IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

DAVID BROWNE, ANTONIO CALDWELL, and LUCRETIA HALL, *on behalf of themselves and those similarly situated,* PLAINTIFFS v. P.A.M. TRANSPORT, INC., *et al.* DEFENDANTS.	**Civil Action No.**: 5:16-cv-05366

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL PURSUANT TO FED. R. CIV. P. 12(C)

Plaintiffs David Browne, Antonio Caldwell, and Lucretia Hall (hereinafter "Named Plaintiffs") submit the following memorandum of law in opposition to Defendant's Motion for Partial Dismissal.

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I. INTRODUCTION

Plaintiffs are over-the-road truck drivers who spent weeks away from home while delivering freight for Defendant. Plaintiffs allege that Defendant violated the Fair Labor Standards Act ("FLSA") and the Arkansas Minimum Wage Act ("MWA") because Defendant's pay system routinely failed to pay the minimum wage for all hours worked. In moving for judgment on the pleadings, Defendant argues that certain time Plaintiffs plead as compensable is *per se* non-compensable and thus entitles Defendant to judgment as a matter of law. Specifically, Plaintiffs assert, consistent with Department of Labor ("DOL") regulations applicable to employees who work 24-hour shifts, Defendant was, at most, only permitted to exclude a maximum of 8 hours from compensation for time a driver spent in a truck's sleeper berth. Plaintiffs contend that the balance of the time they spent in sleeper berths of their trucks accordingly constitutes compensable hours worked.

Defendant has moved this Court to order that all sleeper berth time is *per se* non-compensable, a ruling soundly rejected by DOL regulations, advisory opinions, DOL guidance, and case law. Defendant argues that because the Federal Motor Carrier Safety Administration ("FMCSA") considers time logged in a sleeper berth to be an "off duty" duty status for commercial driving hours-of-service purposes, the time in excess of 8 hours per day cannot constitute compensable time worked. Defendant's argument ignores that the DOL, not the FMCSA, regulates hours worked for purposes of FLSA compensability, and that the FLSA, not the Motor Carrier Act, provides for minimum wage. Defendant asks the Court to ignore the DOL's regulations which limit the amount of excludable sleeping time to 8 hours per day (provided at least a 5-hour uninterrupted sleeping period is provided), despite explicit guidance from the DOL

that this limitation applies to over-the-road truck drivers who are subject to the FMCSA Hours of Service ("HOS") regulations.

Defendant's argument fails because, first, the FMCSA has itself made clear that its HOS regulations are for driver safety purposes only, and do not address issues of compensability, and second, DOL regulations and interpretations of same are unanimous in applying limits to a carrier's ability to not pay for time a driver gives it simply because the driver is permitted to rest in a sleeper berth. Those regulations and interpretations are fully consistent with the longstanding Supreme Court precedent of *Skidmore v. Swift*, 323 U.S. 134 (1944), and *Armour v. Wantock*, 323 U.S. 126 (1944), which held that employees on 24-hour shifts can have *bona fide* sleeping periods excluded from pay but must be paid for other idle time in which they are nevertheless engaged by their employers.

Defendant has also moved to dismiss the MWA claims of Plaintiffs Browne and Hall because those individuals are not residents of Arkansas and performed a significant amount of their work outside the borders of Arkansas. The Court should deny Defendant's motion to dismiss these claims because Defendant has admitted that Arkansas is the locus of employment for its drivers, and because these drivers, including Plaintiffs, had such significant, continuous, and regular contacts with Arkansas that applying the MWA to their employment would not constitute an interference or regulation of out-of-state commercial activity, but would instead only be the regulation of an Arkansas' employer's employment of individuals with substantial and continuous interaction with Arkansas. For the same reasons, applying the MWA to these claims would not violate the dormant commerce clause.

For these reasons and the reasons more fully briefed below, Plaintiffs respectfully request this Court deny Defendant's motion in full.

II. STANDARD OF REVIEW

A motion for partial dismissal filed after the pleadings have closed is considered a Rule 12(c) motion for judgment on the pleadings. Such motions are reviewed under the same standard as a 12(b)(6) motion to dismiss. *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1233 n.3 (8th Cir. 2010). However, where discovery had created a significant record, it is unresolved whether this standard yields or is modified. *Id.* (noting that a late-filed motion for judgment on the pleadings after a substantial record has been developed presents a unique procedural issue). Indeed, Defendant's motion was filed after the original discovery deadline. A motion under 12(b)(6) takes all facts alleged in the complaint as true and makes all reasonable inferences in favor of the non-moving party. *Ryan v. Ryan,* 889 F.3d 499, 506 (8th Cir. 2018). A claim must have facial plausibility—i.e., that enough factual content has been pleaded that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*

A review of matters outside the pleadings on a motion to dismiss may require the conversion of the motion into one for summary judgment. *See Hunter v. JHook Investments, Inc*., 2016 WL 10576624, at *1 (E.D. Ark. Sept. 13, 2016). If the court converts the motion, the parties must be provided with fair notice and an opportunity to resist summary judgment. *Id.* However, the court may consider some materials without conversion if the materials are part of the record, do not contradict the complaint, or are necessarily embraced by the pleadings. *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1089 (8th Cir. 1999).

III. STATEMENT OF FACTS

As this is a motion for partial dismissal on the pleadings, Plaintiffs' facts are taken from their Amended Complaint, ECF Doc. No. 7.

PAM Truck Drivers are paid either a flat salary for all work performed or a per-mileage rate for each mile driven. ECF Doc. No. 7 at ¶¶ 53, 74. The Drivers reported their status to Defendant PAM via the Qualcomm computer in the truck. *Id.* ¶¶ 54, 75. Drivers were required to remain over-the-road in or in the general proximity of their assigned truck for more than 24 consecutive hours. *Id.* ¶¶ 56, 68, 77, 82. Drivers' duties while traveling over-the-road on Defendant's business were to: (1) drive the truck; (2) remain in the truck while the truck was moving so that they could assist in transporting the cargo; (3) wait for cargo to be loaded or unloaded while in the truck or its immediate vicinity; (4) fuel up the truck and perform routine maintenance to same; (5) remain in the vicinity of the truck to help protect Defendant PAM and its customers' property; and (6) remain inside the truck when stopped to log time in the sleeper berth and to help protect Defendant PAM and its customer's property. *Id.* ¶¶ 59, 85.

Drivers were required to engage in significant amounts of travel during regular business hours that kept them away from home overnight. *Id.* ¶¶ 95-97. Drivers were responsible for their trucks 24 hours per day. *Id.* ¶¶ 66, 81. Likewise, they were responsible for all cargo being transported 24 hours per day. *Id.* ¶¶ 67, 82. Drivers spent on average at least 5 and generally 7 days over-the-road each workweek while working for Defendant PAM. *Id.* ¶¶ 70, 84. Defendant operated no fail-safe mechanism to ensure that Drivers were receiving at least either the federal or Arkansas statutory minimum wage for all hours worked. *Id.* ¶¶ 71, 92.

Pursuant to Department of Transportation hours-of-service safety regulations, all Drivers are required to report their HOS duty status to Defendant in or around real time through computers installed on each drivers' truck, with these status designations received by Defendant in Arkansas at Defendant's headquarters. *Id.* ¶¶ 54, 55, 75, 76. This system was the only method Defendant used to capture any information about the hours drivers were working. *Id.* ¶ 38.

IV. LEGAL ARGUMENT

Defendant has moved for partial dismissal of two of Plaintiff Browne and Hall's claims. First, Defendant has argued that Plaintiffs' claim for compensation for time in the sleeper berth in excess of 8 hours per day should be dismissed. Second, Defendant has argued that Plaintiffs' claims under the MWA should be dismissed. For the reasons set forth below, Defendant's motion should be denied in its entirety.

A. DEFENDANT IS NOT ENTITLED TO DISMISSAL OF PLAINTIFFS' SLEEPER BERTH CLAIMS

Plaintiffs have alleged that Defendant failed to pay them the minimum wage for all hours worked because Defendant paid Plaintiffs a per mileage rate that routinely failed to pay the minimum wage for all time deemed compensable under both FLSA and the MWA. Central to this claim is the predicate question of which time is compensable.

Plaintiffs have alleged that *inter alia* pursuant to FLSA and Arkansas regulations related to the compensability certain rest periods which exceeded 8 hours per day constitutes hours worked. Defendant has argued in this motion that over-the-road truck drivers subject to the FMCSA's hours-of-service regulations are subject to different rules than other employers, such that Defendant need not pay for compensable excess sleep time or compensable on-call and engaged-to-wait time. Defendant's argument is based on a false premise and is inconsistent with the Department of Transportation's own directive that hours-of-service regulations are not meant to determine the compensability of time, and that employers of commercial drivers need to look to the DOL's regulations interpreting the FLSA to properly count which hours are compensable and which are not.

(1) Compensability of truck drivers' time is not governed by the FMCSA's hours-of-service regulations.

Defendant's motion to partially dismiss Plaintiffs' minimum wage claims based on failure to pay for "sleeper berth" time stems from a critical error: that the compensability of hours worked by a truck driver is governed by the FMCSA's HOS guidelines and not by the FLSA and the DOL's interpretive guidelines which set forth when waiting time and sleeping time counts as compensable hours worked. (*See* Defendant's Brief at 2) ("Under federal DOT regulations, all time logged in a sleeper berth is 'off-duty' time and therefore presumed to be non-compensable in determining whether drivers are paid minimum wage.")

The FMCSA has disclaimed such an interpretation, and that disclaimer is entitled to deference under *Auer v. Robbins*, which defers to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent with the regulation. 519 U.S. 452, 461 (1997); *Christensen v. Harris County,* 529 U.S. 576, 587 (2000). An agency may pronounce its interpretation of its own regulations in formal guidance or in informal guidance such as an *amicus* brief. *Auer,* 519 U.S. at 461.

The Hours-of-Service ("HOS") regulations are contained in Part 395 of Title 49 of the Code of Federal Regulations. Section 395.2 provides the applicable definitions used in the Hours-of-Service Regulations, and defines "on duty" time to, *inter alia,* include all time in a commercial motor vehicle **except** time spent resting in a parked vehicle or time spent resting in a sleeper berth.

On its website, the FMCSA has provided up-to-date regulatory guidance on the Hours-of-Service Rules. *See* Excerpts of the FMCSA Guidance Regarding Part 395, HOS ("Excepts"), attached to Boyette Declaration as Exhibit 1-I. This regulatory guidance is provided as a series of questions and answers related to the proper interpretation of these regulations. In its regulatory guidance, the FMCSA makes clear that questions of whether time is compensable are separate from what and how time must be logged. For instance, in Question 1, the FMCSA addresses a

hypothetical wherein a company stated that it would no longer pay for driving from the last stop to home, and whether such driving time could be left off time cards. The FMCSA's answer follows:

> *Guidance:* **The Federal Motor Carrier Safety Regulations (FMCSRs) do not address questions of pay**. All the time spent operating a Commercial Motor Vehicle (CMV) for, or at the direction of, a motor carrier must be recorded as driving time.

Id.

Providing further guidance, in Question 10, the FMCSA disclaims the rule Defendant proposes this Court apply here:

> ***Question 10:*** How does compensation relate to on-duty time?
>
> *Guidance:* The fact that a driver is paid for a period of time does not always establish that the driver was on-duty for the purposes of part 395 during that period of time. A driver may be relieved of duty under certain conditions and still be paid.

Id.

Question 10 clarifies that the entitlement to pay does not mean that such time must be designated as "on duty" under the HOS regulations.

Finally, Question 29 deals with a motor carrier with full-time drivers who are also emergency first responders, such as fire fighters or EMTs, and who must spend consecutive 24-hour shifts at station, resting been calls. The guidance provides that these safety professionals may record the time in which they are required or permitted to rest as off-duty time, but that any active work—administrative, cleaning, repairing equipment—would be considered on-duty time. *Id.* This Question is vitally important to the instant case, because under *Armour* and *Skidmore*, discussed below, the Supreme Court has held that the time first responders rest at their stations waiting for a call is compensable except during *bona fide* sleeping periods; nevertheless, the FMCSA's guidance clarifies that this compensable time under the Supreme Court's interpretations of FLSA is nevertheless properly designated as "off duty" time under the DOT regulations.

The divergence between the HOS' requirements and the question of compensability is a result of the very different purposes between the HOS regulations and FLSA. The HOS regulations have been promulgated to regulate "commercial motor vehicle safety" and limit the amount of driving a commercial driver can be permitted or required to do. 49 U.S.C. § 31136(c). HOS regulations stem from the Motor Carrier Act of 1935, which was enacted to preserve and foster "safe, efficient and economical movements in interstate commerce." 47 FR 53383-01. "Ensuring safe driving" is at the heart of hours-of-service regulations. 69 FR 53386-01. "One of the most important goals of the rules is to ensure that commercial vehicle operators do not drive for long periods without opportunities to obtain restorative sleep." *Id.* "Therefore, the hours-of-service rules prohibit CMV drivers from driving or being directed to drive more than a specified amount of time between mandatory off-duty periods." *Id.* But, as the guidance makes clear, the HOS regulations do not address questions of pay, and allow for on-call time and rest periods to be recorded as off-duty.

That the FMCSA intended for compensability of work to be governed, not by the HOS regulations, but rather by the same standards applicable to other employees covered by the FLSA is further apparent from its Notice of Proposed Rulemaking in 2000, in which modifications to the HOS rules were proposed. Regarding time drivers had to spend waiting, the FMCSA suggested that whether such time was compensable would be governed by the DOL's regulations setting forth the "legal definition of time worked," and cited to the substantive holding of *Skidmore v. Swift* for the proposition that waiting time can be compensable. 65 FR 25540-01, 25573, May 2, 2000. And in discussing the impact of motor carriers contacting drivers while the drivers were in their sleeping period, the FMCSA **cited** 29 C.F.R. 785.22 for the proposition that if the driver was interrupted to such a significant degree that the driver could not get at least 5 hours of uninterrupted

sleep, the **entire** sleeping period would be compensable, thereby discouraging carriers from doing so, and advancing the FMCSA's goal of increasing the ability of drivers to get 8 hours of sleep. *Id.,* 25587.

Notably, and fatal to Defendant's motion, the FMCSA explicitly noted that many motor carriers failed to understand "the differences between the current FMCSA and WHD definitions of duty time, off duty time, interstate commerce, and record keeping methods" and may be violating the minimum wage requirements of the FLSA. *Id.,* 25564-25565. "**The FMCSA believes some motor carriers that have not understood the difference may miscalculate the minimum wage, placing the motor carrier in violation of the FLSA**. The driver may lose pay because the driver recorded time based upon the current FMCSA regulations and guidance rather than using the WHD regulations and guidance for duty time." *Id.* Defendant now seeks this Court to adopt this misunderstanding and allow it to continue to pay its drivers less than minimum wage.

The FMCSA also supplied the counterfactual of a DOT enforcement official who, apparently like Defendant, failed to appreciate the difference between a wage and hour compliant time card and an FMCSA compliant log:

> The enforcement official may see on the WHD-compliant time card that the driver "punched in" at 8:00 a.m. The FMCSA-compliant RODS, however, may show the driver off-duty until 11:00 a.m., when the load was ready for transport. An enforcement official who does not know the differences may cite a false RODS out of ignorance of the different definitions of duty time and off-duty time. **Both records were accurate, but the different definitions led to a perceived conflict**.

Id., 25565.

The FMCSA could not be clearer that that the mere fact that time is designated as "off-duty" under the HOS regulations does not mean it should be considered non-compensable under

federal labor law: "**Both records were accurate, but the different definitions lead to a perceived conflict.**"[1]

Given that the only basis for Defendant's motion is that the sleeper berth time in question was considered "off duty" by the Department of Transportation, the FMCSA's statement here is sufficient to warrant denial of Defendant's motion.

The above demonstrates that whether time is compensable is not governed by the HOS regulations, because the FMCSA has disclaimed that the HOS regulations should be used for that purpose, and pointed individuals questioning whether time is compensable to the DOL.

Importantly, the DOL has echoed that guidance:

> **Time during which an employee is considered on or off duty by the Department of Transportation is not governed by the same principles as apply under the FLSA**. The DOT's regulations are concerned primarily with the safe operation of the vehicle and not compensable hours worked. **Thus, the off-duty time required by DOT for safety purposes may exceed the amount of sleep time or other non-working time that may be deducted** pursuant to FOH 31b09 or 31b12."

United States Dept. of Labor Field Operations Handbook, Chapter 14, 14g03(b), attached to Boyette Declaration as Exhibit 1-A.

Given the care and detail with which both the DOT and the DOL have made clear that their respective regulations related to "off duty" and "on duty" time have different means, purposes, and applications, Defendant's argument that the Court should apply the *in pari materia* canon necessarily fails. Moreover, the case Defendant cites for its proposition that regulations from the

[1] While the 2000 NPRM expressed the potential benefit of the FMCSA HOS regulations being brought into line with the Department of Labor's "hours worked" regulations, the HOS' current definitions of duty statuses are essentially identical to the definitions extant in 1968. *Compare* 49 C.F.R. § 395.2, 395.8 *with* 33 FR 19758-19760, Dec. 25, 1968. The final HOS regulations enacted in 2003 made no further mention of aligning the definitions of the HOS duty statuses with Department of Labor "hours worked" definitions. Instead, the FMCSA noted that industry objections had caused the FMCSA to reject a hard rule that communication between a carrier and an employee during the employee's 10-hour rest period should be prohibiting, thereby further demonstrating the divergence between the DOL's requirements for off-duty with the FMCSA's requirements. 68 FR 22456, 22466, April 28, 2003.

DOL should be read *in pari materia* with regulations from the Department of Transportation **rejected** the use of the canon because it concluded that a statute addressing venue and a statute addressing subject-matter jurisdiction are not "concepts of the same order." *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315 (2006). *Wachovia Bank* held that if the considerations driving the interpretation of ambiguous language in one statute are different than the considerations driving the interpretation of ambiguous language in another statute, it would be error to interpret both provisions *in pari materia* with each other. *Id.* at 316.

The DOL's waiting time and sleep regulations address whether passive time provided to an employer should be compensated. The DOT's HOS regulations address how long a driver should be permitted to drive before it is no longer safe for him to continue to do so. These are two wholly separate purposes, and, accordingly, the two bodies of regulations should not be read *in pari materia* with each other under *Wachovia*. Given same, the Court should follow the guidance of both the DOT and the DOL: the compensability of sleeper berth time is determined by the FLSA and the DOL's interpretive regulations, not the FMCSA and the Hours-of-Service regulations.

(2) FLSA and the Department of Labor makes clear that when an employee is on duty for 24 hours of more and has a regularly uninterrupted scheduled sleeping period of more than 8 hours, only 8 hours will be credited against hours worked.

FLSA contains no definition of "hours worked," but uses the term in its definition of "employ," which states that to employ means to "suffer or permit to work." 29 U.S.C. § 203(g) accordingly, shortly after FLSA was enacted, the Supreme Court defined the term "work" to mean "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944). In a subsequent case, the Court clarified that definition to include as work all time spent primarily for the benefit of the

employer, even if the employee does nothing but wait. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) (an employer "may hire a man to do nothing, or do nothing but wait for something to happen."). "Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. . . Whether time is spent primarily for the employer's benefit or for the employee's is a question dependent upon all circumstances of the case." *Id.*

In *Armour*, the Court held that firefighters required to stay on the employer's premises after their active-duty shifts to respond to alarms were working during the entire time, even though they spent their post-shift hours "sleeping, eating, playing cards, listening to the radio or otherwise amusing themselves." *Id.* at 128. That the "employer and employee cooperated to make the confinement and idleness incident to it more tolerable" did not diminish the fact that the confinement primarily benefited the employer and was compensable. *Id.* at 134. In *Skidmore*, known typically as the leading case on regulatory deference prior to *Chevron*, the substantive issue was the same as *Armour* and was released in tandem with that opinion. *Skidmore v. Swift*, 323 U.S. 134, 136 (1944). The Supreme Court held in *Skidmore* that nothing precludes waiting time from also being working time, and that for employees confined to the employer's premises for 24 hours, but off-duty for twelve, eating and sleeping time should be excluded from hours worked, but that the balance of the time was compensable because "**there is nothing in the record to suggest that, even though pleasurably spent, it was spent in the ways the men would have chosen had they been free to do so."** 323 U.S. at 139.

The DOL has issued regulations codifying the holdings of *Skidmore* and *Armour* which govern the calculation of work time for employees whose workdays include sleeping or other periods of inactivity. 29 C.F.R. §§ 785.12-785.45. Plaintiffs are entitled to compensation for

sleeper berth periods in excess of 8 hours per day under 29 C.F.R. § 785.22, entitled "Duty of 24 hours or more." That regulation provides that when an employee is required to be on a tour of duty for 24 hours or more, the employer and employee may agree to exclude *bona fide* meal periods and a *bona fide* regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. *Id.* If the sleeping period is more than 8 hours, only 8 hours of the sleeping period will be credited as non-compensable. *Id.* Where no express or implied agreement to the contrary is present, the 8 hours of sleeping time and meal periods constitute hours worked. *Id.*

The other body of interpretative regulations that apply to the hours worked of over-the-road truck drivers is the DOL's travel-time regulations, 29 C.F.R. §§785.33-41. In general, whether time spent traveling is compensable hours worked "depends upon the kind of travel involved." 29 C.F.R. § 785.33. Ordinarily, regular home-to-work commuting time is not hours worked. 29 C.F.R. § 785.35. In contrast, travel from job-site to job-site during the workday is typically hours worked. 29 C.F.R. § 785.38. Travel that keeps an employee away from home overnight is travel away from home and is clearly worktime when it cuts across the employee's workday, including during the corresponding hours on nonworking days. 29 C.F.R. § 785.39. Finally, any work an employee is required to perform while traveling counts as hours worked. 29 C.F.R. § 785.41. An employee who drives a truck, bus, automobile, boat, or airplane for an employer, or an employee who rides therein as an assistant or helper, is working while driving or riding, except during *bona fide* meal periods of when permitted to sleep in "adequate facilities furnished by the employer." *Id.* This last regulation provides that drivers and assistant drivers are working whether or not they are driving the vehicle or riding in the vehicle, but that their employers

may exclude a *bona fide* sleeping period from their hours worked, just like other employers who may, under certain conditions, exclude 8-hour sleeping periods from hours worked under 29 C.F.R. § 785.22.

The DOL has provided specific interpretative guidance on how the sleeping period regulations of 29 C.F.R. § 785.22 and 29 C.F.R. § 785.41 work for over-the-road truck drivers. Plaintiffs' allegations that sleeper berth time in excess of a *bona fide* 8-hour sleeping period is compensable follows the guidance supplied by the DOL in its Field Operations Handbook ("FOH") **specifically** interpreting how 29 C.F.R. § 785.22 and § 785.41 apply to over-the-road truck drivers. Field Operations Handbook, Chapter 31, 31(b)(09)*Hours worked by truck drivers, including team drivers* (current as of June 28, 2018, revised September 19, 1996, and republished August 10, 2016), attached to Boyette Declaration as Exhibit 1-B. .

