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Notice 2022-61: IRS & Treasury guidance on prevailing wage and apprenticeship requirements in the Inflation Reduction Act of 2022

Tax Alert

Overview

On November 30, 2022, Treasury and the IRS issued Notice 2022-61[1] (the "Notice"), which provides guidance on the prevailing wage and apprenticeship requirements applicable to many of the energy tax provisions (sections 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E and 179D) modified or created by the Inflation Reduction Act of 2022 (P.L. 117-169, the "IRA"). The Notice establishes the 60-day period described in the provisions, which means January 28, 2023 is the last day by which a taxpayer may begin construction of qualified facility, energy property, or energy project without having to meet the substantive prevailing wage and apprenticeship requirements to qualify for increased credit or deduction amounts. The Notice provides relevant cross-references, definitions for various terms, and procedures in order for taxpayers to apply the substantive prevailing wage and apprenticeship requirements. In addition, the Notice provides guidance for determining the beginning of construction or installation relevant to the prevailing wage and apprenticeship requirements and for other credit eligibility and qualification purposes, by reference to other IRS guidance previously issued. Finally, the Notice states that the IRS and Treasury anticipate issuing proposed regulations or other guidance with respect to prevailing wage and apprenticeship requirements.

Background

The IRA created or amended sections 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E, and 179D, including prevailing wage and apprenticeship requirements that must be satisfied for taxpayers to qualify for increased credit or deduction amounts.

Prevailing Wage Requirement

A taxpayer must ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in: (i) the construction of such facility, and (ii) the alteration or repair of such facility (with respect to any taxable year, for any portion of such taxable year that is within the 10-year period beginning on the date the qualified facility is originally placed in service), are paid wages at rates not less than the prevailing rates for construction, alteration, or repair of a similar character in the locality in which such facility is located as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31, of title 40, United States Code (Prevailing Wage Rate Requirement).[2]

Apprenticeship Requirement

A taxpayer must ensure that, with respect to the construction of any qualified facility, not less than the applicable percentage of the total labor hours of the construction, alteration, or repair work (including such work performed by any contractor or subcontractor) with respect to such facility is, subject to section 45(b)(8)(B), performed by qualified apprentices. The applicable percentage is (i) 10 percent, if construction begins in 2022, (ii) 12.5 percent if construction begins in 2023, and (iii) 15 percent if construction begins after 2023 (Apprenticeship Labor Hour Requirements). This is subject to any applicable requirements for apprentice-to-journey worker ratios of the Department of Labor (DOL) or the applicable State Apprenticeship Agency (Apprenticeship Ratio Requirements). Additionally, each taxpayer, contractor, or subcontractor who employs 4 or more individuals to perform construction, alteration, or repair work with respect to the construction of a qualified facility must employ 1 or more qualified apprentices to perform such work (Apprenticeship Participation Requirements).[3]

60-day Period

A facility generally must meet the prevailing wage and apprenticeship requirements to receive the increased credit or deduction amounts under sections 30C, 45, 45Q, 45V, 45Y, 48, 48E, and 179D if construction (or installation for purposes of section 179D) of the facility begins on or after the date 60 days after the Secretary publishes guidance with respect to the prevailing wage and apprenticeship requirements. January 29, 2023 is the applicable date that is 60 days after the Notice was published.

Applicable Code Sections

Below is a list of IRA tax provisions for which prevailing wage and apprenticeship requirements and the 60-day period apply. As noted, application of the requirements and the 60-day period differ among the provisions.

