "prevailing" wage rate in that locality would be at least that rate – unless the Department of Labor used a geographic area which crossed state lines when it set the wage rate in the Area-Wide Wage Determination.

Furthermore, as discussed *infra*, on February 12, 2014 President Obama signed Executive Order 13658, which set the minimum wage for all workers employed pursuant to federal contracts at \$10.10, effective January 1, 2015. Exec. Order No. 13658, 79 FR 9851. Although 29 states plus the District of Columbia currently have state laws establishing a minimum wage higher than the federal rate, the highest two rates are \$9.50 (District of Columbia) and \$9.47 (Washington state). *See* U.S. Dep't of Labor, *Minimum Wage Laws in the States*, available at <http://www.dol.gov/whd/minwage/america.htm> (Jan. 1, 2015). Thus, as of 2015, federal contract employees, including service employees subject to the SCA, will (eventually) be paid a higher minimum wage than any state law currently provides.

It follows that until a state raises its minimum wage above \$10.10, no claims will be brought by employees arguing for the application of state minimum wage laws in federal enclaves pursuant to any authorization found within the SCA. And because Executive Order

13658 also mandates an annual increase of the minimum wage for contract employees equivalent to the annual percent increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers, this rate will likely remain higher than any subsequently raised state minimum wage rates. *See* Exec. Order No. 13658, 79 FR 9851.

#### **D. Enforceability of State “Right-to-Work” Statutes in Federal Enclaves**

From the perspective of labor unions and the employees they represent, one clear benefit of the federal enclave doctrine as applied to labor law is the preemption of so-called “right-to-work” laws propagated by many states.

Section 8(a)(3) of the National Labor Relations Act articulates a national policy that certain union-security agreements, which require all bargaining unit employees to pay membership dues or agency fees to the union as a condition of employment, are valid as a matter of federal law. 29 U.S.C. § 158(a)(3) (“[N]othing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later”).

However, this policy is limited by Section 14(b) of that Act. Under Section 14(b), states may enforce “right-to-work” laws prohibiting the requirement of membership in a labor organization as a condition of employment. 29 U.S.C. § 164(b) (“Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.”). These laws have been passed by many state legislatures in order to weaken unions by allowing unit employees to “opt out” of

paying union dues or agency fees. Presently, 25 states and Guam have “right-to-work” laws in place. National Conference of State Legislatures, *Right-to-Work Resources*, available at <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> (last accessed Mar. 27, 2015).

As discussed in detail above, the federal enclave doctrine generally holds that state laws which are passed *after* cession or sale of a territory giving exclusive jurisdiction to the federal government are not applicable within that territory. This rule has long been applied in relation to states’ “right-to-work” laws. *See Vincent v. Gen. Dynamics Corp.*, 427 F. Supp. 786, 795 (N.D. Tex. 1977) (state ceded exclusive jurisdiction of Fort Worth Air Force Plant No. 4 to U.S. government before passage of state’s “right-to-work” statute, so statute was inapplicable and CBA’s agency shop provisions were valid). Thus, even in states such as Texas, where union shop or agency shop clauses requiring all bargaining unit employees to make payments to the union are illegal, unions can still generally include such terms in their CBAs if they are located on a federal enclave.

The former Fifth Circuit expanded the application of this doctrine in *Lord v. Local Union No. 2088, Int’l Bhd. of Elec. Workers, AFL-CIO*, 646 F.2d 1057 (5th Cir. 1981), cert. denied, 458 U.S. 1106 (1982). There, employees who worked on two federal enclaves in the State of Florida sought a declaration that the enforcement of a CBA’s agency shop clause was prohibited by a 1944 amendment to the Florida constitution that included a “right-to-work” provision. The first enclave, Patrick Air Force Base, was ceded to the United States in 1939 and 1940, before that amendment; but the second enclave, Cape Canaveral Air Force Station, was ceded in 1955. *Id.*

The court noted that Section 8(a)(3) of the NLRA conflicted with Florida’s “right-to-work” constitutional provision; and under the Constitution’s Supremacy Clause, “[s]ince a

conflict exists between section 8(a)(3) and state law, application of Florida law within a federal enclave is precluded unless, as plaintiffs argue, section 14(b) dictates otherwise.” *Id.* at 1062. The plaintiffs argued that Section 14(b) gave “the right of way to State laws” regarding union-security laws. *Id.* The court disagreed, stating: “Congress’ direction in Section 14(b) ‘to give the right of way to State laws’ extends, however, only to the area over which the state has power to legislate. The Supreme Court has made it clear that states retain no such power with regard to federal enclaves even though they are physically located within their territory.” *Id.*

Based on this reasoning, the court held that the state’s “right-to-work” laws were inapplicable regarding both federal enclaves, regardless of whether they were ceded before or after the “right-to-work” amendment was adopted, because the state never had any authority whatsoever to regulate this matter. *Id.* This rule continues to be applied by federal courts. *See, e.g., N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) (en banc) (“state right-to-work laws are of no effect in federal enclaves such as Indian reservations”); *Local 514, Transp. Workers Union of Am. v. Keating*, 212 F. Supp. 2d 1319, 1326 (E.D. Okla. 2002) *aff’d*, 358 F.3d 743 (10th Cir. 2004) (“the State of Oklahoma is precluded from enforcing its penal laws in employment settings where the United States possesses exclusive jurisdiction.”).

However, not all courts have held that “right-to-work” laws are without force in federal enclaves. This normally turns on whether the state managed to reserve any concurrent jurisdiction over the enclave at the time it was sold or ceded; and the general rule is that “right-to-work” laws will not be applied in cases where the employees spend most of their time on property that is exclusively federal. In *Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO v. Dyncorp, Aerospace Operations, Sheppard ENJJPT Div.*, the union sought a declaration enforcing its union security clause covering work that was performed on Sheppard Air Force

Base within a federal enclave outside of Wichita Falls, Texas; and a union dues objector sought a declaration that the union security clause was unlawful under Texas's "right-to-work" statute. 796 F. Supp. 976 (N.D. Tex. 1991).

The federal enclave housing Sheppard Air Force Base was created through several deeds of cession, whose language was far from identical. As the court explained:

Sheppard Air Force Base is located on approximately 4,200 acres of land. Of this, approximately 2,200 acres are under exclusive federal jurisdiction, having been ceded by the State of Texas to the United States by four deeds of cession, duly recorded, perfected and accepted. On the remaining 2,000 acres the State and federal governments have concurrent civil jurisdiction. It is on this portion of Sheppard that 95% of the DynCorp employees work and on which 98% of [union dues objector] Hadley's work time is spent.