The DOL Field Operations Handbook provides the following with respect to the compensability of time spent by a truck driver in a sleeper berth:

> Time spent in sleeping berths in trucks.
>
> (a) Berths in trucks are regarded as adequate sleeping facilities for the purposes of IB 785.41 and 785.22. **However, this rule applies to sleeping berth time of truck drivers or helpers only when they are on continuous tours of duty during trips away from home for a period of 24 hours or more.** If the trip begins and ends at the home station and is performed within one working day (less than 24 hours), ***all time on duty on the truck is time worked*** (except, of course, for bona fide meal periods) ***even though some of that time is spent in the sleeping berth***. (FOH 3lb00.)
>
> (b) Tours of duty of 24 hours or more but less than 48 hours. **FOH 31b12 and IB 785.22 describe excludable sleep time for hours of duty of 24 hours or more**. On continuous tours of duty of more than 24 hours but less than 48 hours, one extra hour of sleep time in excess of the maximum 8 hours may be claimed for each hour beyond 40 that a continuous tour of duty extends, provided that the employee has actually

> slept such number of hours. **For example, in a 42-hour continuous tour of duty, no more than 10 hours could be deducted for sleep time.** Similarly, in a 45-hour continuous tour, a maximum of 13 hours could be deducted. However, in the absence of an express or implied agreement concerning the exclusion of sleep time, the time spent sleeping constitutes hours worked even though the tour of duty exceeds 24 hours. See also 31b12.

Id.

The Eighth Circuit Court of Appeals has repeatedly viewed the DOL's Field Operations Handbook as ***persuasive authority*** in interpreting the FLSA and ***"controlling"*** when interpreting DOL regulations. *See Fast v. Applebees Int'l, Inc.*, 638 F.3d 872, 875 (8th Cir. 2011), *cert. denied* 132 S.Ct. 1094 (2012) (DOL Handbook used to determine that employer violated the FLSA by using the tip credit for time worked by a tipped employee performing related but non-tipped work*);* *Murray v. Stuckey's*, 50 F.3d 564, 568-69 (8th Cir. 1995) (DOL Handbook used to interpret regulation's language of supervising "two full time employees"); *DeArment v. Harvey*, 932 F.2d 721, 722 (8th Cir. 1991) (reciting and recognizing the "ministerial exception" found in the DOL Handbook). *See also, Leib v. Georgia-Pacific Corp.*, 925 F.2d 240, 245 (8th Cir 1991) (relying upon the DOL's Veterans' Reemployment Rights Handbook as "informed guidance"); *see also infra* at pp. 24-25 (discussing cases holding that ***"controlling deference"*** is mandated when the DOL is interpreting its own regulations).

Additionally, like the DOL Field Operations Handbook, DOL Advisory Opinions are persuasive in interpreting the FLSA. *See Reich*, 37 F.3d at 1194; *Chao v. Fossco, Inc.*, 2006 U.S. Dist. LEXIS 23400 (W.D. Mo. Apr. 13, 2006) (following the guidance of the Wage and Hour Administrator's Advisory Opinions); *Helmert v. Butterball*, 805 F. Supp. 2d 655, 666 (E.D. Ark. 2011) (same). Moreover, DOL Advisory Opinions interpreting DOL regulations are accorded ***controlling deference*** 'unless plainly erroneous or inconsistent with the regulation. *See Reutter v.*

Barnhart, 372 F.3d 946, 951 (8th Cir. 2004) ("An agency's interpretation of its own regulation is ***controlling*** unless plainly erroneous or inconsistent with the regulation") (emphasis added); *see also Perez v. Loren Cook Co.*, 750 F.3d 1006 (8th Cir. 2014) ("we conclude the Secretary's interpretation of the regulation is reasonable, and . . . controlling Supreme Court precedent requires deference to the Secretary [when interpreting its own regulation]"); *Rodysill v. Colvin*, 745 F.3d 947, 950 (8th Cir. 2014) (agency's interpretation of its own regulation controls unless plainly erroneous of inconsistent with the regulation); *Mansour v. Holder*, 739 F.3d 412, 414 (8th Cir. 2014) (same).

The DOL has issued multiple Advisory Opinions regarding the compensability of sleeper berth time for over-the-road truck drivers. The DOL's Advisory Opinions, like the FOH, make clear that motor carriers may only exclude 8 hours of the sleeping period from hours worked when truck drivers are on trips away from home for a period of 24 hours or more:

> As indicated in section 785.22 of the bulletin on Hours Worked . . . bona fide meal periods and bona fide sleeping periods may be excluded from hours worked where truck drivers and helpers are on trips away from home for a period of 24 hours or more. **The bona fide sleeping period is limited to a maximum of 8 hours in computing hours worked.** If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. Unless the employee can get at least 5 hours of sleep during the scheduled sleeping period, the entire time must be counted as working time. If the trip is less than 24 hours, all time on duty on the truck is hours worked even though some of the time is spent in the sleeping berth.
>
> In effect this adds limitations concerning the duration of the trip and of the sleeping time to the statement . . . that a driver who slept in the sleeping cab of a truck while the truck was being driven by a relief driver was not working.

(Wage and Hour Administrator, Advisory Opinion, February 17, 1964, attached to Boyette Declaration as Exhibit 1-C) (emphasis added).

In a second Advisory Opinion written two years later, the DOL again held that 29 C.F.R. §785.22 prohibits a trucking employer from docking an employee's pay for more than 8 hours per day for sleeper berth time:

> As indicated in Section 785.22 . . . bona fide sleeping periods may be excluded from hours worked where truck drivers and helpers are on trips away from facilities for a period of 24 hours or more provided adequate sleeping facilities are furnished by the employer. **The bona fide sleeping period is limited to a maximum of 8 hours in computing hours worked**.

(Wage and Hour Administrator, Advisory Opinion, November 18, 1966, attached to Boyette Declaration as Exhibit 1-D) (emphasis added).

The DOL Field Operations Handbook and Advisory Opinions accordingly provide that **time spent in a sleeper berth exceeding 8 hours per 24 hour period is compensable time as contemplated in 29 C.F.R. § 785.22.**

(3) The holdings of *Petrone v. Werner* warrant denial of Defendant's motion.

The most significant case to address the compensability of excess sleeper berth time for over-the-road truck drivers in excess of 8 hours per day is *Petrone v. Werner Enters.* 121 F.Supp.3d 860 (D. Neb. 2015) (Strom, J.) ("*Petrone I"*) (holding sleeper berth time in excess of 8 hours per day for over-the-road truck drivers is compensable as a matter of law), *vacated in part by* 2017 WL 510884 (D. Neb. Feb. 2, 2017) (Smith Camp, J.) ("*Petrone II"*) (vacating summary judgment award and holding that whether sleeper berth time is compensable must be determined by jury); *see also Petrone v. Werner,* Order on Motion to Clarify (Smith Camp, J.) (further holding that whether sleeper berth time is compensable must be determined by jury), attached to Boyette Declaration as Exhibit 1-E.

In *Petrone,* drivers who were paid a daily rate sued for failure to pay minimum wage, arguing, like here, that they were entitled to payment for hours spent in the sleeper berth in excess

of 8 per day.[2] Judge Strom granted summary judgment to the plaintiff-drivers as to this claim, deferring to the DOL regulations cited above and deferring to the DOL's interpretation of its own regulations and their interplay. *Petrone I,* 121 F.Supp.3d at 866. "[29 C.F.R. § 785.22 and 22 C.F.R. § 785.41], when read on their face, are ambiguous as to whether one or both apply to truck sleeper berths while on a tour of duty." *Id.* at 868. "Because the Administrator's interpretations are not plainly erroneous of inconsistent with the regulations as a whole, the Court must give deference to the interpretations." *Id.* In addressing a predicate question of whether the drivers were subject to 22 C.F.R. § 785.22 because they were in an off-duty status while logged in the sleeper berth, the court found that the drivers were on-duty for FLSA purposes because "student drivers were not allowed to leave the truck whenever they wished. The student drivers were required to rest in the sleeper berth so they can train and drive Werner's trucks and be in compliance with DOT regulations." *Id.* at 868.

Judge Strom cited to the testimony of the carrier's CFO, who testified that student drivers typically spent one day at home for every week they were away from home, and spent approximately 8 weeks total away from home in the training program. Judge Strom recognized that a stay at home or in a motel resting would break up the 8-weeks such that the students were not continuously "on duty" for 8 weeks, but that the testimony and facts demonstrated that student drivers were on a continuous 24-hour shift when on the road for days or weeks at time, that much of the time in the sleeper berth was spent while the trainer driver was driving, and that, accordingly,

[2] In *Petrone*, Werner utilized a cross-check to provide additional wages where the total "on duty" time multiplied by the minimum wage was less than the driver was paid. Despite P.A.M.'s statement in its brief, Plaintiffs do not allege that PAM utilized a cross-check and indeed, P.A.M. has still not implemented a cross-check for any of its drivers except trainees, and even that cross-check was implemented during the class period, not before it. (*See, e.g.* ECF Doc. No. 65-5 at 2) ("P.A.M. is in the process of implementing a 'fix' which we believe will eliminate future 'subminimum wage' workweeks.").

for purposes of 29 C.F.R. § 785.22, the student drivers were on duty for 24 hours or more when on the road training. *Id.*

Judge Strom held that the travel regulation 29 C.F.R. § 785.41 made clear that a motor carrier could exclude from hours worked *bona fide* sleeping periods, even when the sleeping period was taken in the sleeper berth of a moving truck, but that 29 C.F.R. § 785.22 limited the *bona fide* sleeping period to a maximum of 8 hours per 24-hour period. *Id.* at 869. Following Judge Strom's decision, the defendants filed, with leave from Judge Strom, a petition for interlocutory review of the summary judgment opinion. The Eighth Circuit Court of Appeals denied the petition. *Petrone v. Werner Enters.*, 15-8018 (8th Cir. Sept. 25, 2015).

Following the court's issuance of the decision, but prior to a trial occurring for damages, *Petrone* was reassigned to a different judge, Judge Smith Camp. On the defendants' motion for reconsideration (a motion which had been previously denied by Judge Strom) of the previous summary judgment order, Judge Smith Camp revised the prior decision, and denied both parties summary judgment as to the compensability of excess sleeper berth time. 2017 WL 510884.[3] However, contrary to Defendant's representation in its brief, Judge Smith Camp **did not** hold that all time logged in a sleeper berth is "off duty" and non-compensable under the FLSA. *See* Defendant's Brief, ECF Doc. 55 at 8.

Judge Smith Camp agreed with Judge Strom that both 29 C.F.R. § 785.41 and 29 C.F.R. § 785.22 applied to truck drivers when they were in a sleeper berth. Judge Smith Camp, however, declined to defer to the DOL's reconciliation of the two regulations, and instead held that "under

[3] This Court is not bound by a sister court's opinion; thus, neither *Petrone I* or *Petrone II* are entitled to different levels of deference. That a new judge, after taking assignment of a case which had been pending for five years, vacated the original decision and issued a new decision immediately after the case was reassigned, does not entitle the decision to additional deference, and if anything, cautions the opposite. This Court should thus determine which decision, if either, is the most persuasive. For the reasons that follow, Plaintiffs submit that *Petrone I* is the correct interpretation of the law.

the plain language of the regulatory scheme, § 785.22 limits non-compensable sleeper berth time for truck drivers and their assistants in a 24-hour cycle only where it can be shown that the truck driver or assistant was continuously on duty." 2017 WL 510884 at *5. "Section 785.22 applies to employees who are continuously on duty for 24 hours or more, even while sleeping." Id. "Sleeper berth time is compensable, if ever, only where a plaintiff can demonstrate that he or she was on duty while in the sleeper berth." *Id*; but see Wage and Hour Division, U.S. Dep't of Labor, Field Assistance Bulletin No.2009–2, at 11 n. 5 (2009) ("The second requirement in 29 C.F.R. 785.22(a) for excluding the [no more than 8 hours of] sleep time of an employee who works shifts of 24 hours or more is whether that employee 'can usually enjoy an uninterrupted night's sleep.' **This requirement is intended to limit the sleep time exception to those employees who are not required to perform work during a reasonable sleeping period the majority of the time.**")

While Plaintiffs disagree with parts of Judge Smith Camp's opinion and reasoning, there are two important points which Plaintiffs fully endorse. First, Judge Smith Camp held that under certain circumstances, Section 785.22 applies to over-the-road truck drivers' time in the sleeper berth such that sleeper berth time excess of 8 hours per day is compensable hours worked. Second, issues of fact related to sleeper berth time could exist that would preclude granting summary judgment to either party.

Still, though Plaintiffs endorse these two important points from Judge Smith Camp's order, Plaintiffs contend that *Petrone II* nevertheless rested on faulty legal premises and therefore should be rejected.

Judge Smith Camp noted that in the first instance, the plain language of 29 C.F.R. § 785.41 meant that there was no presumptive limit on the non-compensability of sleeper berth time. 2017 WL 510884 at *5. Addressing the DOL interpretative guidance which provided that over-the-road

truckers are subject to Section 785.22's limit of 8 hours of non-compensable sleep time per day, Judge Smith Camp rejected this interpretation because, under her reading, Section 785.22 required that the individual be on duty, even while sleeping, such as a firefighter who remains on call and subject to awakening.

Judge Smith Camp held that allowing the DOL to remove this "on duty" predicate from Section 785.22 would "**permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."** *Id.* (citing *Christensen v. Harris County*, 529 U.S. 576 (2000)). This conclusion was wrong for two reasons. First, the DOL did not remove the "on duty" predicate to Section 785.22 but recognized that an over-the-road driver away from home for multiple days at a time is "on duty" for purposes of 29 C.F.R. § 785.22 throughout their tour of duty. Second, even if the FOH modified the "on duty" element of 29 C.F.R. § 785.22 for truck drivers, Judge Smith Camp's citation to *Christensen* as a reason to disregard the FOH and Advisory Opinions was misplaced.

Christensen involved an agency interpretation of its own notice-and-comment regulation entitled to *Chevron* deference; in such cases, to allow agencies to issue interpretations inconsistent with the plain language of the regulation would allow agencies to avoid notice-and-comment rulemaking, eviscerate the protections of the APA, and bootstrap *Chevron* deference onto its own interpretative regulations. In contrast, where the interpretation in question is merely clarifying another interpretative regulation that was never entitled to *Chevron* deference in the first place, an agency is permitted to create new interpretations informally any time it wishes. In *Perez v. Home Mortgage Bankers Assn'n,* 135 S.Ct. 1199 (2015), the Supreme Court held that the DOL could issue new opinion letters changing its prior interpretative guidance at will. Accordingly, if the

DOL chose to modify 29 C.F.R. § 785.22 and 29 C.F.R. § 785.41, it could do so through informal means, such as an Advisory Opinion, an amicus brief, or through the Field Operations Handbook.

Under *Skidmore* deference, an agency's interpretations are entitled to deference commensurate with its power-to-persuade, giving due regard to the agency's care, consistency, formality, relative expertness, and the persuasiveness of the agency's position. *U.S. v. Mead Corp.*, 533 U.S. 218, 227-228 (2001). But Judge Smith Camp rejected the DOL's interpretation of its own interpretative regulations not because that interpretation was unpersuasive, but because Judge Smith Camp believed it contradicted the plain language of the interpretative regulations.

Judge Smith Camp never assessed whether a "literal" interpretation of 29 C.F.R. § 785.41 was consistent with the Supreme Court's holdings in *Skidmore* and *Armour* that *bona fide* sleeping periods could be excluded from hours worked, but other periods of idleness in which the employee remained under the control of the employer are compensable. The DOL's reconciliation of 29 C.F.R. § 785.22 and § 785.41 is consistent with *Skidmore* and *Armour*; Judge Smith Camp's assessment that a 16-hour sleeper berth period could be non-compensable even though the truck driver sleeps for eight hours, and is waiting for dispatch for another eight, is not.

Judge Smith Camp departed from Judge Strom's decision in a second manner by finding that whether the drivers were working for DOL purposes while they remained in the sleeper berth was a question of fact that precluded summary judgment for the plaintiffs. *Id.* at *10-11. Judge Smith Camp noted that under Eighth Circuit case law, whether "whether "sleep time must be compensated in a particular case is a question of fact," which "involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances [.]" *Id.* (*citing Bouchard v. Regional*

Governing Bd. of Region v. Mental Retardation Servs., 939 F.2d 1323, 1327 (8th Cir. 1991)). Thus, Judge Smith Camp held that the parties in *Petrone* had raised an issue of fact as to whether the drivers—as a class—were subject pursuant to the defendant's policies to sufficient restrictions and responsibilities while in the sleeper berth such that they were on-duty while in the sleeper berth, and, therefore, 29 C.F.R. § 785.22. This holding suggests that Defendant is not entitled to judgment on the pleadings, because, here, Plaintiffs have pleaded sufficient facts showing that drivers were subject to significant restrictions and responsibilities while in the sleeper berth, such to make them "on duty" for DOL purposes and thereby trigger the application of 29 C.F.R. § 785.22.

(4) *Nance v. May Trucking* addresses a wholly separate fact-pattern from the facts and legal theories alleged here, and accordingly, does not warrant dismissing Plaintiffs' sleeper berth claims.

Defendant has also suggested that Plaintiffs' sleeper berth claims should be dismissed because in *Nance v. May Trucking Co.,* the U.S. District Court for the District of Oregon addressed the "legal question of whether time spent in the sleeper berth is compensable because the truck is moving," and answered in the negative, holding that 29 C.F.R. § 785.41 meant that sleeper berth time was not compensable just because the truck was moving. 2014 WL 199136 (D. Oregon, Jan. 15, 2014). In *Nance,* the district court applied the very same provisions of the FOH which Plaintiffs cited above to hold that the defendant in *Nance* was entitled to consider sleeper berth time non-compensable. However, the plaintiffs in *Nance* never argued that they were entitled to compensation only for their excess berth time. Indeed, there are no facts in *Nance* suggesting that drivers were confined to a truck's sleeper berth for more than eight hours per day. Thus, the district court in *Nance* never addressed whether and when 29 C.F.R. § 785.22 limits how much sleeper berth time is compensable. Because *Nance* only addressed the narrow issue of whether the fact that the truck is moving renders sleeper berth time compensable, its holding is limited to that

proposition. Here, Plaintiffs do not contend that sleeper berth time is compensable solely because the truck is moving. Rather, Plaintiffs contention is simply that worker protections **limits** the non-compensable portion of the sleeper berth period to 8 hours per day—that time when the driver is actually expected to sleep. Similarly, the Ninth Circuit's single-sentence affirming *Nance*'s holdings on sleeper berth time was limited to the question of whether a driver was entitled to compensation simply because he was in a moving truck. *See Nance v. May Trucking Co.*, 685 Fed. Appx. 602, 605 (9th Cir. 2017) (unpublished).

That 29 C.F.R. § 785.41 should be limited to rendering only 8 hours of sleeper berth time non-compensable is further supported by common sense and the FMCSA's intent in broadening the required off-duty period from 8 hours to 10 hours in 2003. After notice and comment and expert review, the FMCSA concluded that for drivers to receive 8 hours of sleep, they needed to be provided with a 10-hour rest-period. 68 FR 22456, 22466, April 28, 2003. Accordingly, though a driver may spend 10 hours in the sleeper berth during his 10-hour rest period, there is no expectation that the driver would typically be sleeping for longer than 8 hours. Those extra two hours are therefore akin to the non-sleeping idle time that *Armour* and *Skidmore* considered compensable, not the *bona fide* sleeping period those cases considered non-compensable.

(5) Plaintiffs have pleaded that they were restricted and responsible for Defendant's equipment and cargo while in the sleeper berth such that they were on duty for purposes of 29 C.F.R. § 785.22.

Defendant suggests that Judge Smith Camp's decision in *Petrone II* warrants this Court dismissing Plaintiffs' sleeper berth claims as a matter of law. Given that Judge Smith Camp's decision **denied** Werner's motion for summary judgment of sleeper berth claims as a matter of law, *Petrone II* suggests instead that this Court should deny Defendant's motion for partial dismissal.

Plaintiffs have pleaded the same facts which Judge Smith Camp held warranted denying Werner's motion for summary judgment. Plaintiffs pleaded that they and other drivers were responsible for their trucks 24 hours per day. ECF Doc. No. at 7 ¶¶ 66, 81. Likewise, they pleaded that they and other drivers were responsible for all cargo being transported 24 hours per day. *Id.* ¶¶ 67, 82. They pleaded that as part of their jobs, they and other drivers were required to engage in significant amounts of travel during regular business hours that kept them away from home overnight. *Id.* ¶¶ 95-97. The Plaintiffs pleaded that their job duties included, when driving in a team, riding in the truck while it was moving so that they could assist in transporting cargo; in a team setting or solo, remaining near the truck to help protect Defendant PAM and its customers' property; in a team setting or solo, remaining inside the truck when stopped to log time in the sleeper berth and to help protect Defendant PAM and its customer's property. *Id.* ¶¶ 59, 85. Finally, they pleaded that they and other drivers spent on average at least 5 and generally at least 7 days over-the-road each workweek while working for Defendant. *Id.* ¶¶ 70, 84.

These facts are like the facts in *Petrone,* which Judge Strom held warranted granting summary judgment to the plaintiffs that 29 C.F.R. § 785.22 applied, and which Judge Smith Camp held warranted denying summary judgment to Werner and sending the case to trial. Accordingly, both decisions in *Petrone* hold that here, Plaintiffs have pleaded enough facts to preclude the Court dismissing Plaintiffs' sleeper berth claims on the pleadings.

Here, the parties have not completed fact discovery, and Plaintiffs do not yet move for summary judgment as to the compensability of sleeper berth time. But assuming the facts pleaded in the complaint as true, if Plaintiffs can ultimately prove those facts to this court and can demonstrate that there are no material disputes as to those facts, Plaintiffs would be entitled to judgment as to the compensability of excess sleeper berth time.

Because Plaintiffs never ceased providing vitally important and indispensable services to Defendant while in the sleeper berth, and because they were severely restricted in their freedom to engage in their own pursuits while in the sleeper berth, and could not use the time sufficiently for the own benefit, they have successfully pleaded that they are entitled to compensation for all time in the sleeper berth other than a *bona fide* sleeping period, i.e., all time logged in the sleeper berth in excess of 8 hours per day, pursuant to 29 C.F.R. § 785.22.

B. ARKANSAS MINIMUM WAGE ACT APPLIES TO NAMED PLAINTIFFS' EMPLOYMENT BECAUSE ARKANSAS WAS THE "HUB AND HEADQUARTERS" OF THEIR EMPLOYMENT.

