

INVESTIGATIVE PROCESS

UNDER

SCA/CWHSSA/FLSA

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INTRODUCTION TO THE INVESTIGATIVE PROCESS

The WHD is responsible for administering and enforcing a number of federal laws that set basic labor standards, among them:

- ◇ The Fair Labor Standards Act (FLSA)
- ◇ The Family and Medical Leave Act (FMLA)
- ◇ The Migrant and Seasonal Agricultural Worker Protection Act (MSPA)
- ◇ The Employee Polygraph Protection Act
- ◇ Certain employment standards and worker protections under the Immigration and Nationality Act
- ◇ The Davis-Bacon and related Acts
- ◇ The McNamara-O'Hara Service Contract Act

The WHD may conduct investigations under any one or more of the laws it enforces. A WHD investigator(WHI) may conduct an investigation to determine whether these laws apply to an employer. A WHI may also visit an employer to provide information about the application of, and compliance with, the labor laws administered by the WHD.

Most employers are subject to the FLSA, the federal law of most general application requiring payment of the minimum wage and overtime premium pay, keeping certain basic payroll and employment records, and limiting the working hours and types of jobs for certain underage youths. Section 11(a) of the FLSA authorizes representatives of DOL to investigate and gather data concerning wages, hours, and other employment practices; enter and inspect an employer's premises and records; and question employees to determine whether any person has violated any FLSA provision(s).

The WHD does not require an investigator to previously announce the scheduling of an investigation, although in many instances the investigator will advise an employer prior to opening the investigation. The WHI has sufficient latitude to initiate unannounced investigations in many cases in order to directly observe normal business operations and develop factual information quickly.

The WHD conducts investigations for a number of reasons, all having to do with enforcement of the laws and ensuring an employer's compliance. The WHD does not typically disclose the reason for an investigation. Many are initiated by complaints. **All complaints are confidential; the name of the worker and the nature of the complaint are not disclosable; whether a complaint exists may not be disclosed.** In addition to complaints, the WHD selects certain types of businesses or industries for investigation. Regardless of the particular reason that prompted the investigation, all investigations are conducted in accordance with established policies and procedures.

SCA LABOR STANDARDS/CONTRACT STIPULATIONS

Section 2(a) of the SCA requires that stipulations (contract clauses) be included in all covered contracts in excess of \$2,500. The stipulations are set forth at 29 C.F.R. § 4.6 and FAR 48 C.F.R. § 52.222-41. Among the contract clause requirements are:

- ◇ Minimum wages to be paid the various classes of service employees.
- ◇ Fringe benefits to be furnished to the service employees.
- ◇ Safety and health provisions.
- ◇ Furnishing employees notice of required compensation.
- ◇ Statement of rates the federal agency would pay to the various classes of service employees if they were federal employees.
 - ◇◇ DOL must give due consideration to such rates in making wage and fringe benefit determinations.

In addition to the SCA contract stipulations established in 29 C.F.R. § 4.6, contracts to which CWHSSA overtime requirements apply must also include the contract clause language set forth at 29 C.F.R. § 5.5(b) and FAR 48 C.F.R. § 52.222-4.

INVESTIGATION PROCEDURES

DOL has sole enforcement authority under the SCA (unlike the Davis-Bacon Act). The WHD applies the procedures described below in conducting investigations under the SCA, CWHSSA, FLSA, and other laws within its scope of enforcement responsibility.

The WHI will identify himself/herself and present official credentials. The WHI will explain the investigation process and the types of records required during the review.

Generally, a WHD investigation may consist of the following steps:

- ◇ Examination of records to determine which laws or exemptions apply. These records include, for example, those showing the employer's annual dollar volume of business transactions, involvement in interstate commerce, and work on government contracts. *Information from an employer's records will not be revealed to unauthorized persons.*
- ◇ Examination of payroll and time records, and taking notes or making transcriptions or photocopies essential to the investigation.
- ◇ Interviews with certain employees in private. The purpose of these interviews is to verify the employer's payroll and time records, to identify workers' particular duties in sufficient detail to decide which exemptions apply, if any, and to confirm that minors are legally employed. Interviews are normally conducted on the employer's premises. In some instances, present and former employees may be interviewed at their homes or by mail or telephone.

