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Service Contract Act Compliance May Change Under Biden

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As the administration of President Joseph Biden takes hold, federal service contractors can expect policy and enforcement proposals affecting their workforces. For those subject to the McNamara-O'Hara Service Contract Act, or SCA, the resulting changes may seem indirect.

Statutory changes to the SCA itself or its implementing regulations seem unlikely. Instead, contractors should plan for policy changes that affect contracts that happen to be SCA covered, such as a potential increase in the contractor minimum wage to $15 per hour.

Enforcement might become more aggressive as well, though a look backward shows the prior administration's SCA enforcement was closer to Obama-era enforcement than one might expect.

We identify several potential changes in this article and suggest actions to consider in preparation. No matter how these predictions fare, however, SCA-covered contractors must always continue to monitor for changes and assess new compliance obligations vigilantly.

During the Transition

Any time the presidency changes parties, shifts naturally follow in policy and enforcement priorities. This year's transition features multiple proposals for labor and employment issues generally, with attention on collective bargaining and worker classification among other areas.

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But changes with SCA-specific effects in this transition might be more subtle than one might expect. This is a possibility because SCA policy and enforcement were somewhat stable from the end of the Obama administration through the Trump administration.

For example, per published data, the U.S. Department of Labor's Wage & Hour Division found SCA violations in approximately 15% more cases per year for fiscal years 2017 through 2020 as compared to fiscal years 2009 through 2016.[1] Fiscal years do differ from presidential terms by about four months on each end but still offer insights.

The WHD's annual total SCA backpay assessments were around 66% higher in fiscal years 2017 through 2020 compared to fiscal years 2009 through 2016.

Plus, the Obama-era executive order to provide sick leave under SCA-covered contracts, among other contract types, remained in place and even had its Federal Acquisition Regulation implementation finalized.

So, there is only so much from the departing administration to undo, in a manner of speaking, when it comes to the SCA. Calls for change might instead be based on an October 2020 report from the U.S. Government Accountability Office, "Actions Needed to Improve Department of Labor's Enforcement of Service Worker Wage Protections."[2]

That report offered informative analysis of the WHD's SCA enforcement data, but its recommendations for enhancing consideration of SCA violations in procurement decisions omitted discussion of areas where the WHD's enforcement reporting can lack important context.

For example, WHD data offers no apparent way to distinguish obvious noncompliance with basic SCA obligations from arguable violations based on a disagreement about highly technical SCA interpretations — such as labor category mapping.

Nor is it fair to encourage, as the GAO report does, more contracting officers to consider SCA violations — and alleged violations — in procurement decisions when the WHD does not, as a matter of practice, provide contractors access copies of their final SCA written audit reports at the conclusion of a SCA audit.

Policymakers and advocates not attuned to these issues thus might misapprehend the GAO report as suggesting a need for more change in SCA policy and enforcement than is warranted.

Contractors should be attentive to any invocation of the report as the basis for changing how the WHD applies the SCA, and how contracting agencies assess SCA violations in future procurements.

Policymakers

Biden has nominated Boston Mayor Marty Walsh as labor secretary. As this article went to press, many top-level labor nominees were still to be named, including a WHD administrator. The Democrats' tie-breaking vote in the U.S. Senate should reduce the time to have nominees confirmed.

But there are no guarantees; readers may recall that President Barack Obama's entire first term passed without a confirmed WHD administrator. This is an important consideration because an open WHD administrator chair could slow or even hold up release of any significant SCA policy changes under contemplation.

Early Initiatives

The Biden administration has proposed increasing the minimum wage nationwide to $15 per hour. One step already taken toward that goal is a Jan. 22 executive order that, among other things, directs the U.S. Office of Personnel Management to provide recommendations on promoting a $15 per hour minimum wages for federal employees.

As another step, the president plans to issue, within the first 100 days, an executive order setting a $15 minimum wage for employees of federal contractors. That order will probably build on Obama's Executive Order 13658 — Establishing a Minimum Wage for Contractors — under which a $10.10 minimum wage began applying in 2015; the rate is currently $10.95 per hour.

SCA-covered contractors would likely see a $15 contractor minimum wage applied to them through revisions to SCA wage determinations, as is the practice under Executive Order 13658.

Contractors should pay particular attention to wage determinations in contracts that are fixed-price, labor-hour, or time-and-materials types.

Federal Acquisition Regulations 52.222-43 and -44 provide for price adjustments to compensate for actual increases in wage and fringe-benefit costs attributable to wage determinations applicable at the beginning of option periods and contract anniversary dates — but not before then.

Contractors will have the most direct basis for price adjustments if they have service employees presently earning between $10.95 and $15 per hour. But WHD might also increase the wage rates for higher-wage service employees to prevent compression of wages at or just above $15 per hour.

All SCA-covered contractors should thus monitor the specifics and procedure for implementing a $15 contractor minimum wage.

The administration's ultimate goal is likely a Fair Labor Standards Act amendment codifying the $15 minimum wage for all sectors of the economy, nationwide. If that legislation passes, contractors might have a basis for price adjustments as soon as the statutory increases take effect.

FAR 52.222-43 and -44 also call for price adjustments based on "an amendment to the Fair Labor Standards Act of 1938 that is enacted after award of this contract, affects the minimum wage, and becomes applicable to this contract under law." Unlike with the prior paragraph, this clause does not key the price adjustment to the start of option periods or contract anniversary dates.

In addition to minimum-wage policy, contractors should stay abreast of ongoing legislative and administrative efforts to manage workforces as the COVID-19 pandemic continues. Most notably, understanding the various types of leave that SCA-covered workers have — SCA vacation, Executive Order 13706 sick leave, pandemic-specific leave — will require continued attention to details and ongoing guidance from the WHD.