Defendant has also moved to dismiss their Plaintiffs Browne and Hall's claims under Arkansas law because (a) Defendant argues that Arkansas employment laws cannot apply extraterritorially to non-residents, and (b) Defendant points out that while Plaintiffs **have** alleged a substantial nexus between their employment with Defendant and Defendant's physical headquarters in Tontitown, Arkansas, Plaintiffs did not allege that they performed any work within the State of Arkansas during the course of their employment with PAM from 2005 to December 2015.

Though Defendant has moved to dismiss Plaintiff Browne and Hall's Arkansas claims on the pleadings, because evidence exists that demonstrate Browne and Hall regularly drove through Arkansas, and because the Court can consider that uncontradicted evidence without converting this motion to one for summary judgment, the Court should deny Defendant's motion to dismiss Plaintiffs' Arkansas claims.

As an initial matter, discovery conducted in this litigation unequivocally demonstrates that Plaintiffs Browne and Hall regularly drove in and stopped in Arkansas as part of their work for Defendant. They had a dedicated route that involved pickups in Laredo, Texas, and drop-offs in Detroit, Michigan, and regular transit through Arkansas. *See, e.g.*, Excerpts of Payroll Records of

Named Plaintiffs Browne and Hall, attached to Boyette Declaration as Exhibit 1-F. Browne and Hall's payroll records affirmatively demonstrated that they had loads that both originated and ended within the Arkansas on repeat occasions. *Id.* Plaintiffs expect that Browne and Hall's driver logs will demonstrate on a trip-by-trip basis that they traveled through Arkansas on many occasions, though Defendant has inexplicably failed to provide such logs to Plaintiffs despite this case having been filed more than a year ago and despite Plaintiffs have requesting same. *See* Boyette Declaration at ¶ 11.

However, even if Plaintiffs only rarely worked in Arkansas, Defendant would still not be entitled to dismissal as a matter of law based on the pleadings, because Plaintiffs have pleaded that their employment was localized in Arkansas, and extrinsic evidence consisting of the Defendant's admissions demonstrate same.

Specifically, Defendant makes the following statement in the Driver Manual it provides to all its drivers at the beginning of their employment:

> **Your employment is principally localized in the state of Arkansas and although you will travel through many states, your headquarters and hub of operations will be our facility in Tontitown, Arkansas. Your work will require you to travel regularly in many states over the road.**

See Excerpts of Defendant's Driver Manual, attached to Boyette Declaration as Exhibit 1-G at PAM000276.

As an admission of a party-opponent, the above is substantive evidence of the truth of the matter asserted, i.e., that Plaintiffs' employment **was** principally located in Arkansas, and that the Tontitown facility was each driver's headquarters and hub of operations.

This physical connection to Arkansas is confirmed by additional discovery provided by Defendant and which Defendant cannot contradict. For instance, drivers are supervised by their

Driver Managers and all problems and questions are directed to the Driver Manager. *Id*. at PAM000142. Defendant requires drivers to notify Operations immediately if a driver is going to be late for a pickup or delivery. *Id.* The PAM Operations Department is in Tontitown, AR, and is staffed 24/7, and is available via Qualcomm or phone. *Id*. Moreover, Defendant has engaged in conduct consistent with drivers being employed in Arkansas, namely by designing its minimum-wage-true-up system to pay trainee drivers Arkansas minimum wage. *See* Excerpt of Deposition Testimony of Lance Stewart, attached to Boyette Declaration as Exhibit 1-H at 19:10-20:10.

Finally, Plaintiffs' pleadings have pleaded the substantial physical connection their employment has with Arkansas: Drivers are required to report their HOS duty status to Defendant in or around real time through computers installed on each drivers' truck, with these status designations received by Defendant in Arkansas at Defendant's headquarters. ECF Doc. No. 7 at ¶ 38(3), 54, 55, 75, 76. Drivers reported to management and supervisors who were in Arkansas. *Id.* ¶ 38(2). Drivers had their pay calculated by Defendant in Defendant's headquarters in Arkansas and received their pay from Arkansas. *Id.* ¶ 38(4) and (5). Finally, Plaintiffs pleaded that all substantive decisions related to their employment—including driving assignments—were made in Arkansas. *Id.* ¶ 38.

The MWA contains no explicit geographical limitations in its pronouncement of public policy, or in its definitions of employ, employee, or employer. A.C.A. § 11-4-202, 203. Likewise, none of the substantive provisions of the Act contain geographical limitations. A.C.A. § 11-4-204 *et seq.* Nevertheless, Defendant argues that the MWA does not apply to Plaintiffs because Defendant argues that the MWA has an implied limitation such that it only applies to residents of Arkansas or work performed within Arkansas.

The Arkansas Supreme Court has addressed the extraterritorial application of its statutes on three primary occasions in the modern era. In *Widmer v. Wood,* the Arkansas Supreme Court was asked to conclude whether a statute that provided for treble damages for the destruction of trees and crops applied to land in Oklahoma. 243 Ark. 457, 459 (1967). The Supreme Court noted that, ordinarily, statutes only have effect within the state's territorial limits, and that principle is "**peculiarly applicable to injuries to land, which are governed by the law of the place where the land is**."

In 1996, the Arkansas Supreme Court was asked to address whether the Arkansas Unfair Practices Act's prohibition against unfair price discrimination could be applied to a situation in which a Plaintiff, who owned a car dealership in West Memphis, Arkansas, across the Mississippi River from Memphis, Tennessee, argued that the Defendant had unfairly allowed car dealerships in Memphis to offer cars at a lower and discriminatory price. *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 899 (1996). The Arkansas Supreme Court held that the Unfair Practices Act "**by its very terms**" only applied to pricing discrimination between "one area in Arkansas and another area in Arkansas," only secondarily noting that **"as a general rule"** statutes have no effect except within the state's own territorial limits. *Id.* at 906. The Supreme Court further noted that the penal nature of the statute required strict construction of the statute against whom the penalty is sought. *Id.*

Finally, in *Hetman v. Schwade,* the Arkansas Supreme Court held that Arkansas guardianship law allowing for the court to order a guardian to make an accounting of her use of the ward's property did not apply to a former guardian "appointed, served and removed solely under the laws of another state," finding further support for this conclusion in common law

principles where a foreign representative or guardian could only be held to account in the state in which he or she was appointed. 2009 Ark. 302, *9-10 (2009).

In *Arkansas Valley Electric Cooperative Corp. v. Southwestern Bell Telephone Corp.*, 2017 WL 3314008 (W.D. Ark. Apr. 17, 2017) ("*AVECC*"), this Court **rejected** AVECC's argument that a statute-of-limitation contained in a statute addressing suits against telecommunication companies related to the maintenance of telecommunication equipment should not be applied extraterritorially to a dispute involving telecommunications equipment in Oklahoma, though the Court did question whether that statute's substantive provisions could apply extraterritorially.

Accordingly, in the three post-World War II Arkansas Supreme Court cases which addressed extraterritorial application of specific laws, such was found to apply not merely because of a "presumption" against extraterritorial application, but rather because in each case, the Arkansas Supreme Court looked to conflict-of-law principles. In *Widmer* and in *Hetman*, the Arkansas Supreme Court relied on conflict of law principles to find that laws regulating land and laws regulating guardianship should not have extraterritorial effect. In *Chalmers*, the Arkansas Supreme Court looked to the plain language of the statute, which was explicitly limited to unfair pricing schemes between one area of Arkansas and another. And in *AVECC*, this Court suggested that the substantive provisions of a statute that regulated disputes about telecommunications equipment might be limited to equipment within Arkansas.

None of those considerations are at issue here. And indeed, the contacts between Plaintiffs' employment with Defendant and Arkansas are so continuous, significant, and recurring that application of Arkansas law to their employment would not be an "extraterritorial" application of Arkansas law but rather Arkansas' regulation of an Arkansas' employer's employment of

individuals who performed a substantial amount of work within the borders of and with significant and immediate impact in Arkansas. Accordingly, the instant matter is distinguishable from the cases cited by Defendant in which there were limited or no contacts between the employment and the forum state other than the employer's corporate headquarters.

For instance, the Seventh Circuit's decision in *Glass v. Kemper* is distinguishable from the present matter on two main bases. First, in *Glass,* the employee in question was not simply working in another state; rather, he was working in Spain, and the presumption against extraterritorial effect has significantly greater weight in the international context than the interstate context. 133 F.3d 999, 1000 (7th Cir. 1998) (noting that even federal laws presumptively lack international extraterritorial reach). Second, in *Kemper,* there were no connections between the employee's work in Spain with Illinois except for the fact that the employer's principal place of business was in Illinois. Without any greater connection to Illinois, extraterritorial application would constitute regulation of a transaction **wholly** in foreign commerce, and therefore raise dormant commerce clause issues. *Id.* at 1001. Here, because so much of Plaintiffs' daily employment involved communication with and connection with Arkansas, the regulation of that employment is not the regulation of foreign commerce, but rather the regulation of dual-faced commerce that has both interstate and intrastate effects.

Likewise, in *Risinger v. SOC LLC,* the plaintiff was not arguing that dual-faced employment with a daily interstate and intrastate component should be regulated by Nevada law, but rather that employment which occurred in Iraq should be regulated by Nevada law where the only connection between the work and Nevada was a choice-of-law clause contained in the employment contract. 936 F. Supp. 2d 1235, 1251 (D. Nev. 2013). Importantly, the Nevada Wage and Hour Law—like the Illinois Wage Payment and Collection Law but unlike the MWA—

contains an explicit geographic limitation. *Id.* at 1250. Defendant also cites to *Abdulina v. Eberl's Temp. Servs., Inc*., 79 F. Supp. 3d 1201 (D. Colo. 2015), in which the court held that the Colorado Wage Claim Act did not apply to an employee who neither worked in nor lived in Colorado. Again, unlike the MWA, the Colorado statute contained an express geographic restriction. *Id.* at 1206 (distinguishing Colorado statute from Kansas Wage Payment Act, which contained no express geographic restriction). Likewise, like in *Risinger*, the employee **conceded** that she did not work in Colorado; here, Plaintiffs have pleaded that due to the substantial regular and daily connection of their work to Arkansas, the work they performed was Arkansas work.

In contrast to these cases, many courts have held that in the absence of an explicit geographic limitation, state wage and hour laws can apply to employment that involves out-of-state work. This has been especially true for employees who because of the itinerant nature of their work, have a most significant relationship with their place of supervision. For instance, in *Dow v. Casale,* the Massachusetts Court of Appeals was tasked with determining whether a Florida individual who served as a Director for Sales of a Massachusetts company was protected by Massachusetts wage law. 83 989 N.E.2d 909, 910-911 (Mass. App. Ct. 2013). Dow resided in Florida but served the defendant's customers in 30 different states, traveling to 19 states, including Massachusetts, where he served between 11 and 19 customers. *Id.* Dow traveled to Massachusetts approximately 20 times over the course of two years, but when not traveling, telecommuted from Florida. *Id.* Dow reported to the owner of the company who worked out of Massachusetts, and the two spoke several times per week and communicated by email almost daily regarding new products, product changes, etc. *Id.* Dow's paychecks were issued in Massachusetts. *Id.*

The court determined that Massachusetts law applied, reasoning that in the modern era, the physical place where work is performed cannot trump all other considerations. *Id.* at 913.

Accordingly, instead of using a "physical location of work" test, the court applied the Restatement of Conflict of Laws 2d's limiting principle that whether a local law applies to particular conduct is subject to a rule of reason. *See id.* at 913-914 (citing *Restatement (Second) Conflict of Laws* § 9 (1971)). Applying that rule, the court found that Massachusetts had by far the most significant relationship to the employment of plaintiff by the defendant, finding that as a "mobile employee," the plaintiff was "untethered to any particular workplace:"

> His duties as a salesperson required him to travel throughout the United States on [his employer's] behalf irrespective of where he lived; and he was allowed and expected to perform his duties whether he was in residence at [his employer's] office, traveling on business, or working from home. In that sense, his work sensibly may be viewed as having 'occurred' in Massachusetts where it benefited [his employer], no matter where he physically was located from day to day.

Id. at 914-915.

In *DaSilva v. Border Transfer of MA, Inc.*, a court of the U.S. District Court for the District of Massachusetts extended the ruling in *Dow v. Casale* to drivers who made deliveries for a non-Massachusetts employer that included stops in Massachusetts to locations both inside and outside Massachusetts and found that Massachusetts law would apply even to out-of-state drivers who spent much of their time delivering out-of-state. 296 F.Supp. 3d 389, 400 (D. Mass. 2017).

In *Helde v. Knight Transp., Inc.*, the court of the United States District Court for the Western District of Washington held that whether Washington or Oregon minimum wage law applied to the work of over-the-road truck drivers should be determined under choice-of-law principals based on a most-significant-relationship test, and in so-doing, found that the drivers were all covered by Washington law. 2013 WL 5588311 *2 (W.D. Wash. Oct. 9, 2013).

In *Portillo v. National Freight, Inc.*, the court of the United States District Court for the District of New Jersey applied New Jersey wage law to the misclassification claims of commercial

drivers by applying a most-significant-relationship test to the employment relationship. 2018 WL 2859289 (D.N.J. Jun. 11, 2018). The court found that employment relationship to have "two faces," with the contractual relationship centered in New Jersey and the physical interface of work performance in Pennsylvania, but that a complete assessment of all factors related to the work meant New Jersey had the most significant relationship to the parties and the working relationships. *Id.* at *14.

In *Performance Contracting, Inc. v. Dynasteel Corp.*, the Sixth Circuit analyzed whether a Michigan law applied extraterritorially and held that the law could be applied outside the borders of Michigan if there are sufficient contacts between the parties, the issue being sued over, and the State of Michigan. 750 F.3d 608, 613 (6th Cir. 2014).

Accordingly, Plaintiffs agree that there are extraterritorial limitations on the MWA, but that those limitations are not based on traditional territorial sovereignty analyses of the physical location of the performance of work, but rather are based on a "significant relationship" and "sufficient contacts" analysis. Same is in keeping with the modern understanding that legislatures and courts have sovereignty not simply of conduct occurring within their physical borders, but rather, conduct which significantly impacts a state's reasonable and legitimate interests.

Here, as set forth above, and as explicitly admitted by Defendant in the Driver Manual Acknowledgment, the hub, headquarters, and locality of Plaintiffs' employment is Arkansas, and Arkansas employment law should apply to Plaintiffs' work. At a minimum, Arkansas law must apply when these drivers are in Arkansas.

C. APPLYING ARKANSAS WAGE AND HOUR LAW TO EMPLOYEES WITH SIGNIFICANT AND CONTINUOUS CONTACTS WITH ARKANSAS DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

Defendant has also suggested—cursorily—that the MWA cannot be applied to Plaintiffs without running afoul of the Dormant Commerce Clause. The Commerce Clause, U.S. Const. § 8, cl. 3, grants Congress the power to regulate commerce "among the several States." This clause has long been recognized to have a negative aspect which limits the power of States to obstruct interstate or regulate interstate commerce. *See Gibbons v. Ogden*, 22 U.S. 1 (1824). This negative aspect is known as the Dormant Commerce Clause and prohibits States from "placing burdens on the flow of commerce across its borders that commerce within its borders would not bear." *American Trucking Ass'n, Inc. v. Michigan Public Service Comm'n,* 545 U.S. 429, 433 (2005).

The Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside the State's borders, whether the commerce has effects within the State. *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). Defendant has argued that because Plaintiffs lived outside Arkansas and regularly worked outside Arkansas, requiring an Arkansas company to pay those Plaintiffs at least the Arkansas minimum wage would be an unconstitutional regulation of commerce taking place wholly outside the State's borders.

This argument should be rejected for the same reason that the Court should find that the MWA can by its own terms extend to employees like Plaintiffs whose work has significant and regular contacts with Arkansas. First, applying the MWA to an Arkansas employer who managers, directs, assigns work, and pays individuals from Arkansas cannot **constitute** a regulation of **wholly** out-of-state commerce. Even for drivers who may never drive in Arkansas, the commerce they are engaged in will always possess a substantial component which occurs in Arkansas. Applying the MWA in this context would only apply to commercial transactions which have a physical locus inside Arkansas and would be no different than applying an excise

tax to freight shipments which are received in Arkansas. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 187-188 (1995). And it is axiomatic that a state has the power to legislate concerning the obligations of its citizens—which would include corporations—regarding transactions occurring outside its boundaries, as long as such legislation does not place an undue burden on interstate commerce.

The cases Defendant cites are similarly distinguishable as not involving the level of contacts that exist here between Plaintiffs and Arkansas. In *Mitchell v. Abercrombie,* for instance, the plaintiff was employed in Pennsylvania and terminated in Pennsylvania and had no contact with Ohio other than working for a corporation with a corporate headquarters in Ohio. 2005 WL 1159412 *4 (S.D. Ohio, May 17, 2005). In fact, *Mitchell* explicitly distinguished its holding from a fact pattern involving an employee who worked "even a brief period of time in Ohio, which would change the applicability of Ohio law to his employment relationship." *Id.* And in *Cotter v. Lyft, Inc.,* 60 F. Supp. 3d 1059, the court never reached the constitutional issue because it determined that the California labor laws should not apply extraterritorially to the employees in question.

Ultimately, applying the Arkansas MWA to the employment of Plaintiffs does not raise constitutional concerns because their employment always had a sufficient nexus with Arkansas such that it was never wholly out-of-state commerce. Just like a telemarketer who works within Arkansas but exclusively calls out-of-state residents can be subjected to Arkansas employee protections without burdening interstate commerce, so too can Arkansas regular employees who are routinely calling in to Arkansas to complete their work. The statute does not regulate out-of-state commerce, but in-state commerce, and does so without discriminating, favoring, or burdening out-of-state commerce versus in-state commerce. Accordingly, the Court should find

that the Dormant Commerce Clause does not preclude application of the Arkansas MWA to Plaintiffs' employment.

V. CONCLUSION

For the foregoing reasons, the Court should deny Defendant's motion for judgment on the pleadings in its entirety.

Respectfully Submitted,

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Chapter 14

THE McNAMARA-O'HARA SERVICE CONTRACT ACT

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14a INTRODUCTION

14a00 Purpose and use of FOH chapter 14.

This chapter supplements 29 CFR 4, which contains the United States (U.S.) Department of Labor (DOL)' s regulations and interpretations with respect to the McNamara-O' Hara Service Contract Act of 1965 (SCA or Act), as amended.

14a01 The McNamara-O'Hara Service Contract Act (SCA or Act).

The SCA (41 USC 351, *et seq.*) applies to every contract entered into by the U.S. or the District of Columbia (DC), the principal purpose of which is to furnish services in the U.S. through the use of service employees. Contractors performing on such federal service contracts in excess of $2,500.00 must observe minimum monetary wage and safety and health standards, and maintain certain records. Service employees on covered contracts in excess of $2,500.00 must be paid not less than the monetary wages and fringe benefits contained in wage determinations issued by the DOL for the contract work. Such wage and fringe benefit determinations may reflect what has been determined to be prevailing in the locality, or may reflect the wage rates and fringe benefits contained in the predecessor contractor' s collective bargaining agreement (CBA), if any, pursuant to section 4(c) of the SCA. *See* 29 CFR 4.

14a02 The Fair Labor Standards Act (FLSA).

The FLSA (29 USC 201, *et seq.*) prescribes standards for the basic minimum wage and overtime pay that may affect SCA-covered contracts. The FLSA interacts with the SCA in three key ways:

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(a) Section 2(b)(1) of the SCA provides that no contractor or subcontractor shall pay any employee engaged in performing work on a covered contract less that the minimum wage specified under section 6(a)(1) of the FLSA. *See* 29 CFR 4.159.

(b) Section 8(b) of the SCA defines the term "service employee" as any person engaged in the performance of a contract or that portion of a contract subject to the SCA except those employees in bona fide executive, administrative, or professional capacities as those terms are defined in the FLSA regulations found at 29 CFR 541. *See* 41 USC 357(b) and 29 CFR 4.113.

(c) Section 6 of the SCA recognizes that other federal laws, such as the FLSA, may require overtime compensation to be paid to service employees working on or in connection with contracts subject to the SCA. *See* 41 USC 355, 29 CFR 4.180 -4.182, and 29 CFR 778.

14a03 The Contract Work Hours and Safety Standards Act (CWHSSA).

The SCA recognizes that other federal laws, such as the Contract Work Hours and Safety Standards Act (CWHSSA), may require overtime compensation to be paid to service employees working on or in connection with contracts subject to the SCA. The CWHSSA is more limited in scope than the FLSA and generally applies to government contracts in excess of $100,000 that require or involve the employment of laborers or mechanics, including guards and watchmen. *See* 29 CFR 4.180 -4.182 and 29 CFR 5.5(b).

14a04 WDOL.gov website.

WDOL.gov (http://www.wdol.gov) provides a single website for access to federal contract labor standards information and wage determinations issued under the SCA and the Davis-Bacon Act (DBA). *See* 29 CFR 4.4(c).

14b GENERAL AND STATUTORY PROVISIONS: SCA

14b00 Statutory provisions of the SCA.

(a) Absent an exemption under sections 4(b) or 7 of the Act, section 2(a) mandates that every contract entered into by any agency or instrumentality of the U.S. or DC in excess of $2,500, the principal purpose of which is to furnish services in the U.S. through the use of service of employees, must contain:

(1) specified minimum monetary wages and fringe benefits determined by the Secretary of Labor (Secretary) that are based upon wage rates and fringe benefits prevailing in the locality (or, in certain circumstances, the wage rates and fringe benefits contained in a CBA, if any, applicable to employees who performed on a predecessor contract) to be paid to the various classes of service employees employed by the contractor or any subcontractor in performance of the contract or subcontract;

(2) a requirement that working conditions provided by or under the control of the contractor or subcontractor meet safety and health standards;

(3) a requirement that notice be given to service employees on the day they commence work of the compensation due them under the minimum monetary wage and fringe

benefit provisions of the contract (or that such notice be posted in a prominent place at the worksite); and

(4) a statement of the wage rates and fringe benefits that would be paid by the contracting agency to the various classes of service employees *if* such employees were hired directly by the agency to perform the contract work. This statement is included in contracts for *informational purposes only*.

(b) The remaining sections of the SCA direct DOL to administer and enforce the Act, and give no authority to contracting agencies to issue final coverage determinations. DOL must ultimately decide any issue concerning coverage under the SCA. *See* 41 USC 351, *et seq.;* 29 CFR 4.101(b); and 29 CFR 4.102.

14b01 Coverage: general.

(a) The SCA applies to contracts entered into by the U.S. or DC, the principal purpose of which is to furnish services in the U.S. through the use of service employees. *See* 29 CFR 4.107 - 4.114

(b) Specifications for services in a contract which is not *as a whole principally for services* are not subject to the SCA. *See* 29 CFR 4.111(a).