*Id.* at 982 n.16. The court restated the standard that states can generally apply their "right-to-work" laws on federal enclaves when they do not cede exclusive jurisdiction to the federal government. There, even though the majority of the enclave was under exclusive federal jurisdiction pursuant to the deeds of cession, the bargaining unit employees, including the dues objector, performed their work on the areas in which the state and U.S. governments split jurisdiction. *Id.* It is, therefore, critical to determine whether the specific location on the federal installation where the bargaining unit performs its work is a federal enclave under exclusive federal jurisdiction or is subject to state law, whether concurrent or exclusive.

Because of the location of the work in *DynCorp*, the court allowed for application of the "right-to-work" law and declared the CBA's union security clause void. *Id.* at 985-86. Based on this reasoning, a similar conclusion was reached regarding the Cairns Army Airfield, part of Fort Rucker in Dale County, Alabama. See *Prof'l Helicopter Pilots Ass'n., Office & Prof'l Employees Int'l Union, Local 102 v. Lear Siegler Servs., Inc.*, 326 F. Supp. 2d 1305, 1318 (M.D. Ala. 2004) *aff'd sub nom. Prof'l Helicopter Pilots Ass'n. v. Lear Siegler Servs., Inc.*, 153 F. App'x 630 (11th

Cir. 2005) (“this court finds that the State of Alabama ceded only concurrent jurisdiction, and thereby reserved and retained concurrent legislative jurisdiction over Cairns Field. Therefore, Alabama's right-to-work laws apply there.”).

Accordingly, it is essential for a union to determine which type of jurisdiction is held by the federal government within an enclave before attempting to establish union-security clauses. Indeed, the availability of such contractual clauses may influence the determination as to whether attempting to organize and represent a particular workforce is feasible. In *Professional Helicopter Pilots Association*, both parties referred to U.S. Dep't. of Army Reg. 405-20, Real Estate: Federal Legislative Jurisdiction (1973) in their arguments regarding the type of jurisdiction established at Cairns Field. 326 F. Supp. 2d at 1310. That regulation provided the following helpful guidance in this determination:

Under AR 405-20, **exclusive legislative jurisdiction** is defined as follows:

This term is applied when the Federal Government possesses, by whatever method acquired, all of the authority of the State, and in which the State concerned has not reserved to itself the right to exercise any of the authority concurrently with the United States except the right to serve civil or criminal process in the area relative to activities which occurred outside the area. This term is applicable even though the State may exercise certain authority over the land pursuant to the authority granted by Congress in several federal statutes *permitting* the State to do so. AR 405-20 at 136.

**Concurrent legislative jurisdiction** exists “in those circumstances wherein, in granting to the United States authority which would otherwise amount to exclusive legislative jurisdiction over an area, the State concerned has reserved to itself the right to exercise, concurrently with the United States, all of the same authority.” *Id.*

**Partial legislative jurisdiction** is applicable “in those circumstances where the Federal Government has been granted, for exercise by it over an area in a State, certain of the State's authority, but where the State concerned has reserved to itself the right to exercise, by itself or concurrently with the United States, other authority constituting more than merely the right to serve civil or criminal process ....” *Id.*

As for **proprietary interests only**, the “term is applied to those instances wherein the Federal Government has acquired some degree of right or title to an area in a State, but has not obtained any measure of the State’s authority over the area.” *Id.*

*Id.* at 1310-11 (emphasis added).

During organizing and contract negotiations, it is essential for both unions and employers to review state statutes relating to the cession of territory for federal enclaves, as well as the specific text of any relevant deeds of cession, in order to determine whether the state government has the authority to apply “right-to-work” laws. *See Campbell v. Com.*, 39 Va. App. 180, 571 S.E.2d 906 (2002) (Virginia state statute, Va. Code Ann. § 1-400, expressly creates presumption that the Commonwealth retains concurrent jurisdiction over federal enclaves, unless stated otherwise); *Professional Helicopter Pilots Ass’n* 326 F. Supp. 2d at 1317 (Alabama state statute, Ala. Code § 42-3-1, allows the governor to transfer “such jurisdiction as he may deem wise”, so it is always necessary to refer to language within deed of cession or sale).

#### **IV. Obama’s Executive Orders**

President Obama, in late January 2009, shortly after he took office, issued two Executive Orders which are very important for those of us who work to protect employees under the Service Contract Act. One of these orders, Executive Order No. 13495, requires most new contractors to hire the incumbent employees of the departing contractors except for good cause – or, technically, to give the incumbent employees the right of first refusal. (App. Tab 1) President Clinton had issued a similar Executive Order in late 1994, but it did not apply to military bases, NASA installations and some other service contracts. Not surprisingly, one of George W. Bush’s first acts as President was to rescind that Executive Order. President Obama’s Executive Order covers all service contracts, but did not go into effect until January 2013 after the Department of Labor and the Federal Acquisition Regulatory Council both issued their rules implementing it.

This Executive Order protects those incumbent employees from being replaced by the new contractor in its effort to reduce vacation obligations and, in some cases, the total wages it must pay. Since these government contracts are, for the most part, obtained through competitive bids, all the bidders do their best to come in with as low a bid as possible. Sometimes, their bids are so low, they could not possibly pay the negotiated wages and benefits – at least not honestly – within their bid price. Before this Executive Order, one way they reduced their costs was not to hire the most senior employees of the predecessor. In almost all cases, vacation pay increases with experience. In some cases, wages might be higher for the more senior employees.

The bidders would plan to jettison those senior employees so that they would not have to bear those higher costs. When some security clearance is needed, the successor might not be able to do that. It would need to have a cadre of workers available who have the needed clearance and, sometimes, the training to perform the work at hand. However, there were situations where the contractor would keep the incumbent employees around for as long as needed to get clearances and then would fire them wholesale. *See Houston Building Service*, 296 NLRB 808 (1989), *enfd.* 936 F.2d 178 (5th Cir. 1991), *cert. denied* 112 S.Ct. 1159 (1992), in which a contractor did just that. Fortunately, that contractor never told those employees that they were temporary and the NLRB, eventually, ordered it to reinstate them with full backpay and benefits.

Unfortunately, by the time this case dragged through the NLRB, an appeal to the Fifth Circuit and the employer's ridiculous petition to the Supreme Court for certiorari, the employer was gone from this contract before the NLRB was able to enforce the order. The union, however, was able to get the next contractor to hire all those employees whom Houston Building Service had let go. *See* [dol.gov/whd/govcontracts/SCANonDisplcmntFinalRule.htm](https://www.dol.gov/whd/govcontracts/SCANonDisplcmntFinalRule.htm) for the

Department of Labor's summary of this Executive Order and links to other resources. The union might also want to contact William Brooks at DOL with any questions on this or other SCA issues. He can be contacted at (202) 693-0566 or [brooks.william.L@dol.gov](mailto:brooks.william.L@dol.gov).