In a full SCA investigation, the WHI will examine the following compliance issues:

- ◇ Has the employer posted the "Notice to Employees Working on Government Contracts" (WH Publication 1313)?
- ◇ Did the federal agency incorporate the correct wage determination(s) in the contract?
- ◇ Did the employer post the wage determination or make it available to each employee?
- ◇ Are service employees paid the applicable prevailing wage(s) rate for the class(es) of work performed?
- ◇ Are service employees properly classified based on the work performed on a covered service contract?
- ◇ Has the employer kept accurate records of employees' hours of work, rate(s) of pay, payments made or costs incurred for fringe benefits, gross wages earned, and job classification(s)?

- ◇ Did individual service employees perform work in more than one classification; if so, was the work segregated in the employer's time and payroll records?
- ◇ If fringe benefits were not paid in cash, did the employer incur the appropriate costs to provide fringe benefits?
- ◇ Was overtime properly paid under either CWHSSA and/or FLSA?
- ◇ Are service employee(s) covered by a WHD certificate(s) that allows for the payment of special minimum wages to workers with disabilities under Section 14 of the FLSA?

Initial Employer Conference

- ◇ The WHI will contact a responsible official of the firm at the start of the investigation.
- ◇ Normally, the WHI will advise the official of the various steps that the investigation includes: the initial employer conference, contact with the federal contracting agency and prime contractor (if applicable), examination of the contract documents, examination of the basic payroll records, employee interviews, site inspection, and final conference.
- ◇ The contractor will be asked to provide information, such as the firm's legal name and responsible company officials, trade name(s) if any, address of the firm's headquarters, and federal tax identification (FEIN) number.
- ◇ Generally, the investigation covers a two-year period, but this period can be extended in certain instances. The contractor will be asked to make available basic time and payroll records for that period. (An FLSA investigation may be conducted concurrently with the SCA/CWHSSA investigation.)

Review the Prime Contract

The contracting agency and/or the contractor will be asked to identify:

- ◇ The contracting agency/prime contractor, name and telephone number of the contracting officer, contract number, amount of contract, purpose of contract, date of contract award, period(s) of performance (start and ending dates, if known), place(s) of performance.
- ◇ The WHI may request copies of the contract award letter, the labor standards clauses, wage determination(s) in the contract, conformance actions, contract modifications by which the federal contracting agency exercised options and/or extended the contract, and the e98 (if applicable) the federal contracting agency submitted to DOL to obtain SCA wage determination(s) for the contract. The WHI may review/duplicate portions of the scope of work from the contract.

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- ◇ The WHI will review the contract to determine:
 - ◇◇ Are required SCA contract stipulations in the contract?
 - ◇◇ Is the correct wage determination(s) in the contract?
 - ◇◇ Does the wage determination(s) apply to the geographic area(s) of contract performance?
 - ◇◇ Did the federal agency obtain and incorporate new wage determination(s) in the contract initially and/or at the execution of an option and/or extension of the contract term? 29 C.F.R. § 4.5(a)(2) and 29 C.F.R. § 4.6(b)(3).
 - ◇◇ Is a section 4(c) collective bargaining situation applicable to this contract?
 - ◇◇ Do employees considered to be outside the SCA definition of “service employees” because they are professional, administrative or executive employees meet the requirements for exemption under 29 C.F.R. Part 541? *See* SCA § 8 and 29 C.F.R. §§ 4.113 and 4.156.
 - ◇◇ Are all the classes of service employees who are employed on the contract listed in the contract wage determination and/or conformance actions approved by DOL? 29 C.F.R. §§ 4.6(b)(1)-(2).

Subcontracts

- ◇ The WHI will review documents or information regarding labor standards and wage determinations that were provided by the prime contractor to the subcontractor. The subcontractor will be asked to provide a copy of the subcontract and any other relevant documents.
- ◇ The SCA contract clauses included in the prime contract require the prime contractor to insert the SCA stipulations and applicable wage determinations in any subcontract subject to the SCA. 29 C.F.R. § 4.6(j).
- ◇ The prime contractor is responsible for violations by subcontractors. 29 C.F.R. § 4.114(b).
- ◇ When a subcontractor is investigated, typically the WHI will notify the prime contractor at the beginning of the investigation.