(c) Contracts for services which are performed essentially by employees that qualify for exemption as bona fide executive, administrative, or professional employees under the FLSA and involve only a minor or incidental use of service employees would not require application of the SCA. *See* 29 CFR 4.113(a)(3) and 29 CFR 541.

(d) The term "contractor" as used in the contract clauses required by the SCA also applies to any subcontractors. When a contractor undertakes a contract subject to the SCA, the contractor agrees to assume the obligations that the labor standards will be observed in furnishing the required services. These obligations may not be relieved by shifting all or part of the work to another, and the prime contractor is jointly and severally liable with any subcontractor for any underpayments that constitute a violation of the prime contract. *See* 29 CFR 4.114.

14b02 Agency of the United States or District of Columbia.

(a) Section 2(a) of the SCA covers contracts (and any bid specification therefor) "entered into by the United States or the District of Columbia," and section 2(b) applies to contracts entered into "with the Federal Government." Within the meaning of these provisions, contracts entered into by the U.S. and contracts with the federal government include all contracts to which any agency or instrumentality of the U.S. government becomes a party. *See* 29 CFR 4.107.

(b) Contracts of DC include all contracts of all agencies and instrumentalities of DC which procure services for, or on behalf of, DC or under the authority of DC. *See* 29 CFR 4.108.

14b03 Contracts to furnish services.

(a) Based on the language of the SCA, if a contract is "entered into" by or with the government, and if its principal purpose is "to furnish services in the United States through the use of service employees," it is subject to the SCA. *See* 41 USC 351(a).

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(b) The SCA is intended to be applied to a wide variety of service contracts. To illustrate this point the SCA regulations provide a listing of examples of contracts that have been found to come within its coverage. *See* 29 CFR 4.130(a).

(c) The nomenclature, type, or particular form of contract used is not determinative of SCA coverage. Contracts can be in writing, the result of competitive bidding, awarded on a cost plus basis to a single source ("sole" source), a purchase order, or a telephone call to a contractor. *See* 29 CFR 4.111(a).

(d) Contracts do not have to involve direct services to the government or an agency, nor do they require the expenditure of funds by an agency. Concessionaire contracts in which the contractor provides a service to individual personnel or the general public, for which he or she charges a fee to the user and then remits a portion of sale receipts to the government, are contracts for purposes of the SCA unless exempted. *See* 29 CFR 4.133 and FOH 14d00.

14b04 **Geographical scope.**

(a) Currently, the SCA applies to the 50 states, DC, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, Canton Island, and the Northern Marianas. *See* 41 USC 357(d) and 29 CFR 4.112(a).

(b) The term "United States" excludes any U.S. base or possession within a foreign country. *See* 29 CFR 4.112(a).

(c) For contracts in which any part of the services will be performed within the geographic limits of the U.S., the SCA and appropriate wage determinations must be incorporated in the bid documents and contract, and the service employees must be paid the proper SCA rates for all hours worked within these geographic limits. Work performed outside the geographic limits of the U.S., even if pursuant to a contract for services that is performed in part in the U.S., is not subject to the requirements of the SCA. *See* 29 CFR 4.112(b).

14b05 **"Service employee."**

(a) Section 8(b) of the Act defines "service employee" as any person engaged in the performance of a covered contract except those persons who individually qualify for an FLSA exemption as bona fide executive, administrative, or professional employees as defined in 29 CFR 541. *See* 41 USC 357(b), 29 CFR 4.113, 29 CFR 4.156, and FOH 14c07.

(b) The SCA applies to all persons who actually perform the service work called for by a covered contract, "regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such person," except those persons expressly exempted from the definition of service employee. If a person is engaged in performing any service work called for under a covered contract, such person must be paid the wage and fringe benefits provided under the Act, irrespective of any alleged independent contractor or non-employment relationship. *See* 29 CFR 4.155.

(c) Employees who do not perform the services required by a contract in excess of $2,500.00 principally for services, but whose duties are necessary to the performance thereof, as, for example, clerical employees who handle paper work in connection with the contract (such as billing or payrolls), must be paid not less than the minimum wage specified under section

6(a)(1) of the FLSA assuming such minimum wage obligations apply. *See* 41 USC 351(b)(1)and 29 CFR 4.153.

(d) Most occupational titles for service employees listed on SCA area-wide prevailing wage determinations are defined in the SCA Directory of Occupations, which can be accessed via the WDOL.gov website (http://www.wdol.gov).

(e) Occupational titles contained in SCA wage determinations based on CBA provisions will be defined by the terms of the CBA. *See* 29 CFR 4.163(j).

14b06 Contract clauses.

(a) The amount of the contract is not determinative of the Act's coverage although the statutory requirements and the contract clauses are different for contracts in excess of $2,500.00 and for contracts of a lesser amount. *See* 29 CFR 4.159.

(b) Contracts exceeding $2,500.00

In every covered contract in excess of $2,500.00 or with no definite amount, the agency is required to include the SCA labor standards contract clauses set forth in 29 CFR 4.6. In addition to other matters, such as recordkeeping requirements and a summary of liabilities and penalties for violations, these clauses contain the basic provisions of sections 2(a)(1) through (4) of the Act relating to: payment of prevailing minimum monetary wage rates, furnishing of fringe benefits, observance of safety and health standards, and notice of compensation to employees (posting). In the absence of a wage determination attached to the contract specifying the prevailing rate or rates to be paid and the fringe benefits to be furnished, the clauses also provide that neither the prime contractor nor any subcontractor shall pay any employees performing work on the contract less than the minimum wage required by section 6(a)(1) of the FLSA. *See* 29 CFR 4.6, 29 CFR 4.150, and 29 CFR 4.159.

(c) The labor standards contract clauses included in the prime contract are by their terms required to be included as well in any subcontract or any lower tier subcontract made thereunder. *See* 29 CFR 4.114 and 29 CFR 4.151.

(d) Contracts not exceeding $2,500.00

The only clause required in federal service contracts of $2,500.00 or less is the clause reflecting the basic provisions of section 2(b)(1) of the SCA relating to the payment of the minimum wage required by section 6(a)(1) of the FLSA to employees engaged in performing work on the contract. However, pursuant to section 18 of the FLSA, no provision of the FLSA shall excuse noncompliance with any federal, state or local law establishing a minimum monetary wage higher than the FLSA minimum wage. DOL Wage and Hour Division (WHD or WH) staff will not interpret or enforce any law other than those administered by the WHD, and states cannot interpret or enforce the SCA or FLSA. *See* 41 USC 351(b)(1), 29 CFR 4.150, and FOH 32j01.

(e) Determining contract amount

The value of the contract is determined by either the amount to be paid for the service or the amount which the contractor receives for providing the service. For example, concession

contracts are considered to be contracts in excess of $2,500.00 if the contractor's gross receipts under the contract may exceed $2,500.00. *See* 29 CFR 4.141.

(f) CWHSSA contract clauses

Any federal contract in excess of $100,000.00 that requires or involves the employment of laborers and mechanics, including watchmen and guards, is subject to the overtime provisions of CWHSSA. Such contracts, which may include SCA-covered contracts that employ many classes of service employees that fall within the terms laborers and mechanics, should include CWHSSA's contract clauses set forth in 29 CFR 5.5(b). However, failure to incorporate the CWHSSA contract clauses into a contract does not preclude CWHSSA coverage. *See* 29 CFR 4.181(b), 29 CFR 5.5(b), and FOH 15g02.

14b07 Child labor.

The SCA contains no child labor requirements. However, if the employer is covered under the FLSA, the FLSA child labor provisions are applicable. *See* 29 CFR 570, 29 CFR 579, and FOH 33.

14c EXEMPTIONS AND EXCLUSIONS

14c00 Statutory exemptions.

Section 7 of the Act specifically exempts from coverage seven types of contracts (or work) which might otherwise be subject to the SCA. *See* 41 USC 356(1) -(7) and 29 CFR 4.115 - .122.

(a) Any contract covered by the DBA for construction, alteration and/or repair, including painting and decorating of public buildings or public works. *See* 41 USC 356(1) and 29 CFR 4.116.

(b) Any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act (PCA). *See* 41 USC 356(2); 29 CFR 4.117; 41 USC 35, *et seq.*; and 41 CFR 50-201.

(c) 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. *See* 41 USC 356(3) and 29 CFR 4.118.

(1) This exemption applies only to contracts for carriage by a common carrier. A transportation service contract is exempt only if the service is actually governed by published tariff rates in effect pursuant to state or federal law. The contracts between the government and the carrier would be evidenced by a government bill of lading citing published tariff rates. *See* AAM No. 185.

(2) This exemption typically does not apply to contracts for ambulance or taxicab services as they are usually not deemed common carriers or governed by published tariff rates.

(3) Mail haul contracts are not exempt because mail is not considered to be freight under federal law.

(4) Contracts principally for packing, crating, and warehousing of household goods are also not exempt (even if performed by a common carrier) as the primary purpose of the contract is the warehousing (*i.e.*, storage) of household goods, while the local hauling is a minor, incidental purpose of the contract. *See* FOH 14c05.

(d) Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies subject to the Communications Act of 1934, 47 USC 151, *et seq*. *See* 41 USC 356(4) and 29 CFR 4.119.

(1) This exemption does not apply to any contracts where such companies are furnishing other kinds of services through the use of service employees.

(2) The Communications Act of 1934, has been amended by the Telecommunications Act of 1996. *See* Pub. L. No. 104-104, 47 USC 151, *et seq*. (1996).

(e) Any contract for public utility services, including electric light and power, water, steam, and gas. *See* 41 USC 356(5) and 29 CFR 4.120.

(1) This exemption is applicable to contracts for such services with companies whose rates are regulated under federal, state, or local law governing operations of public utility enterprises.

(2) Contracts covered by this exemption include those between federal electric power marketing agencies and investor-owned electric utilities, Rural Electrification Administration cooperatives, municipalities, and state agencies engaged in transmission and sale of electric power and energy.

(3) Contracts entered into with public utility companies to furnish services through the use of service employees, other than those subject to rate regulation, are not exempt from the SCA.

(f) Any employment contract providing for direct services to a federal agency by an individual or individuals. *See* 41 USC 356(6) and 29 CFR 4.121.

(g) Any contract with the U.S. Postal Service (USPS), the principal purpose of which is the operation of postal contract stations. *See* 41 USC356(7) and 29 CFR 4.122.

14c01 **Other exemptions.**

Section 4(b) of the SCA as amended in 1972 authorizes the Secretary (delegated to the Administrator of the Wage and Hour Division (Administrator)) to provide such reasonable limitations and to "make such rules and regulations allowing reasonable variation, tolerances, and exemptions to and from any or all provisions of this [Act (other than Section 10)], but only in special circumstances where [it is determined 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." *See* 41 USC 353(b) and 29 CFR 4.123.

(a) The following types of contracts have been exempted from all of the provisions of the SCA pursuant to section 4(b):

(1) USPS contracts entered into with common carriers for the carriage of mail by rail, air (except air star routes), bus, and ocean vessel on regularly scheduled runs where the revenue received for the carriage of the mail is insubstantial. *See* 29 CFR 4.123(d)(1).

(2) USPS contracts entered into with individual owner-operators of vehicles for transportation of mail where it is not contemplated at the time the contract is made that the owner-operator will hire any service employee except for brief periods of time such as vacation, or for unexpected contingencies or emergency situations such as illness or accident. Application of this exemption depends on conditions existing at the time the contract is made. If the criteria for the exemption have been met, then SCA wage determination requirements would *not* apply to anyone subsequently engaged in the performance of the contract services during the term of the contract for reasons within the limitations described in 29 CFR 4.123(d)(2). The term owner-operator refers to an individual, not a partnership, two closely related individuals (mom and pop operations), or a corporation.

(3) Contracts for the carriage of freight or personnel where such carriage is subject to rates covered by section 10721 of the Interstate Commerce Act. *See* 29 CFR 4.123(d)(3).

(4) Prime contracts and subcontracts for the seven types of commercial services identified immediately below where an employee' s work on a government service contract represents a small portion of time when compared to the balance of time spent on commercial work and where additional specific criteria for exclusion from SCA coverage are satisfied. This exemption does not apply to solicitations and contracts for any of the seven services listed below that are: (1) entered into under the Javits-Wagner-O' Day Act, 41 USC 47; (2) for the operation of a government facility or portion thereof (government-owned-contractor-operated) (but may apply to subcontracts); or (3) subject to section 4(c) of the SCA, as well as options or extensions under contracts subject to section 4(c) provisions. *See* 29 CFR 4.123(e)(2). The seven commercial services are:

a. Automotive (fleet of automobiles) or other vehicle (*e.g.*, aircraft) normal maintenance services (other than contracts to operate a government motor pool) (*see* 29 CFR 4.123(e)(2)(i)(A))

b. Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services) for use by traveling federal employees or to make small purchases of commercial items to meet the day-to-day needs of a federal agency (*see* 29 CFR 4.123(e)(2)(i)(B)

c. Contracts with hotels/motels for conferences of limited duration (*e.g.*, 1 to 5 days) that may include lodging, meals, and space (*e.g.*, conference rooms) as part of the contract (this exemption does not cover contracts for lodging on an as needed or continuing basis (*e.g.*, lodging for military recruits or for employees attending training at a training center over a longer period of time)) (*see* 29 CFR 4.123(e)(2)(i)(C))

d. Maintenance, calibration, repair, and/or installation (not subject to the DBA, as provided in 29 CFR 4.116(c)(2) for all types of equipment where the services are obtained from the manufacturer or supplier under a contract awarded on a sole source basis) (*see* 29 CFR 4.123(e)(2)(i)(D)

e. Transportation by common carrier of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (*e.g.*, City Pairs contracts) (does not include charter services) (*see* 29 CFR 4.123(e)(2)(i)(E))

f. Real estate services, including real property appraisal services related to housing federal agencies or disposing of real property owned by the federal government (*see* 29 CFR 4.123(e)(2)(i)(F))

g. Relocation services, including services of real estate brokers and appraisers, to assist federal employees or military personnel in buying and selling homes (which shall not include actual moving or storage of household goods and related services) (*see* 29 CFR 4.123(e)(2)(i)(G))

(b) The following categories of service employees have a variation to the prevailing wage requirements pursuant to section 4(b):

(1) *Workers with disabilities*

The SCA, like the FLSA, allows an employer to pay apprentices, student-learners, workers with disabilities in competitive employment, and workers with disabilities in rehabilitation facilities at subminimum monetary wages that are less than the prevailing wages required by the wage determination. 29 CFR 4.6(o) instructs the employer to follow the same conditions and procedures required for the employment of such workers as are set forth in section 14 of the FLSA. This regulatory exception is from the prevailing wage only. Employers are still required to pay the full fringe benefit, or equivalent cash payment in lieu of providing fringe benefits, to service employees with disabilities for the work performed. *See* 29 CFR 4.6(o)(1) and 29 CFR 4.152(c)(2). A subminimum monetary wage or commensurate wage will be based upon the prevailing wage listed in the applicable SCA wage determination for the classification of work to be performed on the contract. It will be determined by the individual productivity of the workers with disabilities in proportion to the productivity of experienced workers without disabilities who perform essentially the same type, quality, and quantity of work. *See* SCA 29 CFR 4.6(o)(1) and 29 CFR 525.

(2) *Apprentices*

Apprentices will be permitted to work at less than the SCA predetermined rate for the work they perform when they are employed and individually registered in a bona fide apprenticeship program registered with a state apprenticeship agency that is recognized by DOL, or, if no such recognized agency exists in a state, under a program registered with the Office of Apprenticeship, Employment & Training Administration (ETA), DOL. The terms and conditions of the approved program will be followed in the employment of apprentices. Wage rates paid apprentices must not be less than the wage rate for their level of progress set forth in the registered

program, usually expressed as a percentage of the journeyworker' s rate in the applicable wage determination. The allowable ratio of apprentices to journeyworkers employed on the contract work must not be greater than the ratio permitted to the contractor under the registered program. Any employee who is not registered as an apprentice in an approved program must be paid the wage rate and fringe benefits contained in the applicable wage determination for the journeyworker classification of work actually performed. *See* 29 CFR 4.6(p).

14c02 **Maintenance and repair of certain automatic data processing, scientific, medical, office, and business equipment.**

(a) Pursuant to section 4(b) of the SCA, the Secretary has exempted from all provisions of the Act contracts which are principally for the maintenance, calibration, and/or repair of:

(1) Automatic data processing equipment and office information/word processing equipment

(2) Scientific equipment and medical apparatus or equipment where the application of microelectronic circuitry or other technology of at least similar sophistication is an essential element

(3) Office/business machines not otherwise exempt under (1) above, where such services are performed by the manufacturer or supplier of the equipment

(b) This exemption is limited to the servicing of only the listed items of equipment furnished to the government that are also furnished commercially to the general public. The contract services must be furnished at catalog or market prices, and the contractor must utilize the same compensation plan for service employees performing on government work as it uses for its employees who service such equipment for commercial customers. The contractor must certify to all of these conditions in the contract. In addition, the contracting officer is required to make an affirmative determination that the conditions of the exemption have been met prior to contract award. *See* 29 CFR 4.123(e)(1).

14c03 **Carpet installation.**

(a) Section 7(1) of the SCA exempts from coverage contracts for construction, alteration, and/or repair, including painting or decorating, of public buildings or public works which are subject to the DBA. *See* 29 CFR 4.116. Where carpet laying is performed as an integral part of, or in conjunction with, new construction, alteration, or reconstruction of a public building or a public work, as opposed to routine maintenance, the DBA would be applicable.

(b) Where the installation of carpeting is performed as a separate contract and is not an integral part of either a construction project or incidental to a supply contract, the installation work would be subject to the SCA.

14c04 **Overhaul and modification of aircraft and other equipment.**

(a) Section 7(2) of the SCA exempts from its provisions “any work required to be done in accordance with the provisions the Walsh-Healey Public Contracts Act.” *See* 41 USC 356(2) and FOH 14c00(b).

(b) The regulations provide detailed guidelines for delineating when contracts for major overhaul of equipment would be considered remanufacturing subject to the PCA rather than the SCA. Complete or substantial teardown and overhaul of heavy construction equipment, aircraft, engines, etc., where the government receives a totally rebuilt end item with a new (or nearly new) life expectancy resulting from processes similar to original manufacturing, will normally be considered remanufacturing subject to the PCA so long as the work is performed in a facility owned and operated by the contractor. Contracts for routine maintenance or repair, inspection, etc., continue to be subject to the SCA. *See* 29 CFR 4.117.

(c) Contracting agencies are required to initially determine whether work to be performed under a proposed contract would involve principally remanufacturing work or service work based on the guidelines, and incorporate the appropriate PCA or SCA labor standards clauses into the contract prior to soliciting bids. Application of the SCA or PCA to any type of contract not discussed in the regulations will be decided on a case-by-case basis by the Administrator. *See* 29 CFR 4.117(b)(4).

14c05 **Storage and local drayage of household goods.**

(a) Contracts for the carriage or transportation of goods or personnel must be actually governed by published tariff rates for such carriage in order for the section 7(3) exemption to apply. An administrative exemption has also been provided for certain contracts where such carriageis subject to section 10721 of the Interstate Commerce Act. *See* 41 USC 356(3), 29 CFR 4.118, 29 CFR 4.123(d)(3), and FOH 14c00(c).

(b) The section 7(3) exemption does not apply where the principal purpose of the contract is packing, crating, handling, loading, and/or storage of goods prior to, or following, line-haul transportation to the ultimate destination. The fact that substantial local drayage to and from the contractor' s establishment may also be required does not alter the fact that the principal purpose of such a contract is other than the carriage of freight. However, if a firm has a separate contract for transportation subject to a published tariff rate, the section 7(3) exemption would apply to that contract. *See* 29 CFR 4.118 and FOH 14c00(c).

14c06 **Shipbuilding, alteration and repair, as distinguished from maintenance and/or cleaning.**

(a) The building, alteration, and repair of ships under government contract is work performed upon public works and is within the section 7(1) exemption (*i.e.*, such work is DBA-covered, except as provided in (b) below). Thus, for example, the SCA will not apply to contracts for the alteration and repair of merchant ships let by the Maritime Administration. *See* 41 USC 356(1).

(b) A contract for the construction, alteration, furnishing, or equipping of a *naval* vessel (*e.g.*, U.S. Navy (including U.S. Coast Guard vessels)), is within the section 7(2) exemption for work subject to the PCA. *See* 10 USC 7299 and 41 USC 356(2).

(c) A contract that calls principally for the maintenance and/or cleaning, rather than alteration or repair, of a ship or naval vessel, is a service contract within the meaning of the SCA. *See* 15d11.

14c07 **Contracts which have as their principal purpose the procurement of a type of service where service employees will not be used.**

(a) Coverage of the Act does not extend to contracts for services to be performed exclusively 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 CFR 541). For example, 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. However, a contract for professional services that requires the use of service employees to a significant or substantial extent (in terms of number of employees or hours worked) is covered by the SCA, even though professional employees may be used in the performance of the contract. *See* 41 USC 357(b), 29 CFR 4.113(a)(3), 29 CFR 4.156, and FOH 14b05.

(b) In practice, a 10 to 20 percent guideline has been used to determine whether there is more than a minor use of service employees. *See* preamble at 48 FR 49736, 49743 -44 (October 27, 1983).

(c) Coverage of the Act will not extend to contracts where it is contemplated that the services will be performed individually by the contractor, and the contracting officer knows when advertising for bids or concluding negotiations that service employees will in no event be used by the contractor in providing the contract services. *See* 29 CFR 4.113(a).

14d COVERED SCA CONTRACTS

The SCA applies to a wide variety of contracts. The SCA does not define or limit the types of services that may be contracted for under a contract entered into by the U.S. or DC. *See* 41 USC 351(a) and 29 CFR 4.110.

14d00 Beneficiary of contract services: concessionaires, etc.

(a) Where the principal purpose of a government contract is to furnish services through the use of service employees, the contract is subject to the SCA regardless of who is the direct beneficiary of the services, or the source of the funds from which the contractor is paid for the service, and irrespective of whether the contractor performs the work in its own establishment, on a government installation, or elsewhere. The fact that the contract requires or permits the contractor to provide the services directly to individual government personnel as a concessionaire rather than through a contracting agency does not negate SCA coverage. *See* 29 CFR 4.133(a).

(b) An administrative exemption is provided in 29 CFR 4.133(b) for certain concession contracts, such as those entered into by the National Park Service, including National Forests and in the National Wildlife Refuge System, which are principally for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public, as opposed to furnishing such services to the U.S. government or its personnel. This exemption does not affect a concession contractor' s obligation to comply with the labor standards provisions of any other statutes such as the CWHSSA, DBA, and FLSA. *See* 29 CFR 4.133(b).