- Section 48 Energy credit (ITC)
- Section 48E Clean electricity investment credit
  - The 60-day period does not apply
- Section 45 Electricity produced from certain renewable resources (PTC)
- Section 45Y Clean electricity production credit
  - The 60-day period does not apply
- Section 45L New energy efficient home credit
  - Prevailing wage applies only during construction
- Section 45Q Credit for carbon oxide sequestration
- Section 45U Nuclear power production credit
  - Prevailing wage applies only during alteration or repair
  - Apprenticeship and the 60-day period do not apply
- Section 45V Credit for production of clean hydrogen
  - The 60-day period applies to exempt from the prevailing wage and apprenticeship requirements during construction of the facility; however, the prevailing wage for alteration or repair during the credit period continues to apply regardless of meeting the 60-day period

- Section 45Z Clean fuel production credit
  - The 60-day period does not apply; however, for facilities placed in service prior to January 1, 2025, the prevailing wage and apprenticeship requirements do not apply during construction
- Section 48C Qualifying advanced energy project credit
  - The 60-day period does not apply
- Section 30C Alternative fuel refueling property credit
- Section 179D Energy efficient commercial buildings deduction
  - Prevailing wage applies only during installation

Details

Notice 2022-61: Prevailing Wage

Wage rate

A taxpayer must use the wage rate contained in the prevailing wage determination published by the Secretary of Labor for the geographic area, type of construction applicable to the facility, and labor classifications for the construction, alteration, or repair work that will be done on the facility by laborers or mechanics. *See* Appendix for a full list of helpful DOL websites.

If no prevailing wage determination exists for the geographic area and type of construction, or the determination does not contain labor classification that is applicable to the planned work, a taxpayer must contact the Department of Labor, Wage and Hour Division (WHD) via email. The email must include:

- Type of facility
- Facility location
- Proposed labor classifications
- Proposed prevailing wage rates
- Job descriptions and duties, and
- Any rationale for the proposed classifications

Taxpayers should direct any questions regarding a wage determination or its listed classifications and wage rates to the WHD.

The prevailing rate for qualified apprentices hired through a registered apprenticeship program may be less than the corresponding prevailing rate for journey workers of the same classification.

Recordkeeping

The taxpayer must follow the general recordkeeping requirements under section 6001 and Treas. Reg. § 1.6001-1, et seq. and maintain and preserve sufficient records, including books of account or records for work performed by contractors or subcontractors of the taxpayer, to establish that such laborers and mechanics were paid wages not less than such prevailing rates.

Definitions

The Notice provides the following definitions (*see* Appendix for the relevant Title 29 CFR sections):

- An "employee" is an individual who performs services in exchange for remuneration, regardless of the individual's status as an employee or an independent contractor for other federal tax purposes
- "Wage" includes any bona fide fringe benefits; *see* 29 CFR 5.2(p)
- For "laborer or mechanic," *see* 29 CFR 5.2(m), which refers to workers who perform primarily manual or physical work, such as electricians, ironworkers, equipment operators, truck drivers, and general laborers, and

does not include persons employed in a bona fide executive, administrative, or professional capacity
- "Construction, alteration, or repair" means "construction, prosecution, completion, or repair;" *see* 29 CFR 5.2(j), which defines as all types of work done on the facility (*i.e.*, onsite work)

Observations:

- The Notice simplifies the prevailing wage application by defining all substantially similar provisions in sections 45(b)(7)(A), 30C, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E, and 179D in the same manner
- The Notice provides an interactive and user-friendly site to search and find the precise wage rate determination
- The definitions provide cross-references to other DOL regulations and are likely bound by the related precedents
- Under www.sam.gov, there are 4 types of construction: heavy, building, residential, and highway; solar and wind constructions are listed as heavy construction
- The Notice provides that after review, WHD will notify the taxpayer as to the prevailing wage determination upon request; it is unclear how long the review will take or whether there will be any communication during the review process
- The DOL established a website dedicated to the IRA prevailing wage and apprenticeship requirements, which provides some helpful information; for instance, it provides examples of sufficient records to establish meeting the prevailing wage requirements, such as records that identify all laborers and mechanics who performed construction work on the facility; and reflect the correct classifications of work they performed, their hours worked in each classification, and the prevailing wage rates paid for the work, including any bona fide fringe benefit contributions or costs

Notice 2022-61: Apprenticeship

The Notice provides an example to illustrate the application of the Apprenticeship Labor Hour Requirement. In the example, the total labor hours for the construction are 10,000, out of which 1,000 labor hours are performed by a contractor and 9,000 labor hours are performed by the taxpayer. The taxpayer hired qualified apprentices who performed 1,150 labor hours and the contractor hired qualified apprentices who performed 100 labor hours. The construction began in calendar year 2023 and is subject to the 12.5 percent Labor Hour Requirement. The example concludes that the taxpayer met the Requirement because 1,250 (1,150+100) labor hours is not less than 12.5% of 10,000.

