

APTAC Body of Knowledge Competency Guide

B. General Business Knowledge/Readiness for Government Procurement

B.3. Operations Management

B.3.4 Personnel Management

Description

This is an overview of the knowledge needed to counsel clients regarding personnel management related compliance requirements of government contracts. The PTAP Solicitation for Cooperative Agreement Application (SCAA) prohibits PTAC counselors from providing general business management advice or training, and counselors should refer clients to other assistance resources for that. The U.S. Department of Labor (DOL) is serious about compliance, and contractors are subject to an auditor visit without warning to interview workers and review documents. A contractor can be severely penalized for violating these laws and regulations, including termination of contract(s), fines, and imprisonment.

Policies and procedures

At specified dollar thresholds, contractors and vendors on government contracts are required to implement various requirements. Government contractors should have written policies and procedures in place to comply with all of these requirements. These policies and procedures should concisely cover at least the following topics:

- Wage and hour as applicable, including Copeland Act Anti-Kickback certifications
- Non-discrimination in employment and promotion
- Affirmative Action for recruitment and hiring
- Discipline and termination of employees
- Equal employment opportunity
- Americans with Disabilities Act compliance and outreach
- Requirements regarding immigrant workers and child labor
- Collective bargaining agreements, if any, and jurisdictional issues
- Designated ombudsman for employees to report complaints
- Safety plan
- Employee training, including training on prohibited gifts and gratuities
- Employee use of government vehicles, office equipment, and other property
- Drug-free workplace, including alcohol and smoking restrictions
- Restriction on personal weapons
- Protection of jobs during jury duty, military duty, and other civic activities
- Code of Conduct (note that this includes required and prohibited behavior)
- Company Code of Ethics (note that this reflects the firm's values and beliefs)
- Jobsite security and badging procedures
- Official language in the workplace (if applicable)
- Executive compensation not to exceed owners

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- Restrictions on gifts, rewards, bonuses, and stock options

U. S. Department of Labor, Wage and Hour Division Resources

"The Wage and Hour Division is committed to providing employers with the tools they need to operate in compliance with the variety of labor laws enforced by the Division. WHD offers a number of useful compliance resources intended to provide employers with readily accessible, easy-to-understand information relevant to both their rights and to their responsibilities under the law. From the interactive E-laws advisor to a complete library of free, downloadable workplace posters, this site offers employers critical information to guide them toward operating their businesses in full compliance with federal labor regulations."

(<http://www.dol.gov/WHD/foremployers.htm> - *laborstandards*).

See additional references below.

Wage and hour requirements

Although there are others, the four most commonly-encountered wage laws are:

- Davis-Bacon Act, covering construction work
- Service Contract Act, covering many types of skilled workers
- Walsh Healy Public Contracts Act, generally covering manufacturing jobs
- Copeland Anti-Kickback Act, covering weekly payroll report requirements.

Refer to the DOL website at <http://www.dol.gov/whd/govcontracts/index.htm> for requirements that contractors must know about. If wage determinations are required, they will be specified in the solicitation documents and can be found at DOL's Wage Determinations Online website at <http://www.wdol.gov>

The DOL collects data about "prevailing wages", by county and nationwide. The data includes hourly labor rates and fringe benefits for detailed classifications of workers. Where collective bargaining agreements prevail, the prevailing rates may closely resemble the rates in the agreements, but there is no requirement for a contractor to bargain with any labor organization. Where there is no collective bargaining agreement, the DOL will use other methods to ascertain the rates industry is paying for each classification of labor.

Employees working under a federal contract must be paid the wages specified in the contract. If an employee works part of the time on the federal job and part of the time on other jobs, the

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employee is paid at two different rates. This situation can cause dissatisfaction among a company's workforce and should be carefully managed.

Each wage determination contains specific details about fringe benefits required, such as sick leave, vacation leave, overtime rates, etc. These are usually in fine print at the bottom of the list of positions and wages, where they are often overlooked. The contractor usually has the option of providing the specified benefits or paying every employee the additional hourly amount "in lieu of benefits". Offerors must include these costs in bids or proposals.

Competition is vigorous in many industries, and some bidders do not pay the regulated wage rates including fringe rates. This could prompt a competitor to "protest" the procurement. Bid protests will be addressed in another section.

Note that cities, counties, and states can enact their own laws covering minimum wage, prevailing wage, or living wage, and companies should be prepared to pay the higher of federal, state, or local wage rates applicable to each contract location. Bidders should become familiar with such requirements at every place of performance required by the resultant contract.

Workers Compensation Insurance

Contractors are required to carry specified amounts of workers compensation insurance and to provide a certificate of insurance to the agency issuing each contract. Federal coverage requirements may be different from state coverage requirements. States may have variations in local laws and requirements for workers comp. Each company is expected to put up informational posters containing contact information in the event of an accident or injury on the job, with phone number and location of the nearest medical facility. If 911 is not the number to call for emergency assistance, the number to call must be prominently posted. These posters are available on the Wage & Hour website. Other workers comp requirements may be specified in individual contracts.