(c) Questions arise in distinguishing between a contract whose principal purpose is the furnishing of services through the use of service employees (subject to the SCA) and a contract which is not for the purpose of procuring services, but rather only sets forth general conditions under which persons desiring to transact business with individuals on government installations may enter and do so. Such agreements are not subject to the SCA.

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(1) For example, where the concession contract provides for the use of government space or equipment on the installation for the activity involved, or prescribes to a significant extent conditions relating to prices, performance, and quality or type of service, the contract would generally be considered to have as its principal purpose the furnishing of services desired by the government for its personnel, and be subject to the SCA. *See* 29 CFR 4.133(a).

(2) In contrast, SCA coverage would not be asserted on a concession contract or agreement which merely requires a contractor to comply with general police regulations designed to control traffic, maintain order, and suppress nuisances. SCA coverage would not be asserted where the requirements imposed by the contract or agreement on the contractor are limited to such matters as restricting solicitation or pick-up practices to specified areas on the installation, restricting hours of operation, requiring observance of speed limits, or other rules and regulations generally applicable to those permitted to do business on a government installation. Also, absent other evidence that the contract' s purpose is to secure services, SCA coverage will not be asserted by reason of inclusion in the contract of requirements to ensure the responsibility of the contractor such as bonding or licensing requirements.

14d01 **Vending machine concession agreements.**

(a) If a vending machine contractor is obligated to furnish, install, stock, and service the vending machines; maintain such machines in efficient working order; make any necessary repairs; and maintain them in a clean, attractive, orderly, and sanitary condition; the contract would be subject to the SCA. Under such a contract, the contractor' s function is primarily that of furnishing a service, rather than a mere sale of supplies since it contemplates a continuing use of service employees to carry out the contract. The question of who owns the items available from the machines at the time a purchase is made is immaterial to the application of the SCA.

(b) If a contractor has an agreement as described in (a) above where a continuing use of service employees is involved, the delivery route personnel and any employees performing any servicing of the machines would be covered by the SCA. Additionally, it is the position of WH that the production employees' work involves the performance of duties necessary to the accomplishment of the contract and such employees must be paid not less than the minimum monetary wage required by Section 2(b) of the Act. *See* 29 CFR 4.153.

(c) Where the government enters into either a leasing or rental/purchase agreement with regard to vending machines under which the government agency stocks and services the machines with the contractor merely delivering the goods to a designated storage area, such an agreement is not subject to SCA.

14d02 **Exploratory drilling.**

Contracts for subsurface exploration, which have as their principal purpose the furnishing of technical information, together with soil samples and rock cores, and/or a record to the government of what was encountered during subsurface drilling, are subject to the SCA if such drilling operations are not directly connected with the construction of a public work (in which case they would be DBA covered). *See* FOH 15d05.

14d03 **Gathering and processing of geophysical and seismic data.**

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Where the principal purpose of a contract is to gather, compile, analyze, and report geophysical and seismic data, such contracts are covered by the SCA even though certain tangible end items (paper, maps, or manuscripts) may result from the intelligence, information, and labor service. *See* 29 CFR 4.131(a) and (e). Thus, while professional services may be involved and individual employees may be exempt under 29 CFR 541, the principal purpose of such contracts is to provide services which could not be furnished without a significant number of logistic support service workers to carry out the survey work. *See* 29 CFR 4.130(a)(21) and FOH 14c07.

14d04 **Surveying and mapping services.**

Contracts for surveying and mapping services for transmission lines, highways, dams, etc., are subject to the SCA, even if they are preliminary to construction. Such contracts would not be subject to the SCA if they are directly related to construction (instead, they would be DBA covered). *See* 29 CFR 4.130(a)(46).

14d05 **Contracts with hotels, motels, and restaurants for lodging and meals.**

(a) A contract between the government and a hotel or restaurant for furnishing of lodging and/or meals is a service contract within the meaning of the SCA.

(b) The various branches of the military issue chits to military personnel so that meals, lodging, or transportation may be obtained. The name of the vendor is left blank and the chit may be exchanged for overnight lodging, meals, or transportation. If there is no general contractual agreement between the government and a particular establishment for the provision of these services, SCA coverage will not be asserted.

(c) Under the commercial services exemption, food and lodging contracts at hotels and motels for meetings and conferences of limited duration (1 to 5 days) are excluded from SCA requirements if certain criteria are met. *See* 29 CFR 4.123(e)(2)(i)(C) and FOH 14c01(a)(4)(c).

14d06 **Management of repossessed properties.**

Federal Housing Administration (FHA), Department of Housing and Urban Development, management contracts with real estate brokerage firms calling for the brokers to perform services and to furnish materials and labor in connection with the management, operation, repair, maintenance, and rental of properties repossessed by FHA, are subject to the SCA. Typical broker contracts contain authorization to employ a variety of service employees, including classifications such as rental clerk, maintenance supervisor, maintenance personnel, janitor, security guard, and pool attendant.

14d07 **Contracts with states and political subdivisions.**

A state or political subdivision may obtain a federal service contract and undertake to perform it with state or municipal employees; for example, police, fire, or trash removal services. The SCA does not contain an exemption for contracts performed by state or municipal employees. Thus, the SCA will apply to contracts with states or political subdivisions in the same manner as to contracts with private contractors. *See* 29 CFR 4.110.

14d08 **Demolition, dismantling, and removal of government property.**

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(a) Property demolition, dismantling, and removal contracts which involve demolition of buildings or other structures are subject to the SCA when their principal purpose is the furnishing of dismantling and removal services, and no further construction at the site is contemplated (if further construction were contemplated, the contract would be subject to the DBA), even though the contractor may receive salvaged materials. *See* 29 CFR 4.116(b), 29 CFR 4.131(f), and FOH 15d03.

(b) If the principal purpose of a demolition contract is the sale of material, and services provided thereunder are incidental to the sale, the contract would not be covered by the SCA.

(c) Asbestos or paint removal performed as a prelude to or in conjunction with a contract for the demolition of a public building or a public work would be subject to the SCA, if subsequent construction on the site is not contemplated. *See* 29 CFR 4.131(f).

14d09 Contracts for disaster relief.

The SCA applies to cleanup, debris removal, or damage assessment contracts awarded by a federal agency. The U.S. Army Corps of Engineers, on behalf of the Federal Emergency Management Administration (FEMA), awards cleanup and assessment contracts in disaster areas. FEMA, too, may award service contracts following a disaster or in an emergency situation.

14d10 Contracts for scheduled or routine maintenance of building systems.

The SCA applies to contracts for scheduled or routine maintenance of building systems, including such operations as filter changing, oiling and greasing, gas or fluid replacement or loading, and cleaning. Such contracts are generally awarded on an annual basis calling for scheduled maintenance or troubleshooting (inspection) checks throughout that year. *See* 29 CFR 4.117(b)(3).

14d11 Contracts for intermittent labor services.

The SCA applies to all contracts, purchase orders, or agreements, whether written or oral, which have as their principal purpose the furnishing of services through the use of service employees. *See* 29 CFR 4.110. An as needed agreement with a contractor, under which arrangements are made for individual calls or orders for intermittent labor services, constitutes a contract in an indefinite amount. The individual calls or orders under this arrangement are subject to the wage determination provisions of section 2(a) of the Act. The particular form of a contractual arrangement is immaterial, and contract amount is not determined by the amount of any individual call. *See* 29 CFR 4.142(a) and (b).

14d12 Furnishing services involving more than use of labor.

(a) If the principal purpose of a contract is to furnish services through the use of service employees, the SCA will apply even though the furnishing of non-labor items (such as tangible items to be supplied to the government) may be an important element in the furnishing of services called for in the contract. *See* 29 CFR 4.131(a).

(b) Examples of covered contracts to furnish services through the use of service employees where the furnishing of non-labor items are an important element of the contract:

(1) Contracts for the maintenance and repair of typewriters that require the contractor to furnish typewriter parts as the need arises in performing the contract services does not change the principal purpose of the contract, which is to furnish maintenance and repair services through the use of service employees. *See* 29 CFR 4.131(b).

(2) Contracts to supply a government agency with freshly laundered items on a rental basis are covered as the principal purposes of these contracts are to launder and deliver tangible items through the use of service employees who launder and deliver such items. *See* 29 CFR 4.131(c).

(3) Contracts for the plowing and reseeding of a park area are covered service contracts even though the contractor is required to rent and furnish equipment. In general contracts under which the contractor agrees to provide the government with vehicles or equipment on a rental basis with drivers or operators for the purpose of furnishing services are covered by the SCA. *See* 29 CFR 4.131(d).

(4) Contracts for data collection, surveys, computer services, and the like are covered contracts, even though the contractor may be required to furnish tangible items such as written reports or computer printouts, as such items are considered to be of secondary importance to the services procured under the contract. *See* 29 CFR 4.131(e).

(5) Contracts for property removal or property disposal where the contractor receives tangible items in lieu of or in addition to monetary consideration are covered where the facts show that the furnishing of such services is the principal purpose of the contract. *See* 29 CFR 4.131(f) and FOH 14e08.

14d13 Services and other items to be furnished under a single contract.

The SCA applies only where a contract *as a whole* is principally for the furnishing of services, as opposed to line items for specific work in a contract. The SCA reference to bid specification refers to the advertised specifications in a solicitation for bids rather than a separate line item or work requirement within a contract. *See* 29 CFR 4.132.

14e CONTRACTS NOT SUBJECT TO SCA PROVISIONS

14e00 Government-owned-contractor-operated prime contracts.

A federal agency may enter into a contract in which the prime contractor is delegated the authority to act for and on behalf of the federal agency (*i.e.*, as an agent of the U.S. government). In such situations, if the principal purpose of the prime contract is not the furnishing of services through the use of service employees (*e.g.*, a contract to totally operate or manage a federal installation or facility or a federal program), then the prime contract would not be subject to the SCA. Such contracts are commonly referred to as GOCO contracts. When such a prime contractor acting as an agent of the government pursuant to delegated authority enters into a subcontract, which has services as its principal purpose, then such subcontract would be covered by the SCA. *See* 29 CFR 4.107(b).

14e01 Federally-assisted contracts for services.

Service contracts entered into by state or local public bodies with contractors are not deemed to be entered into by the U.S. merely because such services are paid for with funds received from the federal government as a grant under a federal program. For example, contracts let under the Medicaid program which are financed by federally-assisted grants to the states, and contracts which provide for insurance benefits to a third party under the Medicare program, are not subject to the SCA. *See* 29 CFR 4.107(b) and 29 CFR 4.134(a).

14e02 **Medical and related services.**

(a) **Contracts with hospitals for patient care**

The SCA is not applicable to contracts with hospitals for the care of patients. For example, the SCA would not be applicable to agreements with the Social Security Administration under which patient care services are furnished by hospitals participating in the Medicare program. *See* 29 CFR 4.107(b).

(b) **Contracts with nursing homes**

The SCA does not apply to nursing homes solely by reason of their participation in the Medicare or Medicaid programs. *See* FOH 14e02(a) above. Contracts between the U.S. Department of Veterans Affairs (VA) and nursing homes, however, are covered.

(c) **Contracts for ambulance services**

Generally, the SCA is not applicable to ambulance services furnished pursuant to contracts for Medicare or Medicaid. Federal contracts for the furnishing of ambulance services (*e.g.*, VA hospitals), however, are covered by the SCA as the exemption provided by section 7(3) of the Act does not apply. *See* 29 CFR 4.118.

14e03 **Job Corps facilities.**

The SCA is not applied to prime contracts entered into by the DOL with private firms for the operation of a Job Corps facility. The SCA, however, may apply to secondary or subcontracts let by such contractors if the principal purpose of these contracts is the furnishing of services through the use of service employees. Such service contracts awarded for or on behalf of the Job Corps facility by its operating contractor will be subject to the SCA to the same extent and under the same conditions as if they were awarded by the government directly. *See* 29 CFR 4.107(b).

14e04 **Job Training Partnership Act contracts.**

(a) The SCA is not applicable to contracts which provide for the training and teaching of vocational skills to the disadvantaged, such as those operated in connection with the Job Training Partnership Act (which replaced the Comprehensive Employment and Training Act) or other DOL, ETA programs.

(b) Where a contractor providing training under such a program also enters into a contract with a government agency for the furnishing of services (*e.g.*, janitorial) any trainees who are performing the services called for in the service contract are subject to the SCA.

14e05 **Contracts with the National Guard.**

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(a) Contracts for the operation and maintenance of state National Guard training and logistical facilities are generally not subject to the SCA. While the National Guard Bureau provides full or partial funding for these contracts, services are provided directly to the states and not to the U.S. government. The states independently obtain services to support training and logistical facilities for each state National Guard unit. Contracts are signed by state officials and are administered by the individual states according to state contracting procedures.

(b) Contracts entered into between the National Guard Bureau, Department of Defense (DOD), and state National Guard units that provide for the acquisition of services for the direct benefit or use of the National Guard Bureau and signed by a U.S. Property and Fiscal Officer would be subject to the SCA.

14e06 **Contracts between a federal or DC agency and another such agency.**

Prime contracts between a federal or DC agency and another such agency are not subject to the SCA. Subcontracts awarded under prime contracts between the Small Business Administration and another federal agency pursuant to various small business/minority set-aside programs, such as the section 8(a) program, are covered by the SCA. *See* 29 CFR 4.110.

14e07 **Government contracts whose principal purposes are something other than services.**

(a) **Contracts for lease of building space for government occupancy**

Where the government contracts for a lease of building space for occupancy and the building owner furnishes general janitorial and other building services on an incidental basis through the use of service employees, the leasing of the space rather than the furnishing of building services is the principal purpose of the contract, and the SCA would not apply. *See* 29 CFR 4.134(b).

(b) **Contracts for the rental of parking space**

This type of contract is outside the coverage of the SCA as the government agency is simply given a lease or license to use the contractor' s real property. Such a contract can be distinguished from contracts for storage of vehicles which are delivered into the possession or custody of the contractor, who will provide the required services including the parking or retrieval of the vehicles. *See* 29 CFR 4.134(b).

14e08 **Federal timber sales contracts.**

(a) Timber sales contracts generally are not subject to the SCA because the services normally provided under such contracts are considered incidental to the principal purpose of the contract (*i.e.*, the sale of timber). *See* 29 CFR 4.131(f).

(b) The SCA would apply to service contracts that are principally for some purpose other than the sale of timber (*e.g.*, the clearing of land to open up the forest for public use, or the removal of diseased or dead trees).

14e09 **Storage and/or sale of surplus farm commodities.**

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Department of Agriculture contracts or agreements (usually designated as Uniform (commodity name) Storage Agreement) awarded by or on behalf of the Commodity Credit Corporation pursuant to various price support programs for the storage, handling, and/or sale of surplus farm commodities, including grain, cotton, tobacco, seeds, naval stores, dairy products, etc., by commercial warehouse establishments, are exempt from the PCA (*See* section 12 of Rulings & Interpretations Number 3), and a CWHSSA exemption has been granted for most of these contracts. *See* 29 CFR 5.15(b)(2). WH has taken no position on the application of the SCA to such contracts.

14f APPLICATION OF THE SCA TO TYPES OF EMPLOYEES

14f00 Airplane and rotorcraft pilots and co-pilots.

Pilots and copilots are service employees within the meaning of the SCA and laborers and mechanics within the meaning of the CWHSSA when they are performing in that capacity on covered contracts. While the work of a pilot requires dexterity, coordination, a degree of physical strength, and other physical and mental processes necessary to control an airplane or rotorcraft in flight, such work does not meet the primary duty requirement for exemption as a bona fide executive, administrative, or professional employee. *See* 29 CFR 5.15(d)(3) for the variation from the CWHSSA overtime requirements for pilots and copilots performing on contracts for firefighting or suppression and related services.

14f01 Employees performing grooming services under concessionaire contracts.

Employees performing work involving the grooming of people under concessionaire contracts for such services entered into with unappropriated fund instrumentalities of the U.S. are service employees under the SCA. This includes, among others, barbers, shoe-shiners, beauticians, and manicurists. See FOH 14d00. (Such employees are also laborers and mechanics for purposes of the CWHSSA.)

14f02 Flight instructors: contracts for flight training.

Flight instructors, who qualify for exemption as teachers under 29 CFR 541.303, are not service employees for purposes of the SCA. *See* FOH 22.

14f03 Air traffic control instructors.

To be teachers and consequently exempt from coverage under the SCA pursuant to section 8(b) of the Act as a professionally exempt teacher under the FLSA, air traffic control instructors must be Federal Aviation Administration (FAA) "Certified Professional Controllers" in accordance with Regulations 14 CFR Part 65, must successfully complete the FAA Facility Instructor Training Course furnished by the FAA Academy, and must, as their primary duty, deliver instruction by using FAA-certified curriculum in classes and laboratories funded by the FAA. *See* 29 CFR 541.303, 29 CFR 4.113(a)(2) -(3), and WHD Opinion Letter FLSA (June 2, 2004) to the FAA.

14f04 Computer-related occupations.

Computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field who qualify for exemption under 29 CFR 541.400

would not be service employees for purposes of the SCA. *See* 29 USC 213(a)(1) and (17), and FOH 22.

14g SPECIAL RULINGS AND INTERPRETATIONS

14g00 Segregation under SCA: covered and non-covered work.

If a contractor desires to segregate covered work from non-covered work under the SCA for purposes of applying the SCA wage determination, the contractor must identify such covered work accurately in the records or by other means. In this regard, an arbitrary assignment of time on the basis of a formula, as between covered and non-covered work, is not sufficient. However, if the contractor does not wish to keep detailed hour-by-hour records for segregation purposes under the SCA, records can be segregated on the wider basis of departments, work shifts, days, or weeks in which covered work was performed. For example, if on a given day no government work was performed by a laundry under its contract, this day can be segregated and shown in the records. Similarly, if on a given day only noontime meals were provided by a restaurant under a covered contract to furnish meals to military personnel, employment on the night shift could be segregated. *See* 29 CFR 4.169 and 29 CFR 4.179.

14g01 Segregation: employees performing work in more than one classification.

(a) If an employee performs work which can be clearly identified and segregated under more than one job classification listed in the applicable wage determination (*i.e.*, working in different capacities in the performance of the contract), then the time spent by the employee in work properly related to each classification should be segregated and paid according to the wage rate specified for each classification. If the contractor cannot provide affirmative proof (employer records) of the hours spent in each class of work, then the contractor must pay the employee the highest of such rates for all hours worked in the workweek. *See* 29 CFR 4.169.

(b) Working in different capacities applies only to work in different job classifications (*e.g.*, janitors and window cleaners as defined in the SCA Directory of Occupations), not to levels within the same job classification (*e.g.*, security guards I and II as defined in the SCA Directory of Occupations). Thus, for example, segregating work performed by an employee as security guard I and II would not be permitted. In such a situation the employee must be paid the highest rate listed in the wage determination for security guards (*i.e.*, security guard II rate) for all hours worked in the workweek on the covered contract.

14g02 Security guard services: compensability of training time.

(a) Where a covered contract dictates that persons are required to complete certain training before performing on the contract as security guards, such persons are considered employees of the contractor while undergoing such training and time spent in training is compensable hours worked as described below. Whether this training is of limited application or more general in nature (*e.g.,* state-mandated training courses), it cannot be considered voluntary within the meaning of 29 CFR 785.27, since the contractor is obligated to provide employees in order to meet the stipulations in the contract which require the training. Likewise, time spent in training that is specifically required by a covered contract is compensable hours worked even if the training is performed prior to formal contract award or the trainee subsequently is not hired as a contract security guard. The training time for such employees would be compensable work time, but not at the compensation level provided in the

applicable wage determination as the contract services for which wage rates and fringe benefits are specified in the applicable wage determination are not being performed. The contractor must pay wages for this training time at rates not less than the minimum wage specified under section 6(a)(1) of the FLSA and section 2(b)(1) of the SCA, unless otherwise specified in the applicable wage determination. *See* 29 CFR 4.146.

(b) Time spent in on-the-job training (*i.e.*, after start of contract performance at the job site) must be paid for at not less than the SCA minimum monetary wage/fringe benefit specified for the guard classification listed in the wage determination included in the contract.

14g03 **Mail haul contracts hours worked issues.**

(a) The basic principles for determining hours worked by a truck driver on duty for 24 hours or more as set forth in FOH 31b09 and FOH 31b12 are applicable to SCA mail haul truck drivers.

(b) Time during which an employee is considered on or off duty by the Department of Transportation (DOT) is not governed by the same principles as apply under the FLSA. The DOT's regulations are concerned primarily with the safe operation of the vehicle and not compensable hours worked. Thus, the off-duty time required by DOT for safety purposes may exceed the amount of sleep time or other non-working time that may be deducted pursuant to FOH 31b09 or FOH 31b12.

(c) The principles set forth in 29 CFR 785.14 -.22 must be applied to determine whether layover or breakdown time is hours worked. Where such time is compensable hours worked and occurs on an SCA contract, it must be paid at a rate not less than the applicable SCA wage determination rate for drivers since such time is intrinsically related to contract work. If a contractor chooses to pay for layover and breakdown time, which would otherwise not be considered hours worked under FLSA 29 CFR 785, for the purpose of not breaking a driver's continuous tour of duty on tours of 24 hours or more, then such time must also be paid at the applicable SCA wage determination rate.

(d) The WHD considers the totality of the circumstances in determining whether layover or breakdown time is hours worked. Small remote towns with few amenities often do not provide an opportunity for an employee to use the time effectively for his own purposes. In such cases, the layover or breakdown time would be considered hours worked and compensation must be no less than the SCA wage determination rate.

(e) **Overtime exemption applicable to mail haul contracts**

Section 13(b)(1) of the FLSA provides an overtime exemption for employees who are within the authority of the Secretary of Transportation to establish qualifications and maximum hours of service pursuant to section 204 of the Motor Carrier Act of 1935. On June 14, 1972, the DOT published a notice in the Federal Register (37 FR 11781) asserting its power to establish qualifications and maximum hours of service for contract mail haulers who operate in interstate or foreign commerce.

The FLSA's section 13(b)(1) exemption may therefore apply to certain employees of contract mail haulers, provided the tests for that exemption are met. *See* 29 CFR 782.8(b). Note: however, that drivers, driver's helpers, loaders, and mechanics, whose duties affect the safety of operation of a vehicle engaged in transportation on public highways in interstate or foreign

commerce and who would otherwise satisfy the exemption, are nonetheless required to be paid overtime compensation if the vehicle used for mail haul purposes weighs 10,000 pounds or less. This is known as the small vehicle exception to the motor carrier exemption. The small vehicle exception applies and overtime pay is due to an employee in any workweek when the employee's work, in whole or in part, affects the safety of operation of a small vehicle. The phrase "in whole or in part" means an employee who performs such duties involving small vehicles for the entire week or part of the week must receive overtime pay for hours worked over 40 in that workweek.