With this Executive Order, unions should be able to argue persuasively that any successor employer under the Service Contract Act is a "perfectly clear" successor under NLRB case law and, thus, not permitted to establish initial terms and conditions of employment, regardless of when it attempts to do so. The government's bid package should notify the bidders that there is a union currently representing the employees. The Executive Order requires the successful bidder, except in very rare cases, to hire all of its nonsupervisory employees from among the incumbent employees to perform similar work in the same locality. The successful bidder, therefore, is a "perfectly clear" successor and cannot change any of the terms and conditions of employment without first bargaining with the union. *See Dupont Dow Elastomers*, 332 NLRB No. 98 (2000); and *Hilton's Environmental, Inc.*, 320 NLRB 437 (1995) (holding that Hilton's, a Service Contract Act employer, was a "perfectly clear" successor when it was evident it would hire the majority of its employees from among the predecessor's workers at the job site).

The other January 30, 2009, Executive Order pertaining to the Service Contract Act, No. 13494, prohibits federal service contractors from billing (or being reimbursed by) any federal contracting office for any costs incurred trying to persuade their employees – or those of any other employer – not to support union representation, as well as costs to persuade their employees to support union representation or to support one union over another. (App. Tab 2) It also prohibits the contractor from passing on any other costs to try to influence whether or how the employees exercise their right to organize and bargain collectively, including wages for

employees who attend “captive audience” meetings called by the employer during an organizing drive.

The Executive Order states its purpose is to require the contractors to absorb any costs of this type themselves, and not to interfere with the right of contractors to “engage in advocacy” for which they do not seek reimbursement. The order became effective in December 2011 with the FAR Council’s amendment of Federal Acquisition Regulation 48 CFR §31.205-21. The Executive Order explicitly excludes the costs of attorneys and/or consultants for persuader activities from the items for which the contractors are permitted to bill the government. Please note, however, that the Executive Order would not prohibit billing for the costs of attorneys and/or consultants to represent the contractors before the NLRB, in arbitration or in court, as only efforts to persuade employees are barred from reimbursable costs.

In July 2014, President Obama issued Executive Order No. 13673, which requires contracting officers to consider a bidder’s history of compliance with federal and equivalent state labor laws in determining whether that company is a “responsible” bidder. (App. Tab 3) This Executive Order lists the various federal statutes with which a contractor must be in compliance. These include the FLSA, the NLRA, OSHA and EEO laws. The bidder is supposed to self-report any decisions – including arbitration awards – in the prior three years in which it was found to have violated any of these statutes; and once a contract is awarded, the contractor is supposed to update that report every six months. The Executive Order does not state how many violations would make a bidder irresponsible or how outrageous a violation would cause such a determination, but leaves that to the contracting officer in consultation with the agency’s Labor Compliance Advisor.

President Obama issued Executive Order No. 13658 in February 2014 to set a minimum wage of \$10.10 for all Service Contract workers. (App. Tab 4) However, that rate only applies to new procurement contracts which become effective after January 1, 2015. In its implementing regulations, over protests from the unions, the DOL made it clear that this minimum does not apply to option years under existing procurement contracts but only when a new contract is put out to bid or other solicitation. The minimum wage rate will be adjusted annually by the Secretary of Labor.

## **V. Conclusion**

Since its adoption in 1965, the Service Contract Act has provided valuable wage and benefit protections for service employees working under federal service contracts, a group of workers who had previously been marginalized due to the transitory nature of these contracts. The Act ensures that service employees will receive at least the same wages and fringe benefits as the prevailing rates in their locality. And since the adoption of the 1972 amendments to the Act, including the addition of Section 4(c), unions and their CBA terms have received greater protection because the SCA now requires contractors under successor contracts – whether they are entirely new contracts, option extensions or modifications of previous contracts – to continue to provide the same value of wages and benefits to their employees that were negotiated by a union under the predecessor contract.

President Obama has issued several Executive Orders in recent years meant to provide further protection to federal service employees and to compel contractors to follow their statutory obligations. The statutory, regulatory and executive protections under the Act make federal service contract employees a promising group for organization and representation.

Unions should continue to fight for the preservation of labor standards for these workers and should continue to hold both employers and contracting agencies to their duties under the Act.

## Appendix

Tab 1	Executive Order No. 13495, Nondisplacement of Qualified Workers Under Service Contracts, 74 FR 6103 (Jan. 30, 2009)
Tab 2	Executive Order No. 13494, Economy in Government Contracting, 74 FR 6101 (Jan. 30, 2009)
Tab 3	Executive Order No. 13673, Fair Pay and Safe Workplaces, 79 FR 45309 (July 31, 2014)
Tab 4	Executive Order No. 13658, Establishing a Minimum Wage for Contractors, 79 FR 9851 (Feb. 12, 2014)
Tab 5	Executive Order No. 13672, Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity (July 21, 2014)

**Tab 1**

## Presidential Documents

Executive Order 13495 of January 30, 2009

### Nondisplacement of Qualified Workers Under Service Contracts

When a service contract expires, and a follow-on contract is awarded for the same service, at the same location, the successor contractor or its subcontractors often hires the majority of the predecessor's employees. On some occasions, however, a successor contractor or its subcontractors hires a new work force, thus displacing the predecessor's employees.

The Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees. A carryover work force reduces disruption to the delivery of services during the period of transition between contractors and provides the Federal Government the benefits of an experienced and trained work force that is familiar with the Federal Government's personnel, facilities, and requirements.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to promote economy and efficiency in Federal Government procurement, it is hereby ordered as follows:

**Section 1. Policy.** It is the policy of the Federal Government that service contracts and solicitations for such contracts shall include a clause that requires the contractor, and its subcontractors, under a contract that succeeds a contract for performance of the same or similar services at the same location, to offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified. There shall be no employment openings under the contract until such right of first refusal has been provided. Nothing in this order shall be construed to permit a contractor or subcontractor to fail to comply with any provision of any other Executive Order or law of the United States.

**Sec. 2. Definitions.**

(a) "Service contract" or "contract" means any contract or subcontract for services entered into by the Federal Government or its contractors that is covered by the Service Contract Act of 1965, as amended, 41 U.S.C. 351 *et seq.*, and its implementing regulations.

(b) "Employee" means a service employee as defined in the Service Contract Act of 1965, 41 U.S.C. 357(b).

