performance of the contract and two or more rates of compensation under section 2 of the Act are applicable to the classes of work which he or she performs, the employee must be paid the highest of such rates for all hours worked in the workweek unless it appears from the employer's records or other affirmative proof which of such hours were included in the periods spent in each class of work. The rule is the same where such an employee is employed for a portion of the workweek in work not subject to the Act, for which compensation at a lower rate would be proper if the employer by his records or other affirmative proof, segregated the worktime thus spent.

§4.170 Furnishing fringe benefits or equivalents.

(a) *General.* Fringe benefits required under the Act shall be furnished, separate from and in addition to the specified monetary wages, by the contractor or subcontractor to the employees engaged in performance of the contract, as specified in the determination of the Secretary or his authorized representative and prescribed in the contract documents. Section 2(a)(2) of the Act provides that the obligation to furnish the specified benefits ''may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.'' The governing rules and regulations for furnishing such equivalents are set forth in §4.177 of this subpart. An employer cannot offset an amount of monetary wages paid in excess of the wages required under the determination in order to satisfy his fringe benefit obligations under the Act, and must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits.

(b) *Meeting the requirement, in general.* The various fringe benefits listed in the Act and in §4.162(a) are illustrative of those which may be found to be prevailing for service employees in a particular locality. The benefits which an employer will be required to furnish employees performing on a particular contract will be specified in the contract documents. A contractor may dispose of certain of the fringe benefit obligations which may be required by an applicable fringe benefit determination, such as pension, retirement, or health insurance, by irrevocably paying the specified contributions for fringe benefits to an independent trustee or other third person pursuant to an existing ''bona fide'' fund, plan, or program on behalf of employees engaged in work subject to the Act's provisions. Where such a plan or fund does not exist, a contractor must discharge his obligation relating to fringe benefits by furnishing either an equivalent combination of ''bona fide'' fringe benefits or by making equivalent payments in cash to the employee, in accordance with the regulations in §4.177.

§4.171 "Bona fide" fringe benefits.

(a) To be considered a ''bona fide'' fringe benefit for purposes of the Act, a fringe benefit plan, fund, or program must constitute a legally enforceable obligation which meets the following criteria:

(1) The provisions of a plan, fund, or program adopted by the contractor, or by contract as a result of collective bargaining, must be specified in writing, and must be communicated in writing to the affected employees. Contributions must be made pursuant to the terms of such plan, fund, or program. The plan may be either contractor-financed or a joint contractor-employee contributory plan. For example, employer contributions to Individual Retirement Accounts (IRAs) approved by IRS are permissible. However, any contributions made by employees must be voluntary, and if such contributions are made through payroll deductions, such deductions must be made in accordance with §4.168. No contribution toward fringe benefits made by the employees themselves, or fringe benefits provided from monies deducted from the employee's wages may be included or used by an employer in satisfying any part of any fringe benefit obligation under the Act.

(2) The primary purpose of the plan 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 unemployment benefits, and the like.

(3) The plan must contain a definite formula for determining the amount to be contributed by the contractor and a definite formula for determining the benefits for each of the employees participating in the plan.

(4) Except as provided in paragraph (b), the contractor's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund must be set up in such a way that the contractor will not be able to recapture any of the contributions paid in nor in any way divert the funds to its own use or benefit.

(5) Benefit plans or trusts of the types listed in 26 U.S.C. 401(a) which are disapproved by the Internal Revenue Service as not satisfying the requirements of section 401(a) of the Internal Revenue Code or which do not meet the requirements of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, *et seq.* and regulations thereunder, are not deemed to be ''bona fide'' plans for purposes of the Service Contract Act.

(6) It should also be noted that such plans must meet certain other criteria as set forth in § 778.215 of 29 CFR part 778 in order for any contributions to be excluded from computation of the regular rate of pay for overtime purposes under the Fair Labor Standards Act (§§ 4.180–4.182).

(b)(1) Unfunded self-insured fringe benefit plans (other than fringe benefits such as vacations and holidays which by their nature are normally unfunded) under which contractors allegedly make ''out of pocket'' payments to provide benefits as expenses may arise, rather than making irrevocable contributions to a trust or other funded arrangement as required under § 4.171(a)(4), are not normally considered ''bona fide'' plans or equivalent benefits for purposes of the Act.