Note: the small vehicle exception will not apply to certain vehicles A) designed or used to transport more than 8 passengers (including driver) for compensation, B) designed or used to transport more than 15 passengers (including driver) and not used to transport passengers for compensation, or C) used in transporting hazardous material requiring placarding under regulations prescribed by the Secretary of Transportation. *See* Fact Sheet #19 and FAB No. 2010-2.

(f) In addition, the CWHSSA exempts all federal contracts "for transportation by land, air or water" from its provisions for overtime pay. The overtime provisions of this statute would also not apply to employees working on USPS mail hauling contracts. *See* 40 USC 3701(b)(3), FOH 15i00(2), and FOH 15i01(c).

(g) Applicable wage rate

The wage rate applicable to mail haul truck drivers is based upon the point of origin of the route required by the contract. This point of origin is commonly referred to as the head out point. The head out rate is applicable to all drivers who work on the contract regardless of where they may start their portion of the route.

14g04 <u>Cost of furnishing and maintaining uniforms.</u>

(a) Employees performing on most SCA food service, security guard service, nursing home service, and janitorial service contracts are required by the employer, by the employer's government contract, by law, or by the nature of the work, to wear clean uniforms and/or related apparel or equipment. In such situations the financial cost of furnishing and maintaining (except in the case of wash and wear uniforms, *see* FOH 14g04(d) below) clean uniforms or equipment is considered to be a business expense of the employer and may not be imposed upon the employees if to do so would reduce their wages below the FLSA minimum wage or SCA prevailing wage rate (or FLSA or CWHSSA overtime). Where the minimum monetary wage (or overtime) is diminished below the required rate, the employer must bear the cost of providing clean uniforms and equipment up to the amount of any such deficiency. *See* 29 CFR 4.168(b).

(b) A determination of the cost of furnishing the uniforms (and related equipment) itself presents no problem. If the employee is required to furnish the uniform, the actual cost incurred by the employee shall be used to ascertain whether a minimum monetary wage or overtime violation has occurred. The same is true where a commercial laundry or uniform rental services is utilized. *See* 29 CFR 4.168(b) and FOH 30c12.

(c) Where uniform cleaning and maintenance is the responsibility of the employee, a contractor may satisfy its wage obligation under the Act by reimbursing employees $3.35 per week or $0.67 per day for such cleaning and maintenance. *See* 29 CFR 4.168(b)(1)(ii).

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(d) There generally is no requirement that employees be reimbursed where the uniforms furnished are made of wash and wear materials which may be routinely washed and dried with other personal garments and require no special treatment such as daily washing, dry cleaning, or commercial laundering. This limitation does not apply, however, where a different provision has been set forth in the applicable wage determination. In the case of wage determinations issued under section 4(c) of the Act for successor contracts, the amount established by the parties to the predecessor CBA is deemed to be the cost of laundering uniforms. *See* 29 CFR 4.168(b)(2).

14g05 **Military base installation contracts.**

Operations and maintenance contracts let by the military whose principal purpose is to provide services may be subject to both the SCA and the DBA where there are substantial and segregable amounts of construction. When it is unclear whether the work required is SCA maintenance or DBA repair/painting, and where individual work orders have repair work that requires less than 32 hours to complete or painting of less than 200 square feet, WH will consider such work to be subject to the SCA. Work orders that exceed these amounts are subject to the DBA.

14g06 **Military housing privatization.**

Maintenance services performed on military housing constructed or managed under the Military Housing Privatization Initiative is not subject to the SCA as the contract is not principally for services. *See* Administrator Letter dated December 20, 2006.

14h SCA WAGE DETERMINATION/CONFORMANCE PROCESSES

14h00 **SCA wage determinations.**

(a) The SCA wage determination sets forth the minimum monetary wages and fringe benefits that contractors and their subcontractors must pay service employees working on covered contracts. *See* 29 CFR 4.3(a).

(1) Wages are defined as monetary compensation provided to employees. They are usually listed in the wage determination as hourly rates.

(2) The fringe benefits specified in the wage determination depend upon the type of wage determination issued and the evaluation of source data used to develop the wage determination.

(b) Most wage determinations are revised periodically, as new wage and benefit survey data become available. If a wage determination is properly included in the contract at the time of award, the contract does not need to be modified to include subsequent revisions to the wage determination prior to completion of the first year of the contract. *See* 29 CFR 4.5(a)(2).

(c) Section 10 of the Act requires a wage determination to be made by WH for every covered service contract in excess of $2,500 and employing six or more service employees. If five or fewer service employees are employed under a contract, the contracting agency should obtain a wage determination, and if one is available, incorporate it into the contract. WH is not required by the Act to issue a wage determination for covered contracts that exceed $2,500 with five or fewer service employees, but the contracting agency should still seek to obtain

one. In instances where no wage determination has been issued for a service contract involving five or fewer service employees, the contractor can pay no less than the minimum wage required by section 6(a)(1) of the FLSA. *See* 29 CFR 4.2, 29 CFR 4.3(a), and 29 CFR 4.4(b)(1).

(d) Two bases on which SCA wage determinations are issued:

(1) Prevailing in the locality wage determinations set forth minimum monetary wages and fringe benefits determined to be prevailing for various classes of service employees in the locality of the service contract after giving due consideration to the rates applicable to such service employees if directly hired by the government. *See* 29 CFR 4.51.

a. Rates are usually based on data collected by the Bureau of Labor Statistics (BLS) under the National Compensation and Occupational Employment Statistics Surveys.

b. Or, rates may be based on union dominance where a single rate is paid to a majority (50 percent or more) of workers in a class of service employees engaged in similar work in a particular locality. *See* 29 CFR 4.51(b).

(2) Section 4(c), or successorship, wage determinations set forth the wages and benefits, including accrued and prospective increases, contained in CBAs reached as a result of arm's-length negotiations that were applicable to service employees employed on predecessor contracts in the same locality. *See* 29 CFR 4.163.

a. For section 4(c) to be applicable, the predecessor contract must involve substantially the same services being provided in the same locality. *See* 29 CFR 4.163(i).

b. The successor contractor is obligated to pay its service employees the CBA rates whether or not the employees of the predecessor contractor are hired by the successor contractor. *See* 29 CFR 4.163(a).

c. The provisions of section 4(c) are self-executing and failure to include the CBA rates in the wage determination issued for the successor contract does not relieve a successor contractor of the statutory requirements to comply with the CBA rates. *See* 29 CFR 4.163(b).

d. Any interpretation of the wage and fringe benefit provisions of the CBA where its provisions are unclear must be based on the intent of the parties to the CBA provided that such interpretation is not violative of law. *See* 29 CFR 4.163(j).

e. The obligation of the successor contractor is limited to the wage and benefit requirements of the predecessor contractor's CBA and does not extend to other items such as seniority, grievance procedures, work rules, overtime, etc. *See* 29 CFR 4.163(a).

f. The successor contractor may satisfy the fringe benefit provisions of the CBA by furnishing any equivalent combination of benefits or by making

equivalent or differential payments in cash in accordance with 29 CFR 4.177. *See* 29 CFR 4.163(j).

g. Application of section 4(c) is not negated because the contracting authority may change and the successor contract is awarded by a different contracting agency. *See* 29 CFR 4.163(g).

h. The successorship provisions of section 4(c) apply to full term successor contracts. Bridge or short-term interim contracts due to bid protest, default by the predecessor contractor, temporary closing of facility, etc., are not predecessor contracts for section 4(c) purposes and do not negate the application of section 4(c)' s successorship provisions to the full term contract awarded after the temporary interruption or hiatus. Contractors are required to pay the predecessor contractor' s CBA rates during short-term interim contracts. *See* 29 CFR 4.163(h).

i. Under section 4(c), the predecessor contractor' s existing CBA provides the basis for the wage determination applicable to the successor contract. If the CBA is no longer binding on the parties (*e.g.*, as a result of union decertification or a legitimate impasse recognized by the National Labor Relations Act), the successorship requirements of section 4(c) would be broken. The CBA rates would not apply to the successor contract, but would continue to apply throughout the contract period during which the decertification or impasse was reached.

j. Pursuant to section 4(b) of the SCA, a variation limits the self-executing application of section 4(c) for new and changed CBAs entered into by the incumbent contractor such that a new or changed CBA is not effective for successorship purposes if:

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

2. for awards of successor contracts to be entered into pursuant to negotiations or resulting from execution of a renewal option or extension, notice of the terms of the new or changed CBA is received by the contracting agency after the award of the successor contract, and the start of contract performance is within 30 days of the award, renewal option, or extension (however, if the contract does not specify a start of performance date within 30 days from the award, and/or performance of such procurement does not begin within this 30-day period, any notice of the terms of the new or changed CBA received by the contracting agency not less than 10 days before commencement of the contract will be effective for purposes of the successor contract under section 4(c))

This variation will apply only if the contracting agency has given both the incumbent contractor and its employees' collective bargaining representative written notification at least 30 days in advance of applicable estimated procurement dates. Estimated procurement dates include 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. *See* 29 CFR 4.1b(b).

k. There are two types of appeals that can be made concerning collectively bargained rates where section 4(c) applies – based on substantial variance issues, or based on issues concerning arm's-length negotiations. Both types of appeals are resolved based on administrative proceedings handled by an Administrative Law Judge pursuant to 29 CFR 6, and/or the Administrative Review Board pursuant to 29 CFR 8. *See* 29 CFR 4.10, 4.11, 4.163(c).

14h01 **Obtaining SCA wage determinations.**

Wage determinations can be obtained from the wdol.gov website (http://www.wdol.gov) by the agency in two different ways. The agency has total discretion as to the method it will follow.

(a) **"e98" process** (*see* 29 CFR 4.4(b)

(1) The e98 is an electronic application on the WDOL.gov website that contracting agencies may use to request wage determinations directly from DOL WH. The submission of an e98 requires the same general information as required by the SF 98.

(2) After a wage determination is sent to the agency, the e98 system continues to monitor the request and if the applicable wage determination is revised in time to affect the procurement, an amended response will be sent to the email address identified on the e98.

(3) If the bid opening date for invitations for bid (IFB), or if contract commencement for all other contract actions, is delayed by more than 60 days the contracting agency must submit a revised e98.

(b) **WDOL process (*see* 29 CFR 4.4(c)**

(1) Agencies may use the WDOL website to select the proper wage determination for the procurement. The WDOL website provides assistance to the contracting agency in the selection of the correct wage determination. The contracting agency is fully responsible for selecting the correct wage determination.

(2) Where the incumbent contractor furnishes services through the use of service employees whose wages and benefits are the subject of one or more CBAs, the contracting agency may prepare a wage determination referencing and incorporating a complete copy of the CBA into the successor contract action.

(3) The contracting agency shall monitor the WDOL website to determine whether the applicable wage determination has been revised. Revisions published on the WDOL site or otherwise communicated to the contracting officer are applicable and to be

included in the contract if published or communicated within the following timeframes:

a. For advertised procurement: *10 days* or more before the date set for bid opening

b. For negotiated procurement: before the award date if start of performance is within 30 days of the award, or 10 or more days before commencement of the contract if the contract does not specify a start of performance date within 30 days from the award and/or performance of such procurement does not commence within this 30-day period (*see* 29 CFR 4.5(a)(2))

(4) If WH determines that the contracting agency failed to incorporate the SCA stipulations and wage determination into the contract, or inserted an incorrect wage determination to a specific contract, the contracting agency within 30 days of notice from WH, will amend the contract to incorporate the SCA stipulations and/or correct wage determination as determined by WH. *See* 29 CFR 4.5(c)(1).

(5) If a prevailing wage determination is not available on the WDOL website, the contracting agency must submit an e98.

14h02 **Conformability of classifications and wage rates.**

(a) Conformance is the method used to establish wage rates for classes of service employees to be employed on a covered service contract that are not listed on the wage determination included in the contract (*i.e.*, the work to be performed is not performed by any classification listed in the wage determination). *See* 29 CFR 4.6(b)(2).

(1) Contractors should conform wage rates for any unlisted class of service employee before such an employee performs any contract work and classify unlisted classes in a manner that provides a reasonable relationship *(i.e.*, appropriate level of skill comparison) between the unlisted class and the classes listed in the wage determination.

(2) Conformed wage rates must be paid to all employees in the affected class retroactive to the date such employees commenced any contract work. Such rates are treated as if the rates and classes had been included on the original wage determination issued for the contract. *See* 29 CFR 4.6(b)(2)(v).

(3) Conformances may not be used to artificially subdivide classes already listed in the wage determination. For example, a stock clerk as defined in the SCA Directory of Occupations is the same job in terms of knowledge, skills, and duties as the shelf stocker and store worker II. If a stock clerk was listed in the wage determination, a conformance cannot be based on splitting the job into two jobs and establishing a hybrid classification (*e.g.*, shelf stocker and stock clerk II). *See* 29 CFR 4.152(c)(1).

(4) Where wage determinations list a series of levels within a job classification family (*e.g.*, engineering technicians I through VI), the lowest level listed for a job classification family is considered to be the *entry level* and establishment of a lower level through conformance is *not* permissible. A conformance cannot establish a job level below the *entry level* listed in the wage determination. *See* 29 CFR 4.152(c)(1).

(5) Trainee classifications cannot be conformed. *See* 29 CFR 4.152(c)(1).

(6) Helper classifications in skilled maintenance trades (*e.g.*, electricians, machinists, automobile mechanics, etc.) cannot be conformed. Helper classifications in skilled maintenance trades whose duties constitute separate and distinct jobs may be used if listed in the wage determination. *See* 29 CFR 4.152(c)(1).

(b) Conformance procedures

(1) The contractor is required to provide a written report of a proposed conformance, including information as to whether the employees involved or their authorized representative agree or disagree with the conformed wage rates and fringe benefits, to the contracting officer no later than 30 days after such unlisted class begins to perform work on the contract. *See* 29 CFR 4.6(b)(2)(ii).

(2) The contracting officer, after reviewing the proposed conformance, is required to submit a report that includes the agency' s recommendation to the National Office, Division of Wage Determinations, Service Contracts Wage Determinations Branch for review. *See* 29 CFR 4.6(b)(2)(ii).

(3) The branch will approve, modify, or disapprove the proposed conformance or render a final determination within 30 days of receipt of the report or will notify the contracting agency that additional time is necessary to review the report. *See* 29 CFR 4.6(b)(2)(ii).

(4) The branch will transmit the final determination to the contracting officer who is to promptly notify the contractor of the action taken. The contractor is required to furnish each affected employee with a copy of the conformance determination or post it at the job site as part of the wage determination. *See* 29 CFR 4.6(b)(2)(iii).

(5) If the contracting agency does not agree to submit a conformance, the WHD may initiate action pursuant to 29 CFR 4.6(b)(2)(vi) for a final determination of a proper conformed classification, wage rate and/or fringe benefit.

(6) In the case of a contract modification, an exercise of an option or extension of an existing contract, the conformance procedures provide an indexing procedure for previously conformed classifications. A contractor can increase a previously conformed rate by the average percentage increase between the rates listed in the current wage determination for all classifications to be used on the contract and those rates specified for the corresponding classifications in the previously applicable wage determination without obtaining WH approval or agreement by the employees involved, but must notify the contracting officer. *See* 29 CFR 4.6(b)(2)(iv)(B).

14i WAGE PAYMENT REQUIREMENTS

Subpart D of 29 CFR 4 (29 CFR 4.159- .186) contains the interpretations regarding minimum monetary wages and fringe benefits under the SCA. FOH 14i and 14j supplement these interpretations.

14i00 Wage payments to employees: general.

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(a) Monetary wages specified under the SCA must be paid to employees promptly and in no event later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under the SCA may not be of any duration longer than semi-monthly. *See* 29 CFR 4.6(h) and 29 CFR 4.165(b).

(b) Wages due service employees must be paid free and clear and without subsequent rebate, or kickback on any account, except deductions permitted by law. *See* 29 CFR 4.165 -.168.

(c) The Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees, and the wage determination minimum monetary wages and fringe benefits apply, in the absence of an express limitation, equally to such service employees engaged in work covered by the SCA. *See* 29 CFR 4.165(a)(2) and 29 CFR 4.176(a).

(d) If participation in a fringe benefit plan requires a contribution from the employee's wages, whether through payroll deduction or otherwise, the employee's concurrence is necessary before such payroll deduction can be made. *See* 29 CFR 4.168(a).

(e) A contractor cannot offset an amount of fringe benefits paid in excess of the fringe benefits required under a wage determination in order to satisfy its minimum monetary wage obligations, and vice versa. *See* 29 CFR 4.167, 29 CFR 4.170(a), and 29 CFR 4.177(a)(1).

14i01 Tipped employees.

(a) Tips may generally be included in wages of employees working on SCA contracts (such as at military post barbershops, etc.) in accordance with section 3(m) of the FLSA and 29 CFR 531. *See* 29 CFR 4.6(q), 29 CFR 4.167, and FOH 30d.

(b) Although the current tip credit provided under the FLSA requires a cash payment of no less than $2.13, the tip credit taken by an SCA contractor is limited to $1.34 per hour. In no event shall the sum credited be in excess of the value of tips actually received by the employee. The requirements for successor contractors under section 4(c) are different and are described in (c) below. *See* 29 CFR 4.167.

(c) Where section 4(c) of the SCA applies, the use of FLSA section 3(m) tip credit must have been permitted under the terms of the predecessor's CBA in order for it to be utilized by the successor in satisfying the SCA minimum monetary wage obligations. *See* 29 CFR 4.163(k).

14i02 SCA contractors and FLSA exemptions.

In some cases, a covered service contract may be awarded to an establishment whose employees otherwise would be exempt from the minimum wage provisions of the FLSA pursuant to section 13(a). The FLSA at section 6(e)(1) negates the exemption provisions of FLSA section 13 (except sections 13(a)(1) and 13(f)) and requires payment of the FLSA minimum wage to all of a service contractor's employees whose pay is not governed by the SCA or to whom FLSA section 13(a)(1) does not apply. *See* FOH 30e.

14j FRINGE BENEFITS PAYMENT REQUIREMENTS

14j00 General provisions.

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(a) The fringe benefits that an employer is required to furnish employees performing on a covered contract will be specified in the applicable wage determination included in the contract documents.

(1) Any administrative costs (*e.g.*, recordkeeping costs associated with payroll administration) incurred by a contractor directly in providing fringe benefit plans are considered business expenses of the firm and not contributions made on behalf of the employees. Such administrative costs cannot be credited toward meeting the fringe benefit obligations of the applicable wage determination. *See* 29 CFR 4.172.

(2) The cost incurred by a government contractor's insurance carrier (or third party trust fund) in its administration and delivery of benefits to service employees can be credited toward the contractor's fringe benefit obligations under an SCA wage determination.

(b) Fringe benefit obligations may be discharged by furnishing any equivalent combination of cash or bona fide fringe benefits. *See* 29 CFR 4.170 and 29 CFR 4.177.

(c) The terms "equivalent fringe benefit" and "cash equivalent" mean equal in terms of monetary cost to the contractor. *See* 29 CFR 4.177(a)(3).

(d) It is the contractor's responsibility to satisfy the fringe benefit obligations set forth in an SCA wage determination. The contractor may choose the fringe benefits to be provided, whether an employee accepts or refuses the fringe benefits offered. If an employee desires cash payments or benefits other than those chosen by the contractor, that would be a matter for discussion and resolution between the employee and the employer. If the contractor furnished a lesser amount of the fringe benefit called for by the applicable wage determination, the contractor must furnish the employee with the difference between the amount stated in the wage determination and the actual cost of the fringe benefit which the contractor provided. As set forth in 29 CFR 4.175(a)(2), the contractor may make up the difference in cash to the employee, or furnish equivalent benefits, or a combination thereof. *See* 29 CFR 4.177.

(e) If participation in the fringe benefit plan requires a contribution from the employee's wages, whether through payroll deduction or otherwise, the employee's concurrence is necessary. No contribution toward fringe benefits made by employees, or deducted from their wages, may be included or used by an employer in satisfying any part of any fringe benefit obligation under the Act. *See* 29 CFR 4.168(a).

(f) Service employees employed by a single employer are entitled to fringe benefit payments only up to a maximum of 40 hours per week, regardless of the number of contracts on which they work, unless otherwise specified by the applicable wage determination. This position only affects covered contracts subject to prevailing wage determinations with the fixed cost per employee health and welfare, paid vacation and holiday benefits. Service employees who work for a single employer on multiple contracts which may have other requirements, such as a collectively bargained fringe benefits or an "average cost" health and welfare fringe benefit, may be entitled to fringe benefit payments in excess of 40 hours per week. *See Dantran, Inc. v. U.S. DOL,* 171 F.3d 58 (1st Cir. 1999).

(g) The fringe benefit requirements under successor contracts subject to SCA section 4(c) are included in 29 CFR 4.163. Terms of the CBA will dictate eligibility requirements, and the

amount and extent of such fringe benefits. Since a successor contractor's obligations are governed by the terms of the CBA, any interpretation of the wage and fringe benefit provisions of the CBA where they are unclear must be based on the intent of the parties, provided that such interpretation does not violate the law. Some of the principles discussed in the regulations regarding specific interpretations of the fringe benefit provisions of prevailing wage determinations may not be applicable to wage determinations issued pursuant to section 4(c). The provisions of section 4(c), however, do not supersede the provision of section 2(a)(2) of the Act that allows a contractor to satisfy its fringe benefit obligations by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash. *See* 29 CFR 4.163(j) and 29 CFR 4.177.

14j01 **Bona fide fringe benefit plans.**

(a) To be considered bona fide for SCA purposes, a fringe benefit plan, fund, or program must constitute a legally enforceable obligation which meets certain criteria. The plan, fund, or program must be compliant with the Employment Retirement Income Security Act (ERISA), laws and regulations enforced by the Internal Revenue Service (IRS), and state insurance laws, and contributions must be made irrevocably to a trustee or third person pursuant to an insurance agreement, trust, or other funded arrangement. *See* 29 CFR 4.171(a).

(b) The primary purpose of a fringe benefit plan under the SCA must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, supplemental employment benefits, and the like. *See* 29 CFR 4.171(a)(2). While not specifically enumerated in the regulations, supplemental unemployment plans and prepaid legal plans are considered bona fide fringe benefits for purposes of the Act.

(c) Unfunded, self-insured fringe benefit plans under which a contractor allegedly makes out of pocket payments to provide benefits for employees as costs are incurred, rather than making irrevocable contributions to a trust or other funded arrangements, are not normally considered bona fide plans or equivalent benefits except for plans to provide paid vacation and holiday fringe benefits. *See* 29 CFR 4.171(b)(1).

(1) Under certain conditions, a contractor may request approval by the Administrator of an unfunded self-insured plan in order to allow credit for payments under such a plan in meeting the fringe benefit requirements of the Act. The purpose of seeking advance approval is to avoid situations involving unfunded plans where monies allegedly allocated by a contractor to provide fringe benefits are used for other purposes or are recouped without actually furnishing any benefits. This procedure is not intended to prohibit self-insured plans where irrevocable payments are made pursuant to a trust or other funded arrangement and other conditions are met. *See* 29 CFR 4.171(b)(2).