**Sec. 3. Exclusions.** This order shall not apply to:

(a) contracts or subcontracts under the simplified acquisition threshold as defined in 41 U.S.C. 403;

(b) contracts or subcontracts awarded pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 46-48c;

(c) guard, elevator operator, messenger, or custodial services provided to the Federal Government under contracts or subcontracts with sheltered workshops employing the severely handicapped as described in section 505 of the Treasury, Postal Services and General Government Appropriations Act, 1995, Public Law 103-329;

(d) agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph-Sheppard Act, 20 U.S.C. 107; or

(e) employees who were hired to work under a Federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employees were not deployed in a manner that was designed to avoid the purposes of this order.

**Sec. 4. Authority to Exempt Contracts.** If the head of a contracting department or agency finds that the application of any of the requirements of this order would not serve the purposes of this order or would impair the ability of the Federal Government to procure services on an economical and efficient basis, the head of such department or agency may exempt its department or agency from the requirements of any or all of the provisions of this order with respect to a particular contract, subcontract, or purchase order or any class of contracts, subcontracts, or purchase orders.

**Sec. 5. Contract Clause.** The following contract clause shall be included in solicitations for and service contracts that succeed contracts for performance of the same or similar work at the same location:

**“NONDISPLACEMENT OF QUALIFIED WORKERS**

“(a) Consistent with the efficient performance of this contract, the contractor and its subcontractors shall, except as otherwise provided herein, in good faith offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which employees are qualified. The contractor and its subcontractors shall determine the number of employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work. Except as provided in paragraph (b) there shall be no employment opening under this contract, and the contractor and any subcontractors shall not offer employment under this contract, to any person prior to having complied fully with this obligation. The contractor and its subcontractors shall make an express offer of employment to each employee as provided herein and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept the offer of employment be less than 10 days.

“(b) Notwithstanding the obligation under paragraph (a) above, the contractor and any subcontractors (1) may employ under this contract any employee who has worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of this contract and who would otherwise face lay-off or discharge, (2) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees within the meaning of the Service Contract Act of 1965, as amended, 41 U.S.C. 357(b), and (3) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor whom the contractor or any of its subcontractors reasonably believes, based on the particular employee’s past performance, has failed to perform suitably on the job.

“(c) In accordance with Federal Acquisition Regulation 52.222–41(n), the contractor shall, not less than 10 days before completion of this contract, furnish the Contracting Officer a certified list of the names of all service employees working under this contract and its subcontracts during the last month of contract performance. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts either with the current or predecessor contractors or their subcontractors. The Contracting Officer will provide the list to the successor contractor, and the list shall be provided on request to employees or their representatives.

“(d) If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), that the contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate sanctions may be imposed and remedies invoked against the contractor or its subcontractors, as provided in Executive Order (No.) \_\_\_\_\_, the regulations, and relevant orders of the Secretary, or as otherwise provided by law.

“(e) In every subcontract entered into in order to perform services under this contract, the contractor will include provisions that ensure that each subcontractor will honor the requirements of paragraphs (a) through (b) with respect to the employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor contractor and its subcontractors. The subcontract shall also include provisions to ensure that the subcontractor will provide the contractor with the information about the employees of the subcontractor needed by the contractor to comply with paragraph 5(c), above. The contractor will take such action with respect to any such subcontract as may be directed by the Secretary as a means of enforcing such provisions, including the imposition of sanctions for non-compliance: provided, however, that if the contractor, as a result of such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the contractor may request that the United States enter into such litigation to protect the interests of the United States.”

**Sec. 6. Enforcement.** (a) The Secretary of Labor (Secretary) is responsible for investigating and obtaining compliance with this order. In such proceedings, the Secretary shall have the authority to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring employment and payment of wages lost. The Secretary also may provide that where a contractor or subcontractor has failed to comply with any order of the Secretary or has committed willful violations of this order or the regulations issued pursuant thereto, the contractor or subcontractor, and its responsible officers, and any firm in which the contractor or subcontractor has a substantial interest, shall be ineligible to be awarded any contract of the United States for a period of up to 3 years. Neither an order for debarment of any contractor or subcontractor from further Government contracts under this section nor the inclusion of a contractor or subcontractor on a published list of noncomplying contractors shall be carried out without affording the contractor or subcontractor an opportunity for a hearing.

(b) This order creates no rights under the Contract Disputes Act, and disputes regarding the requirement of the contract clause prescribed by section 5 of this order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under this order. To the extent practicable, such regulations shall favor the resolution of disputes by efficient and informal alternative dispute resolution methods. The Secretary shall, in consultation with the Federal Acquisition Regulatory Council, issue regulations, within 180 days of the date of this order, to the extent permitted by law, to implement the requirements of this order. The Federal Acquisition Regulatory Council shall issue, within 180 days of the date of this order, to the extent permitted by law, regulations in the Federal Acquisition Regulation to provide for inclusion of the contract clause in Federal solicitations and contracts subject to this order.

**Sec. 7. Revocation.** Executive Order 13204 of February 17, 2001, is revoked.

**Sec. 8. Severability.** If any provision of this order, or the application of such provision or amendment to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstances shall not be affected thereby.

**Sec. 9. General Provisions.** (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. This order is not intended, however, to preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

**Sec. 10. *Effective Date.*** This order shall become effective immediately and shall apply to solicitations issued on or after the effective date for the action taken by the Federal Acquisition Regulatory Council under section 6(b) of this order.



THE WHITE HOUSE,  
*January 30, 2009.*

# Tab 2

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# Presidential Documents

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**Title 3—****Executive Order 13494 of Economy in Government Contracting****The President****Economy in Government Contracting**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, it is hereby ordered that:

**Section 1.** To promote economy and efficiency in Government contracting, certain costs that are not directly related to the contractors' provision of goods and services to the Government shall be unallowable for payment, thereby directly reducing Government expenditures. This order is also consistent with the policy of the United States to remain impartial concerning any labor-management dispute involving Government contractors. This order does not restrict the manner in which recipients of Federal funds may expend those funds.

**Sec. 2.** It is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration of Government contracts, contracting departments and agencies, when they enter into, receive proposals for, or make disbursements pursuant to a contract as to which certain costs are treated as unallowable, shall treat as unallowable the costs of any activities undertaken to persuade employees—whether employees of the recipient of the Federal disbursements or of any other entity—to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees' own choosing. Such unallowable costs shall be excluded from any billing, claim, proposal, or disbursement applicable to any such Federal Government contract.

**Sec. 3.** Notwithstanding section 2 of this order, contracting departments and agencies shall treat as allowable costs incurred in maintaining satisfactory relations between the contractor and its employees, including costs of labor-management committees, employee publications (other than those undertaken to persuade employees to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively), and other related activities. See 48 C.F.R. 31.205–21.