A Return of Obama — and Clinton — Era Policies?

The Biden administration also signaled plans to build on the labor policies from the Obama administration. For example, plans to "drive an aggressive, all-hands-on-deck enforcement effort that will dramatically reduce worker misclassification" would come just a few years after Obama-era policy interpretations — withdrawn in the Trump administration — on independent-contractor and joint-employer issues.

Changes in worker classification policy would likely affect many industries and markets.

But for an SCA-covered contractor, policy changes could affect whether the company — as employer — or the individuals — as independent contractors — have primary responsibility for mapping the individuals' duties to the appropriate SCA labor categories and who is deemed responsible for any mismapping identified by the WHD.

These are important practical considerations to monitor.

So, too, are any changes to the overtime exemptions under the Fair Labor Standards Act. Contractors may recall that the Obama administration promulgated a significant increase in the salary threshold for the exemption.

Many contractors found that they had supervisory-type employees whom the increase would have made nonexempt and thus covered by the SCA for the first time. Yet the WHD did not add or revise SCA labor categories to accommodate newly SCA-covered workers.

The potential for ill-fitting labor categories lessened when a court enjoined the new overtime threshold and the next administration implemented a more modest increase. The concerns of labor-category mismatches could return, though, if the Biden administration seeks to further increase the overtime threshold.

The Biden administration might also dust off two executive orders from prior Democratic administrations.

First, the administration might require successor contractors to offer rights of first refusal to SCA-covered workers of outgoing predecessor employees when the successors will perform the same or similar services at the same location.

Obama issued just such an executive order less than two weeks into his first term — Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts. That executive order expanded on the scope of President Bill Clinton's similar executive order from 1994. Both executive orders were later pulled by the administrations that followed.

Any revival of the nondisplacement rule would likely face the same criticism as the earlier executive orders. Namely, such a rule imposes a solution in search of a problem.

Successor contractors regularly offer employment to most or all of a predecessor's front-line workforce. Just like their agency customers, these successors recognize the benefits of worker familiarity and continuity services.

Regulating this informal practice adds compliance and record-keeping costs without apparent improvements in contractor performance and efficiency. Plus, contractors often have good reasons not to retain certain predecessor employees.

Federalizing those employment judgments invites overzealous enforcement — a risk exemplified by the Obama-era WHD's pursuit of a contractor for refusing to hire a single predecessor employee who had been deemed unqualified by the contracting officer in U.S. Department of Labor v. Metropolitan Security Services.

At least in that case, an administrative law judge ultimately vacated and dismissed the enforcement action.[3]

Yet contractors subject to a new nondisplacement order may feel compelled to hire underqualified predecessor employees just to foreclose the risk of overreaching WHD enforcement. A new nondisplacement order would require contractors to start weighing these efficiency-eroding hiring practices yet again.

Contractors can prepare for this scenario by reviewing and updating their practices for identifying predecessor employees, extending employment offers to them, and documenting the communications and judgments during this transition hiring period.

If a new executive order does appear, contractors should begin reviewing solicitations for nondisplacement obligations — especially H-clauses and similar customized terms adding the obligations before any standard FAR clauses take effect.

Second, the Biden administration might also try to refashion Obama's Fair Pay and Safe Workplaces executive order. Criticized as a form of blacklisting, this executive order required federal contractors to disclose many violations — and alleged violations — of several labor laws when pursuing contracts worth more than $500,000.

For the SCA, the DOL's implementing guidance required disclosure of almost any DOL findings of SCA violations, even supposed violations resulting from a contracting agency's failure to incorporate the SCA in the first place.

Obama issued the fair pay executive order, which updated a Clinton-era version, later in his second term. It did not apply in practice.

In 2016, the U.S. District Court for the Eastern District of Texas enjoined much of the implementation in Associated Builders and Contractors of Southeast Texas v. Rung. President Donald Trump later withdrew the executive order and Congress disapproved the implementing FAR rules under the Congressional Review Act.

Any fair pay revival may be limited by the latter of those three actions. Under the Congressional Review Act, disapproval of a regulation bars future rules that are substantially the same.

Could the Biden administration craft a disclosure regime different enough from Obama's fair pay rulemaking to be permitted under the CRA? Maybe. But any attempt will likely face litigation on this question on top of challenges to the underlying substance.

The administration thus might focus other priorities lacking Congressional Review Act litigation risk. Still, SCA-covered contractors should be alert to any potential for a successor to fair pay, especially any terms requiring overbroad disclosure of SCA violations without consideration for how the WHD classifies and reports on its audit findings.

Looking Ahead

Forecasting policy and enforcement for discrete areas like the SCA is difficult with any new administration. The demands of COVID-19 relief and an impeachment trial make Biden-era predictions even harder.

In general, contractors might plan for SCA changes that are incremental but probably add compliance burdens exceeding the benefits to taxpayers and the service employees protected by the SCA. Only time will tell, of course, so stay tuned.

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[1] https://www.dol.gov/agencies/whd/data/charts/government-contracts.

[2] Actions Needed to Improve Department of Labor's Enforcement of Service Worker Wage Protections (GAO-21-11), https://www.gao.gov/products/GAO-21-11.

[3] https://www.oalj.dol.gov/DECISIONS/ALJ/NQW/2016/WAGE_AND_HOUR_DIVISI_v_WALDEN_SECURITY_2016NQW00001_(DEC_19_2018)_125307_CADEC_PD.PDF.