



Partnering for Success: A Cross-Practice Series on Top Legal Considerations for Government Contractors

Part 3: Wage and Hour Considerations and Strategies

September 28, 2023

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2023 Seyfarth Shaw LLP. All rights reserved. Private and Confidential





Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2023 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Speakers



Scott Hecker
Senior Counsel
WASHINGTON, DC



Adam Lasky
Partner
SEATTLE



Amy Hoang
Partner
WASHINGTON, DC

Agenda

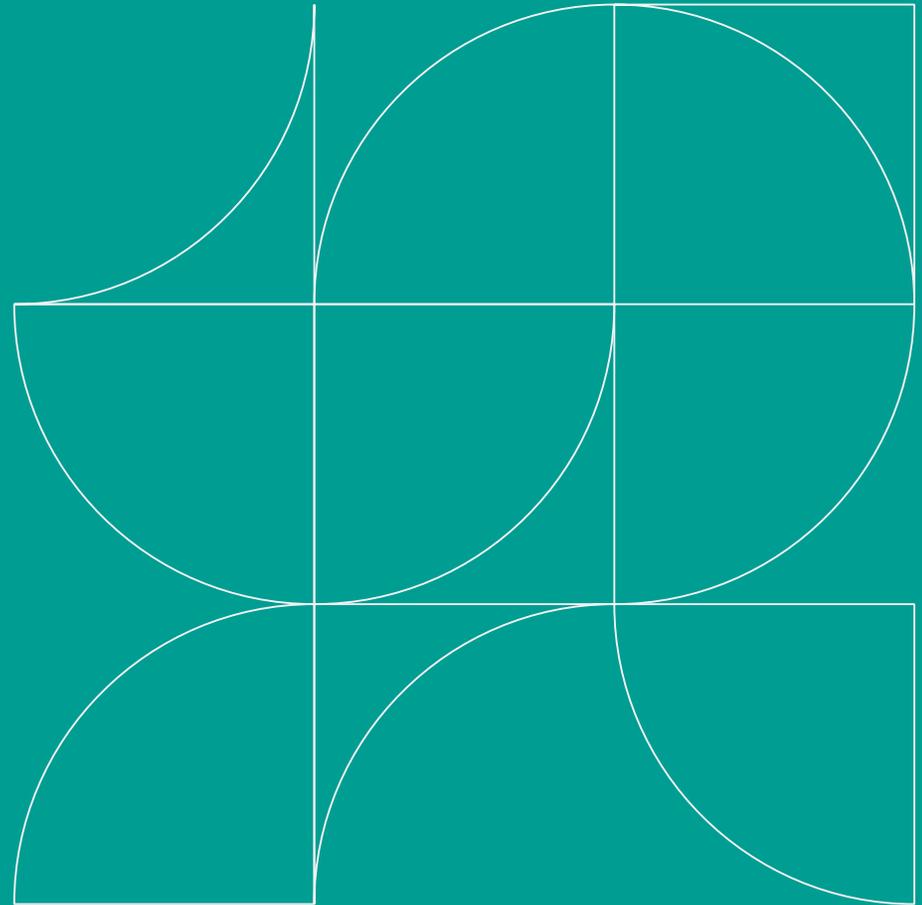
01

How do I decide whether the Service Contract Act applies to my government contract?

02

How will the Inflation Reduction Act expand impacts of prevailing wage requirements into my private sector, i.e., non-government, contracts?