**Sec. 4.** Examples of costs unallowable under section 2 of this order include the costs of the following activities, when they are undertaken to persuade employees to exercise or not to exercise, or concern the manner of exercising, rights to organize and bargain collectively:

- (a) preparing and distributing materials;
- (b) hiring or consulting legal counsel or consultants;
- (c) holding meetings (including paying the salaries of the attendees at meetings held for this purpose); and
- (d) planning or conducting activities by managers, supervisors, or union representatives during work hours.

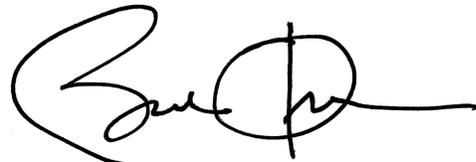
**Sec. 5.** Within 150 days of the effective date of this order, the Federal Acquisition Regulatory Council (FAR Council) shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to carry out this order. Such rules, regulations, and orders shall minimize the costs of compliance for contractors and shall not interfere with the ability of contractors to engage in advocacy through activities for which they do not claim reimbursement.

**Sec. 6.** Each contracting department or agency shall cooperate with the FAR Council and provide such information and assistance as the FAR Council may require in the performance of its functions under this order.

**Sec. 7.** (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

**Sec. 8.** This order shall become effective immediately, and shall apply to contracts resulting from solicitations issued on or after the effective date of the action taken by the FAR Council under section 5 of this order.



THE WHITE HOUSE,  
*January 30, 2009.*

Tab 3

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# Presidential Documents

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**Title 3—****Executive Order 13673 of July 31, 2014****The President****Fair Pay and Safe Workplaces**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 121, and in order to promote economy and efficiency in procurement by contracting with responsible sources who comply with labor laws, it is hereby ordered as follows:

**Section 1. *Policy.*** This order seeks to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by ensuring that they understand and comply with labor laws. Labor laws are designed to promote safe, healthy, fair, and effective workplaces. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government. Helping executive departments and agencies (agencies) to identify and work with contractors with track records of compliance will reduce execution delays and avoid distractions and complications that arise from contracting with contractors with track records of noncompliance.

**Sec. 2. *Compliance with Labor Laws.*** (a) Pre-award Actions. (i) For procurement contracts for goods and services, including construction, where the estimated value of the supplies acquired and services required exceeds \$500,000, each agency shall ensure that provisions in solicitations require that the offeror represent, to the best of the offeror's knowledge and belief, whether there has been any administrative merits determination, arbitral award or decision, or civil judgment, as defined in guidance issued by the Department of Labor, rendered against the offeror within the preceding 3-year period for violations of any of the following labor laws and Executive Orders (labor laws):

- (A) the Fair Labor Standards Act;
- (B) the Occupational Safety and Health Act of 1970;
- (C) the Migrant and Seasonal Agricultural Worker Protection Act;
- (D) the National Labor Relations Act;
- (E) 40 U.S.C. chapter 31, subchapter IV, also known as the Davis-Bacon Act;
- (F) 41 U.S.C. chapter 67, also known as the Service Contract Act;
- (G) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity);
- (H) section 503 of the Rehabilitation Act of 1973;
- (I) 38 U.S.C. 3696, 3698, 3699, 4214, 4301–4306, also known as the Vietnam Era Veterans' Readjustment Assistance Act of 1974;
- (J) the Family and Medical Leave Act;
- (K) title VII of the Civil Rights Act of 1964;
- (L) the Americans with Disabilities Act of 1990;
- (M) the Age Discrimination in Employment Act of 1967;
- (N) Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors); or

(O) equivalent State laws, as defined in guidance issued by the Department of Labor.

(ii) A contracting officer, prior to making an award, shall, as part of the responsibility determination, provide an offeror with a disclosure pursuant to section 2(a)(i) of this order an opportunity to disclose any steps taken to correct the violations of or improve compliance with the labor laws listed in paragraph (i) of this subsection, including any agreements entered into with an enforcement agency. The agency's Labor Compliance Advisor, as defined in section 3 of this order, in consultation with relevant enforcement agencies, shall advise the contracting officer whether agreements are in place or are otherwise needed to address appropriate remedial measures, compliance assistance, steps to resolve issues to avoid further violations, or other related matters.

(iii) In consultation with the agency's Labor Compliance Advisor, contracting officers shall consider the information provided pursuant to paragraphs (i) and (ii) of this subsection in determining whether an offeror is a responsible source that has a satisfactory record of integrity and business ethics, after reviewing the guidelines set forth by the Department of Labor and consistent with any final rules issued by the Federal Acquisition Regulatory (FAR) Council pursuant to section 4 of this order.

(iv) For any subcontract where the estimated value of the supplies acquired and services required exceeds \$500,000 and that is not for commercially available off-the-shelf items, a contracting officer shall require that, at the time of execution of the contract, a contractor represents to the contracting agency that the contractor:

(A) will require each subcontractor to disclose any administrative merits determination, arbitral award or decision, or civil judgment rendered against the subcontractor within the preceding 3-year period for violations of any of the requirements of the labor laws listed in paragraph (i) of this subsection, and update the information every 6 months; and

(B) before awarding a subcontract, will consider the information submitted by the subcontractor pursuant to subparagraph (A) of this paragraph in determining whether a subcontractor is a responsible source that has a satisfactory record of integrity and business ethics, except for subcontracts that are awarded or become effective within 5 days of contract execution, in which case the information may be reviewed within 30 days of subcontract award.

(v) A contracting officer shall require that a contractor incorporate into subcontracts covered by paragraph (iv) of this subsection a requirement that the subcontractor disclose to the contractor any administrative merits determination, arbitral award or decision, or civil judgment rendered against the subcontractor within the preceding 3-year period for violations of any of the requirements of the labor laws listed in paragraph (i) of this subsection.

(vi) A contracting officer, Labor Compliance Advisor, and the Department of Labor (or other relevant enforcement agency) shall be available, as appropriate, for consultation with a contractor to assist in evaluating the information on labor compliance submitted by a subcontractor pursuant to paragraph (v) of this subsection.

(vii) As appropriate, contracting officers in consultation with the Labor Compliance Advisor shall refer matters related to information provided pursuant to paragraphs (i) and (iv) of this subsection to the agency suspending and debarring official in accordance with agency procedures.

(b) Post-award Actions. (i) During the performance of the contract, each agency shall require that every 6 months contractors subject to this order update the information provided pursuant to subsection (a)(i) of this section and obtain the information required pursuant to subsection (a)(v) of this section for covered subcontracts.

(ii) If information regarding violations of labor laws is brought to the attention of a contracting officer pursuant to paragraph (i) of this subsection, or similar information is obtained through other sources, a contracting officer shall consider whether action is necessary in consultation with the agency's Labor Compliance Advisor. Such action may include agreements requiring appropriate remedial measures, compliance assistance, and resolving issues to avoid further violations, as well as remedies such as decisions not to exercise an option on a contract, contract termination, or referral to the agency suspending and debarring official.