Contracts that do not contain the SCA contract clauses

- ◇ If an WHI finds that a service contract in excess of \$2,500 does not contain SCA stipulations and/or the applicable wage determination(s), the investigation may be suspended until the contract is amended.
- ◇ The WHI will try to determine why a wage determination was not included in the contract.

- ◇ Where appropriate, the WHD will advise the contracting agency to insert SCA stipulations and/or the applicable wage determination into the contract, and subsequently proceed with the investigation. 29 C.F.R. § 4.5(c).

Examination of Basic Payroll Records

- ◇ The WHI will examine the contractor's payroll records. The recordkeeping requirements of the SCA are stated in the SCA contract clauses. The contractor is required to maintain records for each employee subject to the SCA and to make these records available for inspection and/or transcription on the request of an authorized WHD representative. These records must be maintained for three years from the completion of the work. 29 C.F.R. § 4.6(g). Also, the contractor may be required to maintain and provide the basic time and payroll records required under the FLSA. 29 C.F.R. § 516.2.

Employee Interviews

- ◇ As stipulated in the SCA contract clauses, the contractor must permit authorized representatives of the WHD to conduct interviews with employees at the work site during normal working hours. 29 C.F.R. § 4.6(g)(4).
- ◇ Employee interview statements are confidential and therefore must be conducted in an area that provides privacy.
- ◇ The WHI may interview current and/or former employees.

Review of Conformance Actions 29 C.F.R. § 4.6(b)(2).

- ◇ If the WHI finds that the contractor employs classes of workers not listed on the wage determination, the WHI will:
 - ◇◇ Determine whether conformance procedures were followed for the unlisted class(es).
 - ◇◇◇ If the contractor has not received a response to a request for approval of a conformance action, the WHI will determine whether a conformance action was initiated, completed, approved, denied and/or returned to the agency for transmittal to the contractor.
 - ◇◇◇ If the contractor and contracting agency have not taken appropriate action to submit a conformance request, the WHD can determine a conformed classification, wage rate, and or fringe benefits that will apply retroactively to the date each affected class of employees commenced work on the contract. 29 C.F.R. § 4.6(b)(2)(vi).
- ◇ After the WHD conformance determination is made, the investigator can proceed to compute back wages due, if any, and complete the investigation.

Determining Compliance with CWHSSA

- ◇ See the “Compliance Principles” section of this resource book for a detailed discussion of determining compliance with CWHSSA overtime pay requirements, where applicable.

CWHSSA Liquidated Damages

- ◇ Liquidated damages are computed at \$10.00 per day per CWHSSA violation. 40 U.S.C. § 3702(c); 29 C.F.R. § 5.5(b)(2); FAR 48 C.F.R. §§ 22.302 and 52.222-4(b).
- ◇◇ As a matter of administrative policy, WHD does not compute liquidated damages for employees whose CWHSSA back wages are less than \$20.
- ◇◇ The contractor should be advised of the potential liquidated damages and the possibility of their assessment by the contracting agency.

The decision on whether to assess the damages is made by the federal contracting agency. (Liquidated damages in excess of \$500 may be waived or adjusted only with the concurrence of Wage and Hour.)

- ◇ Example:

	M	T	W	T	F	S	S	TOTALS
REGULAR TIME	10	12	13	9	8	3	0	55

In the above example, no overtime premium was paid. The 15 weekly overtime hours were worked on three calendar days, Thursday, Friday and Saturday. Thus, \$30.00 in CWHSSA liquidated damages would be computed, and may be assessed.

Overtime requirements under the FLSA, as amended

- ◇ For an overview of determining compliance with FLSA overtime pay requirements (where applicable), see the “Compliance Principles” section of this resource book.
- ◇ Where questions arise concerning overtime pay obligations under the FLSA, consultation with the local WHD District Office is appropriate.

State wage and hour laws

- ◇ Federal laws regarding minimum wages and overtime pay do not preempt the requirements of similar State and local laws. These laws set minimum requirements and can apply concurrently. Where questions arise regarding wage and overtime pay requirements under State (or local) law, consultation with the appropriate State (or local) government agency is appropriate.