(2) Stop loss insurance payments that provide coverage in the event that claims paid from an unfunded self-insured plan exceed specified limits both in the individual and the aggregate can be credited against the fringe benefit obligations of the applicable wage determination.

(d) Contractors may not take credit for any benefit required by federal, state, or local law such as workers' compensation, unemployment compensation, and social security contributions. *See* 29 CFR 4.171(c).

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(e) The furnishing of facilities which are primarily for the benefit or convenience of the contractor or the cost of which is properly a business expense of the contractor is not the furnishing of a bona fide fringe benefit or equivalent benefit or the payment of wages (*e.g.*, items such as relocation expenses, travel, and transportation expenses incident to employment, incentive, or suggestion awards, etc.). Also, a contractor cannot take credit toward its minimum monetary wage and fringe benefit obligations for the cost of providing social functions or parties for employees, flowers, cards, or gifts on employee birthdays, anniversaries, etc.(*i.e.*, sunshine funds), employee rest or recreation rooms, paid coffee breaks, magazine subscriptions, and professional or club dues. *See* 29 CFR 4.171(d) -(f).

14j02 **Crediting of fringe benefit payments.**

The fringe benefits specified in the wage determination must be furnished separate from and in *addition* to the specified minimum monetary wage to the employees engaged in the performance of the contract. A contractor may not offset an amount of monetary wages paid in excess of the minimum monetary wages required under the wage determination in order to satisfy its fringe benefit obligations, and must keep appropriate records separately showing amounts paid for wages or furnished for fringe benefits. *See* 29 CFR 4.167 and 29 CFR 4.170(a).

14j03 **Vacation pay.**

(a) General

Eligibility for vacation benefits specified in a prevailing wage determination is based on completion of a standard period of past service. The principles to be followed in determining an employee' s length of service for vacation eligibility are summarized below. *See* 29 CFR 4.173.

(b) Determining length of service

Most prevailing wage determinations require an employer to furnish employees a specified amount of paid vacation upon completion of a specific length of service with a contractor or successor (*e.g.*, 1 week paid vacation after 1 year of service with a contractor or successor, or 1 week paid vacation after 1 year of service). Unless specified otherwise in an applicable wage determination, the following two factors must be taken into consideration in determining when an employee has completed the required length of service to be eligible for vacation benefits:

(1) the total length of time spent by an employee in the continuous service of the present(successor) contractor, including both the time spent performing commercial work and the time spent performing on the government contract(s) itself (*see* 29 CFR 4.173(a)(1)(i))

(2) where applicable, the total length of time spent in any capacity as an employee in the continuous service of any predecessor contractor(s) who carried out similar contract functions at the same federal facility (*see* 29 CFR 4.173(a)(1)(ii))

However, prior service as a federal employee is not counted toward an employee' s eligibility for vacation benefits under the applicable wage determination. *See* 29 CFR 4.173(a)(3).

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(c) Eligibility requirement: continuous service

Under the principles set forth above, if an employee's total length of service adds up to at least 1 year, the employee is eligible for the specified amount of vacation with pay provided in the wage determination. The term continuous service does not require the combination of two entirely separate periods of employment where there has been a break in service. Whether or not there is a break in the continuity of service so as to make an employee ineligible for a vacation benefit is dependent upon all the facts in the particular case. *See* 29 CFR 4.173(b).

(d) Accrual or vesting and payment of vacation benefits

Where a prevailing wage determination specifies "1 week paid vacation after 1 year of service with a contractor or successor," an employee who renders the 1 year of service continuously becomes eligible for the 1 week paid vacation (*i.e.*, 40 hours of paid vacation, unless otherwise specified in an applicable wage determination) upon his/her anniversary date of employment and upon each succeeding anniversary date thereafter. There is no accrual or vesting of vacation eligibility before the employee's anniversary date of employment, and no segment of time smaller than 1 year need be considered in computing the employer's vacation liability, unless otherwise specifically provided for in a particular wage determination. The vacation benefits need not be provided by the employer on the date of vesting. However, the required benefit must be furnished before the employee's next anniversary date, before the current contract is completed, or before the employee terminates employment, whichever occurs first. *See* 29 CFR 4.173(c)(2).

(e) Contractor liability for vacation benefits

The liability for an employee's vacation is not prorated among contractors unless specifically provided for in a particular wage determination. The contractor by whom a person is employed at the time the vacation right vests (*i.e.*, on the employee's anniversary date of employment) must provide the full benefit required by the applicable wage determination on that date before the employee's next anniversary date, before the current contract is completed, or before the employee terminates employment, whichever occurs first. Thus, vacation benefits must be complied with in full on an annual basis. Any unused vacation benefits may not be carried over from year to year. *See* 29 CFR 4.173(c) - (d).

(f) Certified listing of employee anniversary dates

In the case of a contract performed at a federal facility where employees may be retained by a succeeding contractor, 29 CFR 4.6(1)(2) provides that the incumbent prime contractor must furnish a certified list of all service employees on the contractor's or subcontractor's payroll during the last month of the contract, together with the anniversary dates of employment (with the incumbent as well as predecessor contractors) of each such employee, to the contracting officer not less than 10 days before contract completion. A copy of this list is to be provided to the successor contractor for determining employee eligibility for vacation fringe benefits which are based on length of service with predecessor contractors (where such benefit is required by an applicable wage determination). Failure to obtain such employment data does not relieve a contractor from any obligation to provide vacation benefits. *See* 29 CFR 4.173(d)(2).

(g) Rate applicable to computation of vacation benefits

The rate applicable to the computation of vacation benefits is the applicable wage determination rate or employee's regular rate of pay, whichever is higher, at the time the vacation benefit is provided or a cash equivalent is paid. If an applicable wage determination requires that the hourly wage rate be increased during the period of the contract, the rate applicable to the computation of any required vacation benefits is the hourly rate in effect in the workweek in which the actual paid vacation is provided or the equivalent is paid, as the case may be, and would not be the average of two hourly rates. This rule would not apply to situations where a wage determination specified a different method of computation and the rate to be used. *See* 29 CFR 4.173(e)(1).

(h) Cash equivalent for vacation

Where an employer elects to pay an hourly cash equivalent in lieu of a paid vacation, which is computed in accordance with 29 CFR 4.177(c)(5), such payments need commence only after the employee has satisfied the "after 1 year of service" requirement (in cases where there is such an eligibility requirement). However, should the employee terminate employment for any reason before receiving the full amount of vested vacation benefits due, the employee must be paid the full amount of any difference remaining as a final cash payment. The rate applicable to the computation of cash equivalents for vacation benefits is the hourly wage rate in effect at the time such equivalent payments are actually made. *See* 29 CFR 4.173(c)(1) and (e)(1).

14j04 Holiday pay.

(a) Most prevailing wage determinations list a specific number of named holidays for which payment is required. A full-time employee who is eligible to receive payment for a named holiday must receive a full day's pay up to 8 hours unless a different standard is used in the wage determination, such as one reflecting CBA benefit requirements. A full-time employee who works on the day designated as a holiday must be paid, in addition to the amount he/she ordinarily would be entitled to for that day's work, the cash equivalent of a full-day's pay up to 8 hours, or be furnished another day off with pay. *See* 29 CFR 4.174(c)(1) -(2).

(b) An employee's entitlement to holiday pay fully vests by working in the workweek in which the named holiday occurs. Accordingly, any employee who is terminated before receiving the full amount of holiday benefits due must be paid the holiday benefits as a final cash payment. *See* 29 CFR 4.174(c)(4).

(c) If the applicable wage determination does not include a paid holiday provision for any day declared by the U.S. president to be a holiday, or for any work day where the federal facility is closed such as due to inclement weather, the contractor is not required to pay covered service employees who take that day off. Any pay provided would be a matter of discretion for the contractor, and contract payments for such time not worked would be a procurement matter within the purview of the contracting agency.

14j05 Temporary and part-time employees.

(a) The SCA makes no distinction between temporary, part-time, and full-time employees. In the absence of express limitations, the fringe benefits specified in the wage determination apply to all temporary and part-time service employees engaged in covered work. However, in general, temporary and part-time employees are only entitled to an amount of the fringe benefits specified in the wage determination which is proportionate (*i.e.*, a *pro rata* share) to

the amount of time spent in covered work. Unless otherwise specified in the wage determination, vacation and holiday benefits are based upon a full-time schedule that consists of 40 hours a week or 8 hours a day. *See* 29 CFR 4.165(a)(2), 29 CFR 4.176(a), and FOH 14i00(c).

(b) Holiday obligations to temporary and part-time employees who work an irregular schedule of hours may be discharged by paying such employees a proportion of the holiday benefits due full-time employees based on the number of hours the temporary and part-time employee worked in the workweek *prior* to the workweek in which the holiday occurs. With respect to vacation obligations, the number of hours such employee worked in the year preceding the employee's anniversary date of employment may be utilized to determine vacation benefits due. *See* 29 CFR 4.176(a)(3).

14j06 **Health and welfare, and pension payments.**

(a) As set forth in AAM No. 188, a single prevailing nationwide health and welfare rate method has been established for determining fringe benefit requirements to be incorporated in most SCA wage determinations. The single rate is generally updated once a year based upon data from the BLS Employment Cost Index summary of *Employer Cost for Employee Compensation*. *See* 29 CFR 4.52(a) and 29 CFR 4.175.

(b) **Fixed cost per employee health and welfare fringe benefits (*see* 29 CFR 4.175(a))**

(1) Most prevailing wage determinations containing health and welfare and/or pension requirements specify a fixed payment per hour on behalf of each service employee. This fringe benefit is due each service employee on the basis of all hours paid for, including paid vacations, holidays, and sick leave, *up to a maximum of 40 hours per week and 2,080 hours per year*. Payments are specified on the wage determination in hourly, weekly, and monthly amounts.

(2) If a wage determination specifies a fringe benefit that can be obtained for less than the amount of contribution required on the wage determination, the employer must make up the difference in cash to the employee, or furnish equivalent benefits, or a combination thereof. The fringe benefits and cash equivalent payments under the fixed cost per employee benefit requirement may be made in varying amounts to employees, *provided the total amount paid by the contractor for fringe benefits and/or cash equivalents to each individual employee is at least the amount required by the wage determination*.

(c) **Average cost health and welfare fringe benefits (*see* 29 CFR 4.175(b))**

(1) Some wage determinations specifically provide for health& welfare and/or pension benefits in terms of average cost. In such cases, a contractor's contributions per employee to a bona fide plan are permitted to vary, depending upon the individual employee's marital or employment status. It is also possible under the average cost concept for some employees to not receive any fringe benefits.

(2) The contractor's total contributions for all service employees enrolled in the plan must average at least the wage determination requirements per hour per service employee. In determining average cost, *all hours worked*, including overtime hours, for all service employees that were employed on the contract during the payment

period must be counted. The term all hours worked does not include paid leave hours, such as vacations, holidays, or sick leave. It also does not cover any unpaid leave time.

(3) The contractor's total contributions for all service employees enrolled in the fringe benefit plan(s) must average at least the fringe benefit obligation stated in the wage determination. The types and amounts of benefits (if any) provided, and the eligibility requirements for service employees to participate in a fringe benefit plan, are decided by the employer.

(4) If the contractor's contributions average less than the amount required during a payment period, the contractor must make up the deficiency by providing cash equivalent payments or equivalent fringe benefit payments to *all* service employees who worked on the contract during the payment period. However, *cash equivalent payments under the average cost fringe benefit requirements can only be made in an amount determined to be deficient after payments have been made to the fringe benefit plans, and then must be made equally to all service employees based upon their hours worked*. A contractor cannot make cash equivalent payments to some employees and not to others, nor can a contractor pay different cash amounts to employees under the same contract. A contractor must pay the same amount of cash equivalent payments per hour worked to all employees. *See* 29 CFR 4.175(b).

(d) Some health and welfare and pension plans contain eligibility exclusions for certain employees. Also, employees receiving benefits through participation in plans of an employer other than the contractor or by a spouse's employer may be prevented from receiving benefits from the contractor's plan because of prohibitions against double coverage. While such exclusions do not invalidate an otherwise bona fide plan, the employees excluded from participation in the plan must be furnished equivalent bona fide fringe benefits or be paid a cash equivalent payment during the period they are not eligible, or choose not to participate in the plan. An employee who desires to opt-out of the contractor's health plan must demonstrate that his or her other coverage specifically prohibits double coverage in writing. *See* 29 CFR 4.175(c).

(e) It is not required that all employees participating in a fringe benefit plan be entitled to receive payments from the plan at all times. For example, a contractor may be permitted to claim credit for contributions made to fringe benefit plans on behalf of participating employees during periods of time when they may not be entitled to receive benefits (*e.g.*, a 30-day waiting period under some insurance plans for newly hired employees). If no contributions are made *for* such employees, then no credit may be taken toward the contractor's fringe benefit obligations. *See* 29 CFR 4.175(c)(2).

(f) Payments to a bona fide health and welfare or pension insurance plan or trust program may be made on a periodic basis, but not less often than quarterly. If the plan requires that contributions be made on a monthly basis, then to be in compliance the contractor must reconcile the cost incurred by such contributions against its SCA fringe benefit obligations on a monthly (or no less often than monthly) basis. *See* 29 CFR 4.175(d)(1).

(g) Where the wage determination specifies a fixed contribution on behalf of each employee, and a contractor exercises the option to make hourly cash equivalent or differential payments, such payments must be made promptly on the regular payday for wages. *See* 29 CFR 4.165(a)(1), 29 CFR 4.175(d)(1), and 29 CFR 4.177(c)(1).

(h) The only restriction the SCA places on pension plans, including 401(k) plans, is that they be bona fide fringe benefit plans. Such plans are considered bona fide if they meet the requirements of section 7(e)(4) of the FLSA. *See* 29 CFR 778.215, 29 CFR 4.170, and 29 CFR 4.171(a).

(1) Neither the SCA nor its implementing regulations address vesting requirements with respect to retirement plans. However, bona fide plans are required to meet the vesting requirements pursuant to ERISA. *See* 29 CFR 4.171(a)(5).

(2) Pension plans that define a year's service for vesting purposes in terms of a minimum number of hours worked by a participant and require certain number of years in service for a participant to become fully vested would be in compliance with the SCA so long as the plan's vesting provisions meet ERISA's requirements.

(3) Pension plans often provide that forfeitures of employees who do not vest under the plan will be used to reduce the employer's contribution in the following year. For SCA purposes, an employer may *not* use forfeitures as a credit towards satisfying the requirements of an applicable wage determination. To allow an employer to do so would result in the employer's taking double credit for the same contribution. Forfeitures that are allocated to the accounts of remaining eligible participants would, however, be creditable toward meeting fringe benefit obligations under the SCA.

14k OVERTIME COMPENSATION

14k00 General provisions.

(a) The SCA does not provide for compensation of covered employees at premium rates for overtime hours of work. Section 6 of the Act recognizes that other federal laws, such as the FLSA and CWHSSA may require such compensation to be paid to employees working on or in connection with SCA-covered contracts. CWHSSA (40 USC 327 -332) is more limited in scope than the FLSA (29 USC 201, *et seq.*) and generally applies to federal government contracts in excess of $100,000 that require or involve the employment of laborers, mechanics, guards, and watchmen. *See* 29 CFR 4.180 -.182, 29 CFR 5.1 -5.17; 29 CFR 778, FOH 15g –k, and FOH 32.

(b) Overtime must be paid at one and one-half times the basic hourly rate (or the regular rate of pay, whichever is higher). *See* SCA 29 CFR 4.180 -4.182, 29 CFR 5.5(b)(1), 29 CFR 778, FOH 15k00 -09, and FOH 32.

(c) The SCA excludes the amounts paid by a contractor or subcontractor for fringe benefits in the computation of overtime under the FLSA and CWHSSA whenever the overtime provisions of either of those acts apply concurrently with the SCA's wage provisions. *See* 29 CFR 4.177(e), 29 CFR 4.180, and 29 CFR 778.7.

(d) Neither the FLSA, nor the CWHSSA, preclude any state, territory, or municipality from implementing its own labor standards with respect to minimum monetary wage and overtime compensation. If federal and state laws have different requirements, a contractor would be obligated to satisfy both sets of standards in order to ensure compliance. *See* 29 CFR 778.5.

(e) The CWHSSA requires that "liquidated damages shall be computed, with respect to each individual employed as a laborer or mechanic in violation of any provision of this Act, in the

sum of $10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of 40 hours without payment of the overtime required by this Act." In addition, in all cases liquidated damages are also required to be computed in situations where an employee is paid overtime at an incorrect basic hourly rate of pay. *See* 29 CFR 5.8 and FOH 15k10.

14k01 **Laborers and mechanics under CWHSSA.**

Service employees may also be laborers and mechanics for purposes of CWHSSA. The terms laborers and mechanics include at least those employees whose duties are manual or physical in nature as distinguished from mental or managerial. Generally, employees whose duties are supervisory, professional, and clerical are not laborers or mechanics for purposes of CWHSSA. Determinations as to whether individual employees are laborers or mechanics are based on the duties actually performed under the contract rather than occupational titles or job descriptions. A job that requires manual and mechanical dexterity and is primarily reliant on the use of hands would be typical of mechanical or manual occupations that would fall with the scope of a laborer or mechanic under CWHSSA. The CWHSSA also applies to guards and watchmen employed on government contracts in excess of $100,000. *See* 29 CFR 4.181(b), 29 CFR 5.5(b), and FOH 15j.

14L PAYROLL AND RECORDKEEPING REQUIREMENTS

14L00 **Payroll and recordkeeping requirements.**

(a) Payrolls and basic records relating thereto, including a copy of the contract, must be maintained and preserved for 3 years from the completion of the contract. *See* 29 CFR 4.6(g) and 29 CFR 4.185.

(b) The failure of a contractor to make the required records available to a WHI may result in the suspension of contract payments until such violations cease. Contractors must also permit the WHI to conduct employee interviews at the worksite during normal working hours. *See* 29 CFR 4.6(g).

CONFIDENTIAL

PAM TRANSPORT

DRIVER MANUAL

Rev. Date 1/6/16

PREFACE

You, the professional driver, are the key ingredient to the success of this transportation services company. We appreciate your continuing assistance and value your comments and suggestions regarding this manual.

The performance standards for uniform rules and regulations outlined in this manual are mandatory and govern the actions and status of the drivers of all its divisions (hereinafter referred to as the Company).

Employment with the Company is "employment at will." You may terminate your employment at any time and the Company may terminate or lay-off an employee at any time, with or without notice. By accepting at will employment with the Company, you are agreeing to abide by, and observe, all rules and regulations in this Driver Manual. Your failure to follow these rules and regulations may subject you to disciplinary action up to, and including, discharge. This Manual is intended to set forth certain rules and regulations but does not constitute a contract for employment.

Nothing in these rules and regulations shall change your right to challenge a penalty by making a written protest to management, within three (3) calendar days of the date the penalty is imposed, requesting an Employment Review.

The Company believes in feedback to all drivers concerning their job performance. This approach keeps everyone advised on how well each driver is performing the responsibilities agreed upon at the onset of employment. You are evaluated on your job performance based on the rules and regulations within this manual, other Company publications, and other general rules in the industry.

The Company welcomes both male and female drivers. When a pronoun is used in this manual, the male form (he, his) is used. These terms are used for convenience only and are applied equally to both male and female.

If any portion of this manual is not understood, please bring it to the attention of the Driver Liaison, your Driver Manager, Operations Manager, or the Driver Resources Department.

It is your responsibility to ensure that this manual is kept updated with changes as provided to you by the Company.

In addition to this manual, the Company may provide you with certain other information or publications to assist you in the performance of your duties. It is your responsibility to ensure, each time you are at a company yard, that you are in possession of the most recent publications. Direct any questions you may have to your Driver Manager.

NOTE: This "Driver Manual" supersedes all previously published Driver Manuals. The Company reserves the right to change, amend or delete any or all policies in this manual, without notice, at the sole discretion of Company management.

NOTE: Load specific or job specific instructions are provided through the Qualcomm© information system.

SECTION 8

OPERATIONS

SUPERVISION

As a driver, your supervisor is your assigned Driver Manager, and any problems or questions you may have should be directed to him or her. At times you may be given instructions and/or directions by other Company personnel. These instructions/directions are to be followed in the same manner as if they were given by your supervisor.

If you have talked with your Driver Manager about a problem or question and you feel the response is taking too long, or you disagree with the answer you receive, talk with your Driver Manager's supervisor.

COMMUNICATIONS

The primary communication tool is the Qualcomm® system. As a supplement to Qualcomm®, direct 800 numbers have been established for each Driver Manager and for each department within the company. (Refer to phone list in Driver Resource section.)

IMPORTANT: Notify Operations immediately if for any reason you will be late for a pickup or delivery.

The PAM Operations Department in Tontitown is staffed 24 hours a day / 7 days a week. After hours contact – Call your daytime Driver Manager's 800 number after hours, it will be covered by their coverage group.

TIME-OFF

Requests for time-off should be submitted to your Driver Manager as far as possible in advance of your planned time-off. Drivers are expected to stay out for a three (3) week period. Drivers earn one (1) time-off day for each week out, up to a maximum of five (5) days. If more time is required, you must contact your Driver Manager to arrange for the tractor to be routed to the Tontitown terminal or another terminal as assigned by your Driver Manager.

DAILY CONTACT REQUIREMENTS

NOTE: For all drivers.

Send your daily check call from your Qualcomm® – Macro#10 each morning by 9:00 a.m. *If* your truck is in the shop or if your Qualcomm® is not working, you need to call your driver manager by 09:00 AM each morning.

During time-off, you are required to contact the Driver Manager twenty-four (24) hours prior to your agreed upon scheduled return to duty date (Projected Time of Availability or PTA).

The items needed on check calls are as follows:

1. Trailer number
2. Number of hours you logged the previous day(s)
3. Projected date/time you will be available to accept next dispatch (PTA); and
4. At PTA, projected hours you will have available before your next required ten (10) hour break.
5. Hubometer Reading

IMPORTANT: Some shipments require more frequent contacts; your Driver Manager will instruct you if additional contacts are required. If your Qualcomm® is not working you must call your Driver Manager when you shut down for your break and then again once you are rolling. You will also need to call at least once between your start time and next stop.

TRANSPORTATION SERVICE PROCEDURE

DISPATCH SYSTEM

The Company operates on a forced dispatch system. ***If at any point, from receiving a dispatch until completion of dispatch, you make a determination that you are not capable of performing the service as defined, notify your Driver Manager.***

DISPATCH DEFINITION

The transfer, from the Driver Manager to the Driver, of all order information and any other assignments necessary to perform service required as well as the completion of all of those assignments. Only Driver Managers may change dispatch instructions (e.g., do not call a customer to reschedule an appointment, this is a responsibility of the Driver Manager).