Statutes that Matter



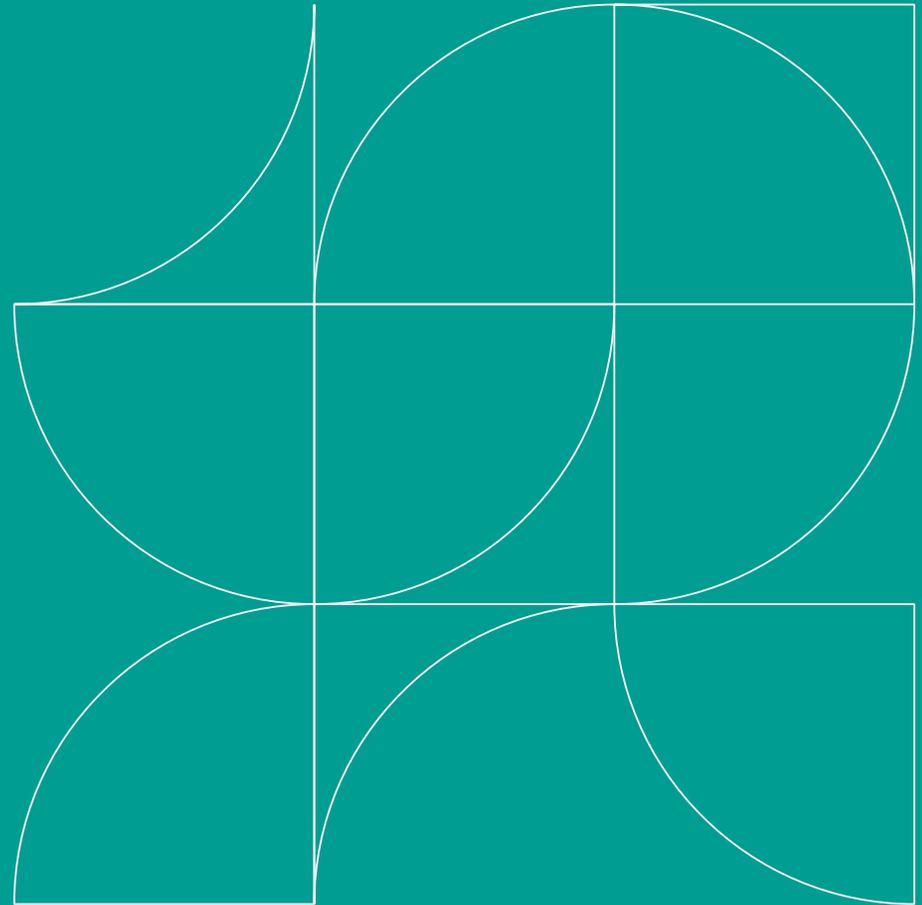
Prevailing Wages Include . . .

- Wage rates; **and**
- Fringe benefits.

Davis-Bacon and Service Contract Act wage determinations issued by the Department of Labor list prevailing wages for relevant job classifications.

Relevant wage determinations should be incorporated into covered **government contracts**.

SCA Coverage



Is my contract covered by the Service Contract Act?

- Who decides?
- Is the contract being entered into with a federal agency or D.C.?
- Does solicitation/contract contain FAR 52.222-41 clause?
- Is contract in excess of the \$2,500?
- Is the contract otherwise subject to a special statutory or regulatory exemption? (see 29 C.F.R. 4.115- 4.123)
 - Examples:
 - Any contract covered by the DBA for construction, alteration and/or repair, including painting and decorating of public buildings or public works.
 - Any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express railway line or oil or gas pipeline where published tariff rates are in effect
 - Any contract for public utility services, including electric light and power, water, steam, and gas
 - A variety of types of contracts with the U.S. Postal Service