Final conference

- ◇ When all the fact-finding steps have been completed, the WHI will ask to meet with the contractor and/or a representative of the firm who has authority to reach decisions and commit the contractor to corrective actions if violations have occurred. The contractor will be told whether violations have occurred and, if so, what they are and how to correct them. If back wages are owed to employees, the WHI will request payment of back wages.
- ◇ The contractor will have an opportunity to respond to the alleged violations and/or provide an explanation as to why the violations occurred.
- ◇ Contractors may be represented by their accountants or attorneys at any point during this process. When the WHI has advised the employer of his/her findings, the employer or representative may present additional facts for consideration if violations were disclosed.
- ◇ If a subcontractor fails to make restitution of the back wage liability found due, the WHI should advise the prime contractor of the findings and request payment of the back wages. SCA § 3(a) and 29 C.F.R. § 4.187(c) and 4.187(e)(1).
- ◇◇ If a subcontractor owes back wages and refused to pay, the prime contractor, who bears the ultimate responsibility, shall be requested to make the payments. If the subcontractor is willing to make the payments but is unable to do so until payments due under the contract are made by the prime contractor, the matter shall be taken up with the prime contractor to arrange a satisfactory method under which the subcontractor can meet the back wage obligations. If the prime contractor does not agree to take steps to effect the payments, withholding action may be necessary to protect the employees' interests.
- ◇ In a refusal-to-pay situation, the WHI may advise a contractor that contract funds can be withheld. However, the WHI does not have the authority to initiate a withholding action.
- ◇ Although the WHI should advise the contractor of any potential CWHSSA liquidated damages assessment, the initial decision to assess liquidated damages for CWHSSA violations will be made by the contracting agency. FAR 48 C.F.R. § 22.302.
- ◇ The WHI may advise the contractor of the debarment sanctions under the SCA (discussed below); and if it appears that the debarment criteria have been met, WHD will advise the contractor at the final conference of the possibility of debarment sanctions.

REMEDIES AND SANCTIONS

(29 C.F.R. §§ 4.187 – 4.191)

Withholding of Contract Funds to Cover Wages and Fringe Benefits Due

- ◇ To protect the rights of covered workers under the SCA and CWHSSA, DOL regulations provide for remedies when compliance is in question. An important element is the withholding of contract funds sufficient to satisfy alleged wage underpayments pending resolution of a wage dispute. Withholding action may be necessary to protect the employees' interests. It assures the availability of monies for the payment of the back wages if a contractor refuses to make restitution when back wages are found due to covered workers. The contracting agency may withhold funds on its own initiative or at the direction of DOL.
- ◇◇ The SCA contract clause set forth at 29 C.F.R. § 4.6(i) and FAR 48 C.F.R. § 52.222-41(k) directs the contracting officer to withhold or cause to be withheld, from the prime contractor, sums an appropriate DOL official requests or sums the contracting officer decides may be necessary to pay underpaid employees of the contractor or subcontractor(s). Such funds may be withheld from any federal contract with the prime contractor. (*See also* 29 C.F.R. § 4.187.) The same contract clause also stipulates that in the event of failure to pay the employees wages or fringe benefits due under the SCA, the agency may also suspend further payments until the SCA violations have ceased; also, the agency may terminate the contractor's right to proceed with work under the contract and charge the contractor in default for any additional cost needed to complete the contract work under other arrangements.
- ◇◇ The comparable CWHSSA contract clause regarding the withholding of contract payments is at 29 C.F.R. § 5.5(b)(3) and FAR 48 C.F.R. § 52.222-4(c); *see also* FAR 48 C.F.R. § :22.406-9(a).
- ◇ There is no right of individual action (suit) to recover back wages under the SCA.
- ◇ The contracting agency is responsible for withholding actions.
- ◇◇ In the case of requirements-type contracts, it is the contracting agency and not the using agency that is responsible for withholding. 29 C.F.R. § 4.187.
- ◇◇ Contracting officers shall withhold funds upon written request from DOL. Contracting officers should respond immediately confirming that the funds have been withheld.
- ◇◇ Additionally, if the request has been made by DOL, it is important for the agency to preserve the withheld funds until notified in writing by DOL regarding final disposition of the withheld funds.