(2) A contractor may request approval by the Administrator of an unfunded self-insured plan in order to allow credit for payments under the plan to meet the fringe benefit requirements of the Act. In considering whether such a plan is bona fide, the Administrator will consider such factors as whether it could be reasonably anticipated to provide the prescribed benefits, whether it represents a legally enforceable commitment to provide such benefits, whether it is carried out under a financially responsible program, and whether the plan has been communicated to the employees in writing. The Administrator in his/her discretion may direct that assets be set aside and preserved in an escrow account or that other protections be afforded to meet the plan's future obligation.

(c) No benefit required by any other Federal law or by any State or local law, such as unemployment compensation, workers' compensation, or social security, is a fringe benefit for purposes of the Act.

(d) The furnishing to an employee of board, lodging, or other facilities under the circumstances described in § 4.167, the cost or value of which is creditable toward the monetary wages specified under the Act, may not be used to offset any fringe benefit obligations, as such items and facilities are not fringe benefits or equivalent benefits for purposes of the Act.

(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. This would be true of such items, for example, as relocation expenses, travel and transportation expenses incident to employment, incentive or suggestion awards, and recruitment bonuses, as well as tools and other materials and services incidental to the employer's performance of the contract and the carrying on of his business, and the cost of furnishing, laundering, and maintaining uniforms and/or related apparel or equipment where employees are required by the contractor, by the contractor's Government contract, by law, or by the nature of the work to wear such items. See also § 4.168.

(f) Contributions by contractors for such items as social functions or parties for employees, flowers, cards, or gifts on employee birthdays, anniversaries, etc. (sunshine funds), employee rest or recreation rooms, paid coffee breaks, magazine subscriptions, and professional association or club dues, may not be used to offset any wages or fringe benefits specified in the contract, as such items are not ''bona fide'' wages or fringe benefits or equivalent benefits for purposes of the Act.

§4.172 Meeting requirements for particular fringe benefits—in general.

Where a fringe benefit determination specifies the amount of the employer's contribution to provide the benefit, the amount specified is the actual minimum cash amount that must be provided by the employer for the employee. No deduction from the specified amount may be made to cover any administrative costs which may be incurred by the contractor in providing the benefits, as such costs are properly a business expense of the employer. If prevailing fringe benefits for insurance or retirement are determined in a stated amount, and the employer provides such benefits through contribution in a lesser amount, he will be required to furnish the employee with the difference between the amount stated in the determination and the actual cost of the benefits which he provides. Unless otherwise specified in the particular wage determination, such as one reflecting collectively bargained fringe benefit requirements, issued pursuant to section 4(c) of the Act, every employee performing on a covered contract must be furnished the fringe benefits required by that determination for all hours spent working on that contract up to a maximum of 40 hours per week and 2,080 (i.e., 52 weeks of 40 hours each) per year, as these are the typical number of nonovertime hours of work in a week, and in a year, respectively. Since the Act's fringe benefit requirements are applicable on a contract-by-contract basis, employees performing on more than one contract subject to the Act must be furnished the full amount of fringe benefits to which they are entitled under each contract and applicable wage determination. Where a fringe benefit determination has been made requiring employer contributions for a specified fringe benefit in a stated amount per hour, a contractor employing employees part of the time on contract work and part of the time on other work, may only credit against the hourly amount required for the hours spent on the contract work, the corresponding proportionate part of a weekly, monthly, or other amount contributed by him for such fringe benefits or equivalent benefits for such employees. If, for example, the determination requires health and welfare benefits in the amount of 30 cents an hour and the employer provides hospitalization insurance for such employees at a cost of $10.00 a week, the employer may credit 25 cents an hour ($10.00 ÷ 40) toward his fringe benefit obligation for such employees. If an employee works 25 hours on the contract work and 15 hours on other work, the employer cannot allocate the entire $10.00 to the 25 hours spent on contract work and take credit for 30 cents per hour in that manner, but must spread the cost over the full forty hours.

§4.173 Meeting requirements for vacation fringe benefits.

(a) *Determining length of service for vacation eligibility*. It has been found that for many types of service contracts performed at Federal facilities a successor contractor will utilize the employees of the previous contractor in the performance of the contract. The employees typically work at the same location providing the same services to the same clientele over a period of years, with periodic, often annual, changes of employer. The incumbent contractor, when bidding on a contract, must consider his liability for vacation benefits for those workers in his employ. If prospective contractors who plan to employ the same personnel were not required to furnish these employees with the same prevailing vacation benefits, it would place the incumbent contractor at a distinct competitive disadvantage as well as denying such employees entitlement to prevailing vacation benefits.

(1) Accordingly, most vacation fringe benefit determinations issued under