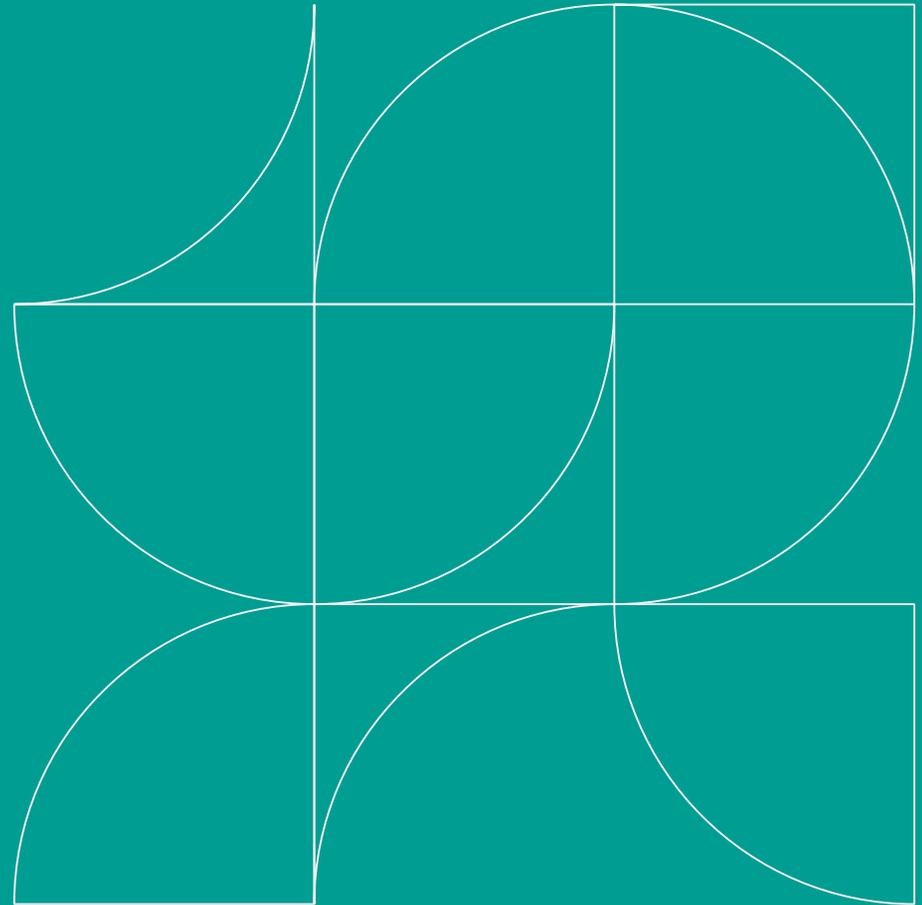
Is my contract covered by the Service Contract Act?

- Is the **principal** purpose furnishing **services** in the **United States** through the use of “**service employees**”?
 - **United States** means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, and the outer Continental Shelf as defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331, et seq.), but does not include any other place subject to U.S. jurisdiction or any U.S. base or possession within a foreign country (29 CFR 4.112).
 - A service contract to be performed in its entirety outside the geographical limits of the United States as thus defined is not covered a contract
 - *A covered contract may have NON-covered employees performing work entirely outside the United States*
 - **Services**
 - applies to a wide variety of service contracts
 - **Service Employees**
 - Is the principal purpose the procurement of a type of service where service employees will not be used?
 - Coverage of the Act does not extend to contracts for services where the vast majority of work is to be performed by persons who are not service employees, i.e., persons who qualify as bona fide executive, administrative, or professional personnel as defined in the FLSA regulations found at 29 C.F.R. Part 541.
 - a contract for professional services performed essentially by bona fide professional employees, with the use of service employees being only a minor factor in contract performance, is not covered by the SCA

When/what to do if you disagree with the contracting agency's position on whether contract is SCA-covered?

- Best time to act is pre-award
 - Pre-bid Q&A
 - Pre-bid protest
 - Go to DOL
- Post-award
 - Go to DOL

Davis-Bacon and the IRA



We care because . . .

Prevailing-wage obligations impact employers in numerous (and expanding) ways, e.g.:

Davis-Bacon and its Related Acts

- Affect projects under the Infrastructure Investment and Jobs Act and Inflation Reduction Act;
- Require attention and new analyses under U.S. DOL Wage Hour Division's final rule, "Updating the Davis-Bacon and Related Acts Regulations," effective October 23, 2023.