(iii) A contracting officer shall require that if information regarding violations of labor laws by a contractor's subcontractor is brought to the attention of the contractor pursuant to subsections (a)(iv), (v) or (b)(i) of this section or similar information is obtained through other sources, then the contractor shall consider whether action is necessary. A contracting officer, Labor Compliance Advisor, and the Department of Labor shall be available for consultation with a contractor regarding appropriate steps it should consider. Such action may include appropriate remedial measures, compliance assistance, and resolving issues to avoid further violations.

(iv) The Department of Labor shall, as appropriate, inform contracting agencies of its investigations of contractors and subcontractors on current Federal contracts so that the agency can help the contractor determine the best means to address any issues, including compliance assistance and resolving issues to avoid or prevent violations.

(v) As appropriate, contracting officers in consultation with the Labor Compliance Advisor shall send information provided pursuant to paragraphs (i)–(iii) of this subsection to the agency suspending and debarring official in accordance with agency procedures.

**Sec. 3. Labor Compliance Advisors.** Each agency shall designate a senior agency official to be a Labor Compliance Advisor, who shall:

(a) meet quarterly with the Deputy Secretary, Deputy Administrator, or equivalent agency official with regard to matters covered by this order;

(b) work with the acquisition workforce, agency officials, and agency contractors to promote greater awareness and understanding of labor law requirements, including recordkeeping, reporting, and notice requirements, as well as best practices for obtaining compliance with these requirements;

(c) coordinate assistance for agency contractors seeking help in addressing and preventing labor violations;

(d) in consultation with the Department of Labor or other relevant enforcement agencies, and pursuant to section 4(b)(ii) of this order as necessary, provide assistance to contracting officers regarding appropriate actions to be taken in response to violations identified prior to or after contracts are awarded, and address complaints in a timely manner, by:

(i) providing assistance to contracting officers and other agency officials in reviewing the information provided pursuant to sections 2(a)(i), (ii), and (v) and 2(b)(i), (ii), and (iii) of this order, or other information indicating a violation of a labor law, so as to assess the serious, repeated, willful, or pervasive nature of any violation and evaluate steps contractors have taken to correct violations or improve compliance with relevant requirements;

(ii) helping agency officials determine the appropriate response to address violations of the requirements of the labor laws listed in section 2(a)(i) of this order or other information indicating such a labor violation (particularly serious, repeated, willful, or pervasive violations), including agreements requiring appropriate remedial measures, decisions not to award a contract or exercise an option on a contract, contract termination, or referral to the agency suspending and debarring official;

(iii) providing assistance to appropriate agency officials in receiving and responding to, or making referrals of, complaints alleging violations by

agency contractors and subcontractors of the requirements of the labor laws listed in section 2(a)(i) of this order; and

(iv) supporting contracting officers, suspending and debarring officials, and other agency officials in the coordination of actions taken pursuant to this subsection to ensure agency-wide consistency, to the extent practicable;

(e) as appropriate, send information to agency suspending and debarring officials in accordance with agency procedures;

(f) consult with the agency's Chief Acquisition Officer and Senior Procurement Executive, and the Department of Labor as necessary, in the development of regulations, policies, and guidance addressing labor law compliance by contractors and subcontractors;

(g) make recommendations to the agency to strengthen agency management of contractor compliance with labor laws;

(h) publicly report, on an annual basis, a summary of agency actions taken to promote greater labor compliance, including the agency's response pursuant to this order to serious, repeated, willful, or pervasive violations of the requirements of the labor laws listed in section 2(a)(i) of this order; and

(i) participate in the interagency meetings regularly convened by the Secretary of Labor pursuant to section 4(b)(iv) of this order.

**Sec. 4. Ensuring Government-wide Consistency.** In order to facilitate Government-wide consistency in implementing the requirements of this order:

(a) to the extent permitted by law, the FAR Council shall, in consultation with the Department of Labor, the Office of Management and Budget, relevant enforcement agencies, and contracting agencies, propose to amend the Federal Acquisition Regulation to identify considerations for determining whether serious, repeated, willful, or pervasive violations of the labor laws listed in section 2(a)(i) of this order demonstrate a lack of integrity or business ethics. Such considerations shall apply to the integrity and business ethics determinations made by both contracting officers and contractors pursuant to this order. In addition, such proposed regulations shall:

(i) provide that, subject to the determination of the agency, in most cases a single violation of law may not necessarily give rise to a determination of lack of responsibility, depending on the nature of the violation;

(ii) ensure appropriate consideration is given to any remedial measures or mitigating factors, including any agreements by contractors or other corrective action taken to address violations; and

(iii) ensure that contracting officers and Labor Compliance Advisors send information, as appropriate, to the agency suspending and debarring official, in accordance with agency procedures.

(b) the Secretary of Labor shall:

(i) develop guidance, in consultation with the agencies responsible for enforcing the requirements of the labor laws listed in section 2(a)(i) of this order, to assist agencies in determining whether administrative merits determinations, arbitral awards or decisions, or civil judgments were issued for serious, repeated, willful, or pervasive violations of these requirements for purposes of implementation of any final rule issued by the FAR Council pursuant to this order. Such guidance shall:

(A) where available, incorporate existing statutory standards for assessing whether a violation is serious, repeated, or willful; and

(B) where no statutory standards exist, develop standards that take into account:

(1) for determining whether a violation is "serious" in nature, the number of employees affected, the degree of risk posed or actual harm done by the violation to the health, safety, or well-being of a worker, the amount of damages incurred or fines or penalties assessed with

regard to the violation, and other considerations as the Secretary finds appropriate;

(2) for determining whether a violation is “repeated” in nature, whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years;

(3) for determining whether a violation is “willful” in nature, whether the entity knew of, showed reckless disregard for, or acted with plain indifference to the matter of whether its conduct was prohibited by the requirements of the labor laws listed in section 2(a)(i) of this order; and

(4) for determining whether a violation is “pervasive” in nature, the number of violations of a requirement or the aggregate number of violations of requirements in relation to the size of the entity;

(ii) develop processes:

(A) for Labor Compliance Advisors to consult with the Department of Labor in carrying out their responsibilities under section 3(d) of this order;

(B) by which contracting officers and Labor Compliance Advisors may give appropriate consideration to determinations and agreements made by the Department of Labor and other agencies; and

(C) by which contractors may enter into agreements with the Department of Labor or other enforcement agency prior to being considered for contracts.