Reporting requirements

In situations in which a Representation or Certification (Reps & Certs) requirement states that the contractor has "filed all required reports", and the contract is below the threshold for reporting, there is not a "correct" response. Some hopeful prospective contractors are reluctant to answer "yes" if they have not been required to file any but are afraid to answer "no". If no reports are required, the best advice is to answer, "yes, we have filed all required reports, which are none".

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Accident reports and incident reports vary, so whatever the company policy and procedures are should be in writing. In most states, workers compensation laws require reports of injuries incurred on the job.

Counselors can help the client compile a checklist of all reports that the contract requires, including those in the clauses "incorporated by reference," which are often overlooked. Even if the customer includes a related Contract Data Requirements List (CDRL), it does not always include all of the reports mentioned here.

Supervision, training, and employee relations

All employees should be trained to comply with the policies and procedures applicable to their job, especially "annual ethics training," which should cover the government's rules and regulations about required and prohibited behavior.

One example: the government will not pay for entertaining including meals, so staff parties cannot be paid for as direct costs or included in indirect rates. Most employee recognition costs are also not allowable. These are legitimate, and commendable, costs of doing business but must be paid out of non-government funds. Often these are a direct hit to the bottom line, so prospective contractors should be sure to charge enough "profit" to cover them.

Staff training is usually an allowable cost, and some government customers require training on certain topics, such as safety plans, ethics policy, etc.

Difference between employee and contractor

Distinguishing between an "employee" and an "independent contractor" in the workplace is an important area for companies to understand. Although clients may have been more flexible in their private-sector dealings, they are subject to closer scrutiny when doing business with the federal government and other public entities. Aside from explaining these general guidelines, the PTAC counselor is encouraged to refer clients to their Small Business Development Center (SBDC) or other business assistance resource for more specific instruction and be clear that they cannot provide legal advice. In general, getting the employee/contractor distinction wrong can result in required payment of back taxes and fines and back wages to re-classified personnel, often including fringe benefits. The legal issues are even more complex if a person classified as an independent contractor but later determined to be an employee uses government property (such as a vehicle, construction equipment, or computer) and incurs injury or property damage. Some factors used to distinguish between the two include:

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- **Compensation:** Employees are paid established rates with income taxes withheld and employer taxes such as FICA and workforce development taxes paid to federal and state governments, and these wages and taxes are reported on the W-2 form. Independent contractors are paid negotiated rates with (usually) no income tax withholding and no employer taxes paid to federal and state governments, and these payments are reported on the 1099 form.
- **Level of control:** A person who is supervised in performing work, attends employee training events, is required to comply with "employee handbook" procedures, is included in the client's staff listing or payroll record, or in any other way has the appearance of being treated like an employee must be classified as an employee and the appropriate taxes and fringes paid. Other state criteria may apply in addition to IRS regulations.
- **Small business size standards:** If the client classifies part of its workforce as 1099 independent contractors, and only counts W-2 employees in the workforce numbers entered into SAM, and if any of the 1099 contractors are later re-classified as W-2 employees and added to the head-count, the business size determination may change, and awards placed as small business set aside could be cancelled with untold repercussions.

Labor relations

The federal government never requires contractor employees to join a union. States may have "right to work" laws, or laws requiring union membership. In some states, contractors have the option to bargain with labor organizations and may require employees to pay dues to that organization. Counselors should be familiar with local laws and practices, especially where labor is performed on government jobsites. In construction, a pre-job meeting may be held to settle any jurisdictional issues, for which procedures vary state by state.

Clients should be made aware of any differences in labor matters between being a prime contractor and a subcontractor. Also a client that is bidding on a job located in another state should be made aware of differences between that state and their home state, and the counselor might contact the PTAC in the other state for assistance. Other assistance programs may be consulted about labor relations, but the PTAC counselor will advise on the government contracting aspects.

Code of Conduct and Code of Ethics

Similar to the Section A.2, Ethics in the PTAC, clients should have also have a set of standards (or Code of Ethics) that their employees are expected to meet. Some government customers will expect to see these codes posted in the workplace. Codes need not be highly detailed but realistic

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and enforceable within their personnel policy on discipline and termination. Having a code without enforcing it may be worse than not having one at all. Employees should feel safe about supporting these codes.

References:

<http://www.dol.gov/WHD/reg-library.htm>

<http://www.dol.gov/elaws/ofccp.htm>

<http://www.wdol.gov>

<http://smallgovcon.com/sbaohadecisions/small-business-violates-ostensible-subcontractor-rule-wins-contract-anyway/>

Fair Labor Standards Act (<http://www.dol.gov/whd/flsa/>)

IRS (<http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee>)

DoL (<http://www.dol.gov/whd/workers/misclassification/>)

<http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Know-Who-You're-Hiring-Independent-Contractor-Self-employed-vs-Employee>

<http://smallgovcon.com/sbaohadecisions/small-business-violates-ostensible-subcontractor-rule-wins-contract-anyway/>

FAR-based contract clauses in each solicitation

State and local laws and regulations in each PTAC service area