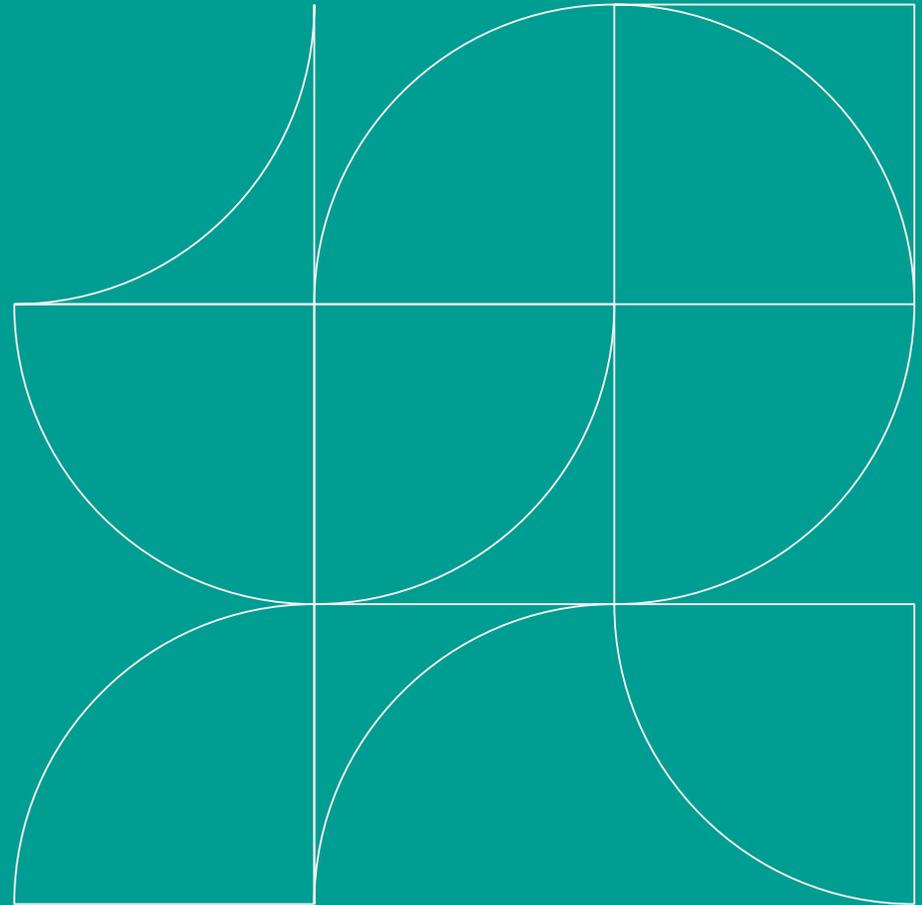
We care because . . .

Prevailing-wage obligations impact employers in numerous (and expanding) ways, e.g.:

Inflation Reduction Act

- Extends prevailing wage obligations to **private-sector, non-government projects**, when entities seek to claim enhanced tax credits under the Act;
- Will be enforced by Treasury/IRS, not DOL/WHHD;
- Is the subject of recent IRS rulemaking providing additional information on compliance with the IRA's prevailing wage and apprenticeship requirements, which may differ from traditional Davis-Bacon obligations, including regarding
 - Identification of a qualifying project's applicable wage determination(s),
 - Penalties for non-compliance, and
 - An exception to penalties for incorporating Project Labor Agreements.

How can we help?



We can support you by . . .

- Identifying hallmarks of (government) contracts implicating prevailing wage requirements;
- Considering potential compliance challenges as early as possible;
- Providing competent counsel on obligations under various statutory/regulatory frameworks; and
- Liaising with government agencies, prime contractors, and upper-tier subcontractors to mitigate risks and limit exposure.

Thank You

For more information please contact:

Scott Hecker

Email: shecker@seyfarth.com

Adam Lasky

Email: alasky@seyfarth.com

Amy Hoang

Email: ahoang@seyfarth.com