(iii) review data collection requirements and processes, and work with the Director of the Office of Management and Budget, the Administrator for General Services, and other agency heads to improve those processes and existing data collection systems, as necessary, to reduce the burden on contractors and increase the amount of information available to agencies;

(iv) regularly convene interagency meetings of Labor Compliance Advisors to share and promote best practices for improving labor law compliance; and

(v) designate an appropriate contact for agencies seeking to consult with the Department of Labor pursuant to this order;

(c) the Director of the Office of Management and Budget shall:

(i) work with the Administrator of General Services to include in the Federal Awardee Performance and Integrity Information System information provided by contractors pursuant to sections 2(a)(i) and (ii) and 2(b)(i) of this order, and data on the resolution of any issues related to such information; and

(ii) designate an appropriate contact for agencies seeking to consult with the Office of Management and Budget pursuant to this order;

(d) the Administrator of General Services, in consultation with other relevant agencies, shall develop a single Web site for Federal contractors to use for all Federal contract reporting requirements related to this order, as well as any other Federal contract reporting requirements to the extent practicable;

(e) in developing the guidance pursuant to subsection (b) of this section and proposing to amend the Federal Acquisition Regulation pursuant to subsection (a) of this section, the Secretary of Labor and the FAR Council, respectively, shall minimize, to the extent practicable, the burden of complying with this order for Federal contractors and subcontractors and in particular small entities, including small businesses, as defined in section 3 of the Small Business Act (15 U.S.C. 632), and small nonprofit organizations; and

(f) agencies shall provide the Administrator of General Services with the necessary data to develop the Web site described in subsection (d) of this section.

**Sec. 5. *Paycheck Transparency.*** (a) Agencies shall ensure that, for contracts subject to section 2 of this order, provisions in solicitations and clauses in contracts shall provide that, in each pay period, contractors provide all individuals performing work under the contract for whom they are required to maintain wage records under the Fair Labor Standards Act; 40 U.S.C. chapter 31, subchapter IV (also known as the Davis-Bacon Act); 41 U.S.C. chapter 67 (also known as the Service Contract Act); or equivalent State laws, with a document with information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay. Agencies shall also require that contractors incorporate this same requirement into subcontracts covered by section 2 of this order. The document provided to individuals exempt from the overtime compensation requirements of the Fair Labor Standards Act need not include a record of hours worked if the contractor informs the individuals of their overtime exempt status. These requirements shall be deemed to be fulfilled if the contractor is complying with State or local requirements that the Secretary of Labor has determined are substantially similar to those required by this subsection.

(b) If the contractor is treating an individual performing work under a contract or subcontract subject to subsection (a) of this section as an independent contractor, and not an employee, the contractor must provide a document informing the individual of this status.

**Sec. 6. *Complaint and Dispute Transparency.*** (a) Agencies shall ensure that for all contracts where the estimated value of the supplies acquired and services required exceeds \$1 million, provisions in solicitations and clauses in contracts shall provide that contractors agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise. Agencies shall also require that contractors incorporate this same requirement into subcontracts where the estimated value of the supplies acquired and services required exceeds \$1 million.

(b) Subsection (a) of this section shall not apply to contracts or subcontracts for the acquisition of commercial items or commercially available off-the-shelf items.

(c) A contractor's or subcontractor's agreement under subsection (a) of this section to arbitrate certain claims only with the voluntary post-dispute consent of employees or independent contractors shall not apply with respect to:

(i) employees who are covered by any type of collective bargaining agreement negotiated between the contractor and a labor organization representing them; or

(ii) employees or independent contractors who entered into a valid contract to arbitrate prior to the contractor or subcontractor bidding on a contract covered by this order, except that a contractor's or subcontractor's agreement under subsection (a) of this section to arbitrate certain claims only with the voluntary post-dispute consent of employees or independent contractors shall apply if the contractor or subcontractor is permitted to change the terms of the contract with the employee or independent contractor, or when the contract is renegotiated or replaced.

**Sec. 7. *Implementing Regulations.*** In addition to proposing to amend the Federal Acquisition Regulation as required by section 4(a) of this order, the FAR Council shall propose such rules and regulations and issue such orders as are deemed necessary and appropriate to carry out this order, including sections 5 and 6, and shall issue final regulations in a timely fashion after considering all public comments, as appropriate.

**Sec. 8. *Severability.*** If any provision of this order, or applying such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstance shall not be affected thereby.

**Sec. 9. General Provisions.** (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an agency or the head thereof; or
- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

**Sec. 10. Effective Date.** This order shall become effective immediately and shall apply to all solicitations for contracts as set forth in any final rule issued by the FAR Council under sections 4(a) and 7 of this order.



THE WHITE HOUSE,  
July 31, 2014.

Tab 4

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# Presidential Documents

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**Title 3—****Executive Order 13658 of February 12, 2014****The President****Establishing a Minimum Wage for Contractors**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to promote economy and efficiency in procurement by contracting with sources who adequately compensate their workers, it is hereby ordered as follows:

**Section 1. Policy.** This order seeks to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by increasing to \$10.10 the hourly minimum wage paid by those contractors. Raising the pay of low-wage workers increases their morale and the productivity and quality of their work, lowers turnover and its accompanying costs, and reduces supervisory costs. These savings and quality improvements will lead to improved economy and efficiency in Government procurement.

**Sec. 2. Establishing a minimum wage for Federal contractors and subcontractors.** (a) Executive departments and agencies (agencies) shall, to the extent permitted by law, ensure that new contracts, contract-like instruments, and solicitations (collectively referred to as “contracts”), as described in section 7 of this order, include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that the minimum wage to be paid to workers, including workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), in the performance of the contract or any subcontract thereunder, shall be at least:

(i) \$10.10 per hour beginning January 1, 2015; and

(ii) beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor (Secretary). The amount shall be published by the Secretary at least 90 days before such new minimum wage is to take effect and shall be:

(A) not less than the amount in effect on the date of such determination;

(B) increased from such amount by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted), or its successor publication, as determined by the Bureau of Labor Statistics; and

(C) rounded to the nearest multiple of \$0.05.

(b) In calculating the annual percentage increase in the Consumer Price Index for purposes of subsection (a)(ii)(B) of this section, the Secretary shall compare such Consumer Price Index for the most recent month, quarter, or year available (as selected by the Secretary prior to the first year for which a minimum wage is in effect pursuant to subsection (a)(ii)(B)) with the Consumer Price Index for the same month in the preceding year, the same quarter in the preceding year, or the preceding year, respectively.

(c) Nothing in this order shall excuse noncompliance with any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this order.