- ◇ In most cases, the WHD provides written notice to contractors regarding withholding requests and provides the contractor(s) an opportunity to submit their views. (*See* discussion, below, regarding due process.)
- ◇ As the prime contractor is responsible for compliance on the contract, and will be liable for payment of the back wages not paid by a subcontractor, the prime contractor may decide to withhold payments from the subcontractor until the back wage issues are resolved.

Due Process for Withholding Action

- ◇ To ensure that contractors and subcontractors receive “due process” prior to the withholding of funds at the direction of the WHD, the following steps are included in the WHD enforcement procedures.
 - ◇◇ Where a contractor refuses to pay back wages under SCA and funds are available for withholding, WHD will generally send a “due process” letter to the prime contractor. This letter will include:
 - ◇◇◇ A statement that the final conference was conducted at which time the contractor was provided an opportunity to discuss alleged violations; or if a final conference was not held, provide the reason(s) why;
 - ◇◇◇ A brief description of the alleged violations;
 - ◇◇◇ An affirmation that the contractor received a Summary of Unpaid Wages;
 - ◇◇◇ A statement that the matter is being forwarded for a decision to a designated WHD deciding official, who will decide whether withholding action will be taken regarding the back wage findings;
 - ◇◇◇ A statement that the contractor has fifteen (15) days to provide the WHD deciding official with written views on whether the violations occurred;
 - ◇◇◇ A statement that any determination regarding the withholding of contract funds will not result in the distribution of the funds to the underpaid workers until such time as the administrative remedies available to the contractor have been completed. See discussion of “The Hearing Process And Appeal Rights,” below.
 - ◇◇ If the deciding official determines that withholding action is warranted, a copy of WHD withholding request to the contracting agency and a letter indicating the deciding official’s decision on withholding will be sent to the prime contractor.
- ◇ In certain cases, such as missed payrolls, likely bankruptcy filings, or imminent contract close out, it may be necessary to request withholding before the

measures described above can be provided. In those cases, the procedures outlined above should be followed after the withholding action; and based on the contractor's submission, the WHD deciding official may decide to revoke an earlier withholding request.

Priority of withheld funds

- ◇ DOL's position is that accrued funds withheld for payment of wages may not be used or set aside for other purposes until such time as the prevailing wage issues are resolved. To give contracting agency reprocurement claims priority, for example, would essentially make the employees unfairly pay for the breach of contract between their employer and the Government.
- ◇ It is DOL's position that wages due underpaid employees have priority over any competing claims against a contractor, regardless of when the claims were raised. (See C.F.R. § 4.187(b).) DOL believes that to hold otherwise would be inequitable and contrary to public policy since the affected employees have already performed work from which the Government has received the benefit.
- ◇ Wage claims for underpayment have priority over:
 - (1) An Internal Revenue Service levy for unpaid taxes;
 - (2) Reprocurement costs of the contracting agency after a contractor's default or termination for cause;
 - (3) Any assignee of the contractor . . . including assignments made under the Assignment of Claims Act;
 - (4) Any claim by a trustee in bankruptcy.

Disposition of withheld funds

- ◇ The disbursement process is handled by DOL.
- ◇◇ When funds are forwarded to DOL for disbursement, so that the receiving DOL office can readily identify and make the appropriate disbursements to the affected employees, the agency should include **the name of the contractor**, and the **contract number for which the work was performed** (rather than the contract number for which the funds may have been withheld via a cross-withholding action) on the check or in a letter transmitting the check. All enclosed information is forwarded to the disbursing office by the bank.

Contract cancellation

- ◇ Pursuant to the contract clause at 29 C.F.R. § 4.6(i) and FAR 48 C.F.R. § 52.222-41(k), the agency may cancel the contractor's right to proceed with work under

the contract and charge the contractor in default for any additional cost needed to complete the contract work under other arrangements.

- ◇ A contract may be cancelled by the contracting agency if any violation(s) are found of any of the SCA contract stipulations, and additional costs of completing the contract work under another arrangement may be charged to the original contractor. 29 C.F.R. § 4.190.

Debarment SCA § 5; 29 C.F.R. § 4.188(b)(3).