SPOTTING / SHUTTLES / CITY WORK

You may be required from time to time to perform one of these services. Check with the Driver Manager to determine if payment is applicable and, if applicable, the amount to be paid.

INTERNATIONAL SHIPMENTS

PAM Transport, Inc. is committed to the safety and security of our employees, the customers we serve, and the general public. We are all aware of the reasons that we must be vigilant to prevent or inhibit the criminal/illegal use of our equipment, terminals, or the products we transport, by terrorists.

We are partners with multiple agencies (e.g., C-TPAT, PIP, CBSA), and as such it is important that we work together to ensure tractor/trailer/cargo security and minimize risks.

Drivers are responsible for familiarizing themselves with all related company policies, such as but not limited to: Company Security Policy, International Shipment Security Procedure, Seal Change Procedure, and Seal Break Procedure.

Tractor and Trailer Security

Tractor and trailer integrity procedures must be maintained to protect against the introduction of unauthorized personnel and material.

Tractor and Trailer Inspection Procedures (See the 7-10-17 Point Inspection Procedure)

- Using a checklist, drivers will inspect their tractor and trailer for natural or hidden compartments.
- Tractor/trailer inspections (Standard or 7-10-17 Point) must be systematic and should be completed upon entering and departing from the truck yard and at the last point of loading prior to reaching the U.S. border.
- Drivers must visually inspect all empty trailers, to include the interior of the trailer, at the truck yard and at the point of loading, if possible.

Trailer Security (See the International Shipment Security Procedure)

- For all trailers in the driver's custody, trailer integrity must be maintained, to protect against the introduction of unauthorized material and/or persons.
- It is recognized that even though a driver may not "exercise control" over the loading of trailers and the contents of the cargo, drivers must be vigilant to help ensure that the merchandise is legitimate and that there is no loading of contraband at the loading dock/manufacturing facility. The driver must ensure that while in transit to the border, no loading of contraband has occurred, even in regards to unforeseen vehicle stops.
- Trailers must be stored in a secure area to prevent unauthorized access and/or manipulation. Unauthorized entry into trailers, tractors or storage areas must be reported to the Driver Manager.
- The driver will notify their Driver manager of any structural changes, such as a hidden compartment, discovered in trailers, tractors or other rolling-stock. Management personnel will notify the proper authorities (e.g., Customs, CBSA, Law Enforcement, etc.)
- When transporting a trailer for an international shipment, a high security seal that meets or exceeds the current PAS ISO 17712 standards for high security seals must be in place prior to crossing the border.
- Drivers must ensure that tractor and trailer integrity is maintained while the cargo is en route to the international border by verifying seals and ensuring correct seal number is annotated on paperwork.
- During physical inspections on the tractor and trailer, as required by state, local or federal law enforcement, drivers must report and document any anomalies or unusual structural modifications found to their Driver Manager.

Trailer Seals (See the International Shipment Security Procedure)

The sealing of trailers, to include continuous seal integrity, is a crucial element of a secure supply chain, and remains a critical part of our commitment to C-TPAT/PIP/CBSA. A high security seal must be affixed to all loaded trailers in-bound for/out-bound from the U.S.

INTERNATIONAL BORDER CROSSING

Speak with your Driver Manager for specific instructions prior to crossing any international border.

RECEIVING A DISPATCH

You may receive instructions from your assigned Driver Manager or from another Driver Manager based upon the account being dispatched; if that is the case, that information will be included in your dispatch instructions. **Please be sure to read and adhere to all special instructions or comments on your dispatch.**

Your dispatch must contain the following information:

1. Name of shipper(s);
2. City and state location of shipper(s);
3. Loading date(s) and time(s);
4. Shipper(s) pickup number or receiver(s) purchase order number;
5. Shipper(s) phone number;
6. Loading and unloading requirements;
7. Name of receiver(s);
8. City and state location of receiver(s);
9. Receiver(s) phone number;
10. Delivery date(s) and time(s); and
11. The Company trip number.

You may be given other information regarding loads, but the above information is necessary on every dispatch to enable you to perform your responsibilities as a driver. If any of these items are needed, contact your Driver Manager.

LOAD CONFIRMATION

After you receive your dispatch, you need to send Qualcomm® Macro #1 LOAD CONFIRMATION. By sending this you are informing operations that you have received the load assignment, you have read and understand all requirements, and all appointments will be met.

ARRIVAL AT SHIPPER

A Qualcomm® message or a phone contact (depending on your Driver Manager's requirements) is required each time you arrive at a shipper's or receiver's facility. The minimum items needed when making an arrival contact are as follows:

1. The Company trip number;
2. Location;
3. Estimated time loading or unloading will be completed;
4. Current PTA; and
5. At PTA, projected hours you will have available before your next required ten (10) hour break.

L-CALL (LOADED CALL) CONTACT

A contact is required each time your trailer is loaded. **You are required to communicate load information before leaving the shipper. This is important for several reasons, as many of our customers require us to update websites in a timely manner, customers monitor their loads, and we are graded on our performance. NOTE: Loaded calls are also required for loads picked up on yards and any other location.**

The minimum items needed when making a loaded call are as follows:

1. Truck number;
2. Trailer number;
3. Location;
4. Bill of lading number;
5. Weight (for each drop and/or pickup);
6. Pieces (for each drop and/or pickup);

7. Seal number;
8. Current PTA; and
9. At PTA, projected hours you will have available before your next required ten (10) hour break.

For each additional pickup you have on a load you will need to send in a Loaded at Pickup from your Qualcomm® (Macro #5).

DISCREPANCY AND EXCEPTION REPORTING

If at any point while performing your dispatch you detect a discrepancy on your bill of lading (e.g. incorrect trailer number, incorrect seal number, etc.); a discrepancy between the bill of lading and information given at dispatch; or if you are unable to locate the bill of lading, **immediately contact the Driver Manager.**

Additionally, shippers may occasionally include on the bill of lading or personally inform you of a delivery appointment which differs from that given to you at dispatch; should this occur, **contact your Driver Manager immediately.**

Dispatch termination contact(s)

A contact is required at termination of dispatch; your dispatch will terminate under one of the following conditions:

T-Call

A T-Call is a dispatch which is terminated at a point other than final destination. If, in your dispatch instructions, you are to terminate your dispatch before the load is delivered to final destination, this contact is required at the point you drop the load.

The items needed for T-Call are as follows:

1. Truck number;
2. Trailer number;
3. Location;
4. Specific location of where bills may be found by next driver;
5. Current PTA; and
6. At PTA, projected hours you will have available before your next required ten (10) hour break.

Empty call

The items needed when making an empty call are as follows:

1. Truck number;
2. Trailer number;
3. Location;
4. Confirm live unload or drop trailer;
5. If drop trailer, confirm one copy of bills is retained to be scanned and/or forwarded with your trip envelope;
6. Bill(s) of lading signed by receiver;
7. New trailer number if drop delivery;
8. Current PTA; and

9. At PTA, projected hours you will have available before your next required ten (10) hour break.

NOTE: The trailer must be empty or dropped and bills signed by receiver before contact is made. Empty call is required at actual empty or drop time.

ROUTING

The Company will furnish you with a fuel route, and no deviations are to be made from this route without prior authorization from your Driver Manager.

In the event you are not provided a route by the Company, contact your Driver Manager for routing instructions.

LOADING AND UNLOADING

Load Securement

As cited in your *FMCSR* Pocketbook, with few exceptions, it is your responsibility to ensure the load is secure. It is very important to read your pre-dispatch instructions, as there are different requirements from each customer. If you are unable to secure the load, contact your Driver Manager for further instructions.

Load Securement Devices

Some dispatches may require purchase or assignment of additional securement devices (i.e., loadlocks, strapping, or lumber). All purchases or assignments must be pre-approved by the Driver Manager.

1. LUMBER – All approved lumber purchases will be reimbursed provided an original receipt for the amount of the purchase is scanned with the paperwork for that load and/or submitted with your trip envelope.

2. LOADLOCKS AND/OR STRAPPING

- Purchases:
  (a) You must contact your Driver Manager for an advance P.O. number.
  (b) You must scan the original receipt with the paperwork for that load.

- Assignments:
  Assignment of loadlocks and/or strapping may be made by shipper facilities, the Driver Manager, other Company terminals, or at the time you are dispatched to pick up a sealed loaded trailer.

Load Shifts

Load shifts can occur when freight is not properly secured. They can become quite costly and time consuming for the company. If a trailer is pre-loaded, you may still be responsible to brace prior to sealing. Ask the shipper what type of bracing has been used in the nose of the trailer, and if that is their common practice. Be specific with types of bracing noted (bulk heads, load

SECTION 9

HOURS OF SERVICE

COMPANY REQUIREMENT

It is a company requirement that all drivers shall comply with Part 395 of the Federal Motor Carrier Safety Regulations. Log training and EOBR (ELD) training will be provided to each driver. Anytime a driver wants additional training, a request needs to be sent to the log department. Anytime a driver has questions about his logs, the driver needs to call the log department.

DRIVER MANAGER COMMUNICATIONS/LOADING AND UNLOADING

It is your responsibility to let the Driver Manager know your log status before being dispatched on another load. When arriving at a Shipper or Receiver it is your responsibility to ensure you have enough time to drive away from the facility or make arrangements to stay at the facility. So, when you arrive at the facility, check to find out how long it will take to load or unload your trailer and if you can stay on the facility or not. You may need to explain you only have x number of hours left and it would be a DOT violation if you have to drive away from their facility in violation of DOT hours of service. If you cannot make arrangements contact your Driver Manager.

AUTHORIZATION TO LOG OFF DUTY FOR MEAL STOPS

DOT has made a stipulation allowing drivers to log meal and breaks as off duty time. This is allowed when you have written authorization from the Company relieving you from responsibility for all tractor, trailer and cargo while taking meals and breaks. Even then, your units must be parked in a well-protected area. If at night, the area should be well lit. During the day, the truck should be in sight. **Logging off duty for meals does not extend the 14-hour rule.**

DRIVER'S VEHICLE INSPECTION REPORT

A driver must complete a pre-trip inspection prior to placing his truck and/or truck and trailer in operation. This time must be recorded as on duty time. The amount of time shown is the amount of time the actual inspection takes. Keep in mind a proper pre-trip for a truck and trailer has 108 points to check. You are required the amount of time it takes you to do the pre-trip (log it as you do it). Under no circumstance can you show less than fifteen minutes. You must be able to demonstrate you can do a proper pre-trip in the amount of time you are logging in case of an accident. Drivers will be required to submit a Driver Vehicle Inspection Report (DVIR) if a defect is found on any piece of equipment operated or pulled during their work day. If more than 1 truck is operated in a day and defects are found on each, a DVIR must be completed on each. All mechanical defects found during road side inspections must be noted. All mechanical defects as a result of an accident must be noted. It is the drivers' responsibility to ensure all repairs have been corrected, for any defect discovered that is listed in Appendix G, before a vehicle is allowed to move. The driver (for outsourced repairs only) or the mechanic must also certify the defect has been corrected. A copy of Appendix G is in the back of the Federal Motor Carrier Safety Regulation book you were issued or it can be located at:

http://www.fmcsa.dot.gov/rules-gulations/administration/fmcsr/Fmcsrruletext.aspx?contentid=3702

ON DUTY NOT DRIVING

How do you log loading and unloading? The entire time spent must be logged on-duty not driving (waiting to back in, paperwork, pulling out, etc.). If you physically load or unload the truck, show the entire time on line #4. How much time needs to be logged depends on how much time was taken to load or unload. **In other words, log it as you do it.**

On duty time will also cover all fuels, drops, hooks, accidents, DOT inspections, being towed, calling in breakdowns, etc. On duty is any time you are required by the company to complete work.

On duty time does not include any time resting in a parked vehicle. For team situations in a moving vehicle, 2 hours in passenger seat immediately before or after 8 consecutive hours in the sleeper berth may be considered as off duty time. It is recommended that if this provision is used, that a comment is made on the log regarding being in the passenger seat.

ELECTRONIC LOGGING

PAM Transport uses an **E**lectronic **O**n **B**oard **R**ecording (**EOBR**) system, also known as an **E**lectronic **L**ogging **D**evice (**ELD**) for our logs. All drivers must be certified for this system by completing the appropriate class. This log is to be maintained daily. If for any reason the EOBR (ELD) is not working properly, a paper log is to be maintained instead. However, prior to going to a paper log anytime an issue occurs with your EOBR (ELD), you must call QualComm Tech Support at **800-541-7490**, you must notify your driver manager, and you must notify the log department at **800-283-5185**. EOBR's must be approved before the next change of duty status on the following day and you must transmit paper logs via Transflo within 48 hours of the completion of each load.

PENALTIES FOR HOURS OF SERVICE VIOLATIONS AND FALSIFICATIONS:

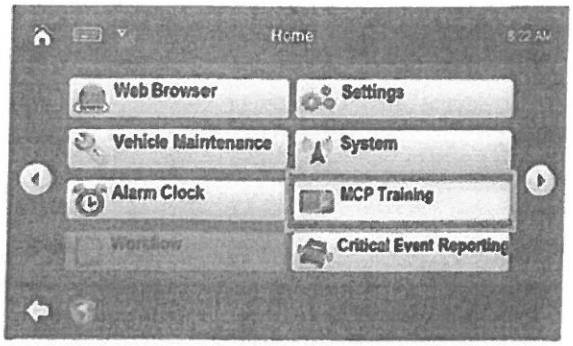
Logs will be checked for accuracy. Drivers having enough violations to warrant probation will be placed on probation and monitored for continued log violations. If a driver continues to have violations, the driver will be given days off or terminated depending on the number and the severity of the violations. Drivers having egregious violations may be terminated at any time.

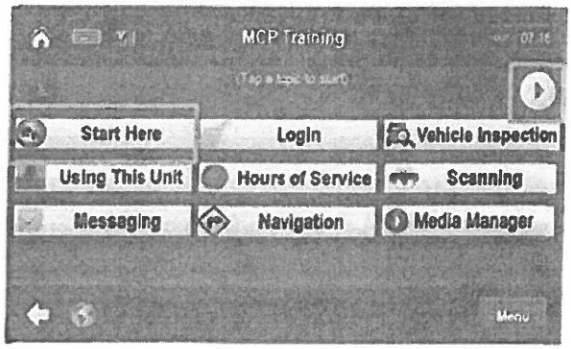
IN CONCLUSION:

1. Approve your EOBR (ELD) logs and/or transmit your paper logs via Transflo as required;
2. Be aware of the 8, 11, 14 and 70 hour clocks;
3. Log it as you do it;
4. Call the Log Department if you have questions **800-283-5185.**

1. Tap MCP Training.
2. Scroll through the training topics using the arrow buttons above the topics.
3. Start by reviewing the Start Here topic.

Note: Not all topics are available for use on the DIU110.





RECEIVING MESSAGES

- Messages automatically arrive when the ignition is on and for a short time after the ignition is turned off.
- A wake-up timer checks for messages periodically, even when the ignition is off – typically once an hour.
- Starting or idling your vehicle is not necessary.
- Messages are stored until you are ready to get them.
- When you are sleeping, you can turn the volume down completely for both alerts and voice.

ACKNOWLEDGEMENT OF RECEIPT OF DRIVERS MANUAL

I have received my copy of the Company Driver Manual, which outlines many of the practices and procedures of the Company. I understand that I am expected to read the information contained herein and to stay up-to-date on the current policies and practices. I also understand that this Driver Manual supersedes and replaces all previous Driver Manuals, handbooks or policies.

I understand that the practices and procedures contained in this Driver Manual constitute guidelines only and are in no way to be interpreted as a contract between the Company and any of its employees.

Your employment is principally localized in the state of Arkansas and although you will travel through many states, your headquarters and hub of operations will be our facility in Tontitown, Arkansas. Your work will require you to travel regularly in many states over the road.

I understand that any occupational injury/disease claim will fall under the jurisdiction occurring interterritorial in Arkansas or extraterritorial out of the State of Arkansas, will be under Arkansas jurisdiction statue. An employee, or any person acting for or on behalf of the employee, shall not commence any petition, suit or proceedings against PAM Transport, Inc. in any court, tribunal or agency located outside of the State of Arkansas.

Any employee that is a resident of Texas is automatically covered by PAM Transport's Inc. ERISA based PAM Texas Injury Plan.

I understand that Company employees are employed "at will." I understand that I am not restricted from voluntarily leaving employment with the Company, and that the Company may terminate my employment at any time, with or without cause. I understand that no practice, procedure, or statement is intended as a guarantee of employment, or continuity of benefits or rights, and that no assurance of permanent employment or employment for any term is intended or implied by statement in this Driver Manual. I further understand that no member of the Company's management, other than its CEO, President, or his/her authorized agent, has the authority to enter into a contract providing otherwise, and even then such contract will not be effective unless it is in writing and signed by the CEO, President, or his/her authorized agent, and by the particular employee involved.

I understand that the Company has the right to modify, delete, or add to any of these practices and procedures hereinafter described in this Driver Manual at any time without notice. Announcement of any changes will be made through standard communication channels, but advance notice may not always be possible. I accept responsibility for keeping informed of these changes.

In the event of loss or damage, I understand that a replacement Driver Manual will be made available to me.

_____
Employee Name (please print)

_____
Employee Signature Date

[Note: Please complete, sign, and return this form to Driver Services]

Rev. Date 1/6/16

CONFIDENTIAL

DEPOSIT AUTHORIZATION SECURITY DEPOSIT

I have been informed of and do fully understand the Deposit Policy and Security deposit of PAM Transport, Inc. By virtue of my signature on this form, I do hereby authorize a $25.00 deduction from each of my weekly payroll checks until a maximum deposit of $500.00 is reached. I further authorize PAM Transport, Inc., in the event of separation from the company for whatever reason, to deduct from my final payroll check any amount (even in excess of $25.00) to bring my deposit amount to this $500.00 maximum. This authorization is granted upon the condition that, once the $500.00 maximum amount has been accumulated, I will be paid interest each quarter based on the annualized rate of 5% or annualized prime rate as determined on the first business day of each quarter, whichever is less. This rate will be determined on the first business day of each quarter.

I understand and agree that the money in the security deposit may be deducted by PAM Transport, Inc., after my termination in the event:

1. PAM fails to receive all of my trip envelopes and bills of ladings.
2. That PAM pays a fine or citation received by me and chargeable to me.
3. That PAM incurs any expenses as a result of my termination including, but not limited to, out of route miles, towing, truck chasing for abandoned vehicle.
4. There is damage to the vehicle or cargo.
5. To recover hiring and on boarding costs should I terminate within the first year.
6. Any other reasonable expense incurred by PAM as a result of my employment or termination.

Final disbursement of the escrow balance, less any deductions, will be made 90 days after termination.

DRIVER'S SIGNATURE: _____

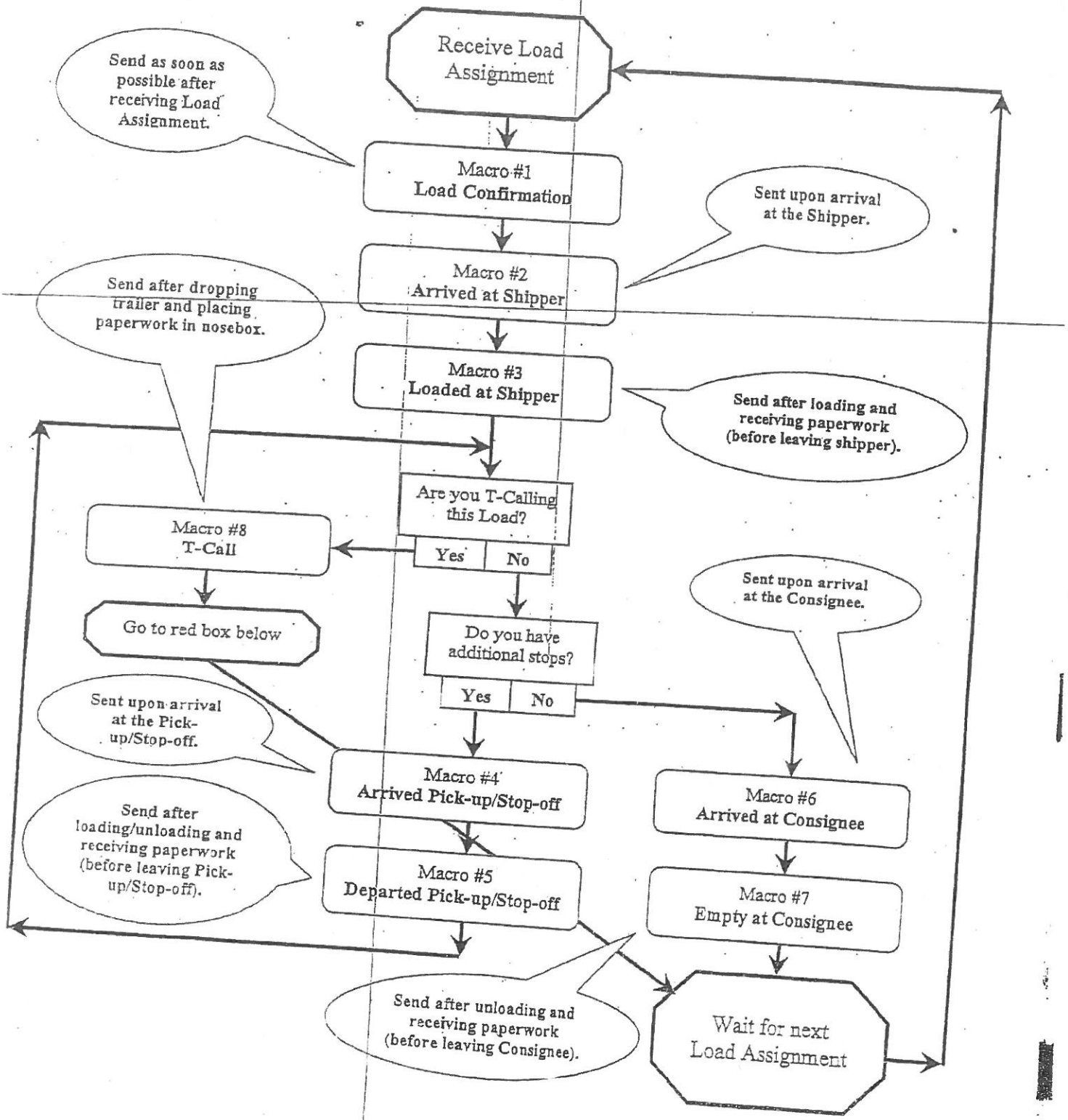
DATE: _____

REVISED: 11/01/14
FORM: PAMT-DAE

Rev. Date 1/6/16

CONFIDENTIAL

Macro (Message) Flowchart for Load Assignments



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