**Sec. 3. Application to tipped workers.** (a) For workers covered by section 2 of this order who are tipped employees pursuant to 29 U.S.C. 203(t),

the hourly cash wage that must be paid by an employer to such workers shall be at least:

(i) \$4.90 an hour, beginning on January 1, 2015;

(ii) for each succeeding 1-year period until the hourly cash wage under this section equals 70 percent of the wage in effect under section 2 of this order for such period, an hourly cash wage equal to the amount determined under this section for the preceding year, increased by the lesser of:

(A) \$0.95; or

(B) the amount necessary for the hourly cash wage under this section to equal 70 percent of the wage under section 2 of this order; and

(iii) for each subsequent year, 70 percent of the wage in effect under section 2 for such year rounded to the nearest multiple of \$0.05.

(b) Where workers do not receive a sufficient additional amount on account of tips, when combined with the hourly cash wage paid by the employer, such that their wages are equal to the minimum wage under section 2 of this order, the cash wage paid by the employer, as set forth in this section for those workers, shall be increased such that their wages equal the minimum wage under section 2 of this order. Consistent with applicable law, if the wage required to be paid under the Service Contract Act, 41 U.S.C. 6701 *et seq.*, or any other applicable law or regulation is higher than the wage required by section 2, the employer shall pay additional cash wages sufficient to meet the highest wage required to be paid.

**Sec. 4. Regulations and Implementation.** (a) The Secretary shall issue regulations by October 1, 2014, to the extent permitted by law and consistent with the requirements of the Federal Property and Administrative Services Act, to implement the requirements of this order, including providing exclusions from the requirements set forth in this order where appropriate. To the extent permitted by law, within 60 days of the Secretary issuing such regulations, the Federal Acquisition Regulatory Council shall issue regulations in the Federal Acquisition Regulation to provide for inclusion of the contract clause in Federal procurement solicitations and contracts subject to this order.

(b) Within 60 days of the Secretary issuing regulations pursuant to subsection (a) of this section, agencies shall take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts as described in section 7(d)(i)(C) and (D) of this order, entered into after January 1, 2015, consistent with the effective date of such agency action, comply with the requirements set forth in sections 2 and 3 of this order.

(c) Any regulations issued pursuant to this section should, to the extent practicable and consistent with section 8 of this order, incorporate existing definitions, procedures, remedies, and enforcement processes under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*; the Service Contract Act, 41 U.S.C. 6701 *et seq.*; and the Davis-Bacon Act, 40 U.S.C. 3141 *et seq.*

**Sec. 5. Enforcement.** (a) The Secretary shall have the authority for investigating potential violations of and obtaining compliance with this order.

(b) This order creates no rights under the Contract Disputes Act, and disputes regarding whether a contractor has paid the wages prescribed by this order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued pursuant to this order.

**Sec. 6. Severability.** If any provision of this order, or applying such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstance shall not be affected thereby.

**Sec. 7. General Provisions.** (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an agency or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) This order shall apply only to a new contract or contract-like instrument, as defined by the Secretary in the regulations issued pursuant to section 4(a) of this order, if:

(i) (A) it is a procurement contract for services or construction;

(B) it is a contract or contract-like instrument for services covered by the Service Contract Act;

(C) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b); or

(D) it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and

(ii) the wages of workers under such contract or contract-like instrument are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act.

(e) For contracts or contract-like instruments covered by the Service Contract Act or the Davis-Bacon Act, this order shall apply only to contracts or contract-like instruments at the thresholds specified in those statutes. For procurement contracts where workers' wages are governed by the Fair Labor Standards Act, this order shall apply only to contracts or contract-like instruments that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to this order pursuant to regulations or actions taken under section 4 of this order.

(f) This order shall not apply to grants; contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended; or any contracts or contract-like instruments expressly excluded by the regulations issued pursuant to section 4(a) of this order.

(g) Independent agencies are strongly encouraged to comply with the requirements of this order.

**Sec. 8. *Effective Date.*** (a) This order is effective immediately and shall apply to covered contracts where the solicitation for such contract has been issued on or after:

(i) January 1, 2015, consistent with the effective date for the action taken by the Federal Acquisition Regulatory Council pursuant to section 4(a) of this order; or

(ii) for contracts where an agency action is taken pursuant to section 4(b) of this order, January 1, 2015, consistent with the effective date for such action.

(b) This order shall not apply to contracts or contract-like instruments entered into pursuant to solicitations issued on or before the effective date for the relevant action taken pursuant to section 4 of this order.

(c) For all new contracts and contract-like instruments negotiated between the date of this order and the effective dates set forth in this section, agencies are strongly encouraged to take all steps that are reasonable and legally permissible to ensure that individuals working pursuant to those contracts and contract-like instruments are paid an hourly wage of at least \$10.10 (as set forth under sections 2 and 3 of this order) as of the effective dates set forth in this section.

A handwritten signature in black ink, appearing to be Barack Obama's signature, consisting of a large 'B' followed by a circle and a horizontal line.

THE WHITE HOUSE,  
*February 12, 2014.*

**Tab 5**

## Presidential Documents

Executive Order 13672 of July 21, 2014

### Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity

By the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 121, and in order to provide for a uniform policy for the Federal Government to prohibit discrimination and take further steps to promote economy and efficiency in Federal Government procurement by prohibiting discrimination based on sexual orientation and gender identity, it is hereby ordered as follows:

**Section 1. Amending Executive Order 11478.** The first sentence of section 1 of Executive Order 11478 of August 8, 1969, as amended, is revised by substituting “sexual orientation, gender identity” for “sexual orientation”.

**Sec. 2. Amending Executive Order 11246.** Executive Order 11246 of September 24, 1965, as amended, is hereby further amended as follows:

(a) The first sentence of numbered paragraph (1) of section 202 is revised by substituting “sex, sexual orientation, gender identity, or national origin” for “sex, or national origin”.

(b) The second sentence of numbered paragraph (1) of section 202 is revised by substituting “sex, sexual orientation, gender identity, or national origin” for “sex or national origin”.

(c) Numbered paragraph (2) of section 202 is revised by substituting “sex, sexual orientation, gender identity, or national origin” for “sex or national origin”.

(d) Paragraph (d) of section 203 is revised by substituting “sex, sexual orientation, gender identity, or national origin” for “sex or national origin”.

**Sec. 3. Regulations.** Within 90 days of the date of this order, the Secretary of Labor shall prepare regulations to implement the requirements of section 2 of this order.

**Sec. 4. General Provisions.** (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an agency or the head thereof; or
- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

**Sec. 5. *Effective Date.*** This order shall become effective immediately, and section 2 of this order shall apply to contracts entered into on or after the effective date of the rules promulgated by the Department of Labor under section 3 of this order.

A handwritten signature in black ink, appearing to be Barack Obama's signature, consisting of a large 'B' followed by a circle and a horizontal line.

THE WHITE HOUSE,  
*July 21, 2014.*