- ◇ After a hearing, any contractor or person responsible for SCA violations may be debarred from receiving government contracts or performing as a subcontractor for a period of three years, unless the responsible DOL official (Administrative Law Judge or, if appealed, the ARB) recommends relief from debarment because of “unusual circumstances.”
- ◇ The term “unusual circumstances,” was added to the SCA by the 1972 amendments, to SCA significantly restricted and removed prior discretionary authority regarding the initiation of debarment.
- ◇ Although Congress did not define the term “unusual circumstances” in the SCA, Congress did indicate that the mere payment of back wages and the promise of future compliance are insufficient to preclude debarment. Criteria for determining “unusual circumstances” are stated at 29 CFR § 4.188(b)(2).
 - ◇◇ Relief from the debarment sanction cannot be in order where a respondent’s conduct in causing or permitting SCA violations provisions of the contract is willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct, as described in 29 C.F.R. § 4.188(b)(3)(i).
 - ◇◇ Furthermore, relief from debarment cannot be in order where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature. A history of recurring violations of an identical nature prevents the finding of “unusual circumstances.”

THE HEARING PROCESS AND APPEAL RIGHTS

(29 C.F.R. Part 6)

- ◇ In accordance with section 4(a) of SCA, DOL is authorized to hold hearings and make decisions based upon findings of fact as deemed necessary to enforce the provisions of SCA.
- ◇ In situations where the contractor refuses to agree to future compliance, fails to make back wage restitution, or debarment action is indicated, investigation files are referred by WHD to the Regional Solicitor for preparation for an administrative hearing before a Department of Labor Administrative Law Judge (ALJ).
- ◇ Employees do not have private rights of action under SCA to institute suits on their own behalf to collect unpaid wages.
- ◇ After review and concurrence by the Regional Solicitor's Office, a complaint is filed with the Office of the Chief Administrative Law Judge requesting that a hearing be held. The contractor is served a copy of this Complaint.
- ◇ The Office of the Chief Administrative Law Judge is responsible for the scheduling of the administrative hearing. The hearing is normally held in the city closest to the location of the contractor.
- ◇ During this period, the Regional Solicitor's Office may continue to contact the firm, attempting to settle the matter without the need for a hearing; and funds will continue to be withheld from the contractor to cover the alleged back wage liability.
- ◇ When the ALJ renders a decision regarding the issues in a case (such as the amount of the alleged back wage liability and/or debarment), any aggrieved party may petition the Administrative Review Board (ARB) within 40 days for review of the decision. 29 C.F.R. Part 8.

**ADMINISTRATIVE REVIEW BOARD PROCEEDINGS
(29 C.F.R. Part 8)**

- ◇ The ARB, an appellate body within the DOL, created in 1996, has a maximum of five members appointed by Secretary of Labor. It succeeded certain former DOL appeals boards. ARB cases arise on appeal from ALJ decisions and final rulings by the WHD Administrator. The ARB issues final agency decisions for the Secretary of Labor in cases arising under a wide range of labor laws, including the Service Contract Act and the Davis-Bacon and related Acts.
- ◇ Jurisdiction of the ARB under the SCA includes:
 - ◇◇ Wage determinations issued under the SCA;
 - ◇◇ Substantial variance proceedings or arm's-length negotiations proceedings pursuant to section 4(c) of the SCA;
 - ◇◇ Debarment or other enforcement proceedings;
 - ◇◇ Proceedings to determine substantial interest of debarred persons or firms;
 - ◇◇ Decisions of the WHD Administrator or authorized representative regarding recommendations of a Federal agency for adjustment or waiver of liquidated damages assessed under CWHSSA;
 - ◇◇ Other final actions of the WHD Administrator or authorized representative, such as additional classification actions and rulings with respect to application of the Act(s), or the regulations, or of wage determinations issued thereunder;
 - ◇◇ Other matters specifically referred to the ARB by the Secretary of Labor.
- ◇ The ARB may accept or not the accept review of any case. Requests for review of:
 - ◇◇ Wage determinations must be filed with the ARB within 20 days of issuance of the WHD Administrator's decision;
 - ◇◇ Coverage and interpretation matters must be filed within 60 days of issuance of the WHD Administrator's decision;
 - ◇◇ Other proceedings must be filed within 60 days of the date of the decision in question.
- ◇ Proceedings may be an oral hearing in Washington, D.C., or, typically, by review of the record in a closed session.