Although the Apprenticeship Labor Hour Requirement is met by combining all hours of work by taxpayer, contractor, and subcontractor, the example clarifies that the Apprenticeship Ratio Requirements and the Apprenticeship Participation Requirements must be met by each taxpayer, contractor and subcontractor separately.

Good Faith Exception

The Notice provides that a taxpayer is deemed to have satisfied the apprenticeship requirements if the taxpayer:

- Requests qualified apprentices from a registered apprenticeship program in accordance with *usual and customary business practices* for registered apprenticeship programs in a particular industry; and
- Maintains sufficient books and records establishing the taxpayer's request and the program's denial of such request or non-response to such request, as applicable

Registered apprenticeship programs can be located through:

- The Office of Apprenticeship's partner finder tool and
- The applicable State Apprenticeship Agency

Recordkeeping

A taxpayer must comply with the general recordkeeping requirements under section 6001 and Treas. Reg. § 1.6001-1, including maintaining books of account or records for contractors or subcontractors of the taxpayer, as applicable, in sufficient form to establish that the Apprenticeship Labor Hour and the Apprenticeship Participation Requirements have been satisfied.

Definitions

The Notice provides the following definitions relevant to the apprenticeship requirements (*see* Appendix for the relevant title 29 CFR sections):

- For "journeyworker," *see* 29 CFR 29.2
- "Apprentice-to-journeyworker ratio" means the ratio described under 29 CFR 29.5(b)(7)
- For "State Apprenticeship Agency," *see* 29 CFR 29.2

Observations:

- Apprenticeship definitions for employ and construction, alteration, or repair mirror the definitions in prevailing wage
- Apprenticeship recordkeeping requirements are also identical to those for prevailing wage
- The Notice provides more details on the good faith exception for noncompliance with apprenticeship requirements
- The definitions provided cross-reference other DOL regulations and are likely bound by the related precedents

Notice 2022-61: Begun Construction Requirement

The Notice provides guidance for the begun construction requirement for purposes of determining whether a taxpayer is deemed to meet the prevailing wage and apprenticeship requirements (by beginning construction by 59 days after publication – January 28, 2023) and more generally for all other purposes of the modified and new credits as listed below.

Sections 30C, 45V, 45Y, and 48E

- For purposes of the Physical Work Test or the Five Percent Safe Harbor, apply principles similar to Notice 2013-29
- For the Continuity Requirement, apply principles similar to the IRS Notices, which refer to all previously issued begun construction notices under sections 45, 45Q, and 48[4]
- For Continuity Safe Harbor, apply principles similar to section 3 of Notice 2016-31 (*i.e.*, 4 calendar years)

Sections 45, 45Q, and 48

- Continue to apply the IRS Notices for purposes of the Physical Work Test and Five Percent Safe Harbor; existing Continuity Requirement and Continuity Safe Harbors apply.

Section 179D

- For purposes of the Physical Work Test or the Five Percent Safe Harbor, apply principles similar to Notice 2013-29

Observations:

- For sections 48 (ITC) and 45 (PTC), the pre-existing guidance related to the Begun Construction Requirement applies
- In other words, all of the IRS notices related to section 48, including Notice 2021-5, that provides the 10-year Continuity Safe Harbor period for offshore wind and onshore federal land projects, continue to apply for sections 48 and 45
- For a facility or energy project the construction of which begins after December 31, 2024 (and is only eligible to claim section 48E or section 45Y (the tech-neutral ITC or PTC)), the Notice specifically applies section 3 of Notice 2016-31 that provides only for a 4-year Continuity Safe Harbor period
- This differing treatment of ITC/PTC from the tech-neutral ITC/PTC is without any explanation in the Notice
- The guidance suggests that if a taxpayer begins construction of an offshore wind project before 2025, it has 10 years to place the project into service to meet the Continuity Safe Harbor for all purposes of the ITC (*i.e.*, prevailing wage and apprenticeship, domestic content, etc.)
- If a taxpayer begins construction of an offshore wind project after 2024, it may only have 4 years to place the project in service to meet the Continuity Safe Harbor for all purposes of the tech-neutral ITC (*i.e.*, eligibility, prevailing wage and apprenticeship, domestic content, etc.)

Appendix

Below is a list of helpful websites maintained by DOL for IRA prevailing wage and apprenticeship requirements.

- www.sam.gov, for wage determinations
- https://www.dol.gov/agencies/whd/IRA, for general information, including FAQs
- https://www.apprenticeship.gov/partner-finder, for registered apprenticeship programs
- https://www.apprenticeship.gov/about-us/state-offices, for registered apprenticeship programs
- https://www.apprenticeship.gov/about-us/apprenticeship-system, for general information and a map showing which state agencies have been recognized by DOL as State Apprenticeship Agencies, along with state agency contact information

Below is a list of terms defined in the Notice by reference to Title 29 CFR sections.

Term	Definition
Apprentice-to-journeyworker ratio, 29 CFR 29.5(b)(7)	A numeric ratio of apprentices to journeyworkers consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements. The ratio language must be specific and clearly described as to its application to the job site, workforce, department or plant.

Construction, alteration, or repair, 29 CFR 5.2(j), (l)	(j)(1) All types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work within the meaning of (paragraph (l) of this section by laborers and mechanics employed by a construction contractor or construction subcontractor (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self–Determination Act of 1996, all work done in the construction or development of the project), including without limitation— (i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site; (ii) Painting and decorating; (iii) Manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self–Determination Act of 1996 in the construction or development of the project); (iv)(A) Transportation between the site of the work within the meaning of paragraph (l)(1) of this section and a facility which is dedicated to the construction of the building or work and deemed a part of the site of the work within the meaning of paragraph (l)(2) of this section; and (B) Transportation of portion(s) of the building or work between a site where a significant portion of such building or work is constructed, which is a part of the site of the work within the meaning of paragraph (l)(1) of this section, and the physical place or places where the building or work will remain. (2) Except for laborers and mechanics employed in the construction or development of the project under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self–Determination Act of 1996, and except as provided in paragraph (j)(1)(iv)(A) of this section, the transportation of materials or supplies to or from the site of the work by employees of the construction contractor or a construction subcontractor is not "construction, prosecution, completion, or repair" (*see* Building and Construction Trades Department, AFL–CIO v. United States Department of Labor Wage Appeals Board (Midway Excavators, Inc.), 932 F.2d 985 (D.C. Cir. 1991)). (l) The term site of the work is defined as follows: (1) The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project; (2) Except as provided in paragraph (l)(3) of this section, job headquarters, tool yards, batch plants, borrow pits, etc., are part of the site of the work, provided they are dedicated exclusively, or nearly so, to performance of

	the contract or project, and provided they are adjacent or virtually adjacent to the site of the work as defined in paragraph (l)(1) of this section; (3) Not included in the site of the work are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.
Journeyworker, 29 CFR 29.2	A worker who has attained a level of skill, abilities and competencies recognized within an industry as having mastered the skills and competencies required for the occupation. Use of the term may also refer to a mentor, technician, specialist or other skilled worker who has documented sufficient skills and knowledge of an occupation, either through formal apprenticeship or through practical on-the-job experience and formal training.
Laborer or mechanic, 29 CFR 5.2(m)	Includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term laborer or mechanic includes apprentices, trainees, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics. Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent.
State Apprenticeship Agency, 29 CFR 29.2	An agency of a State government that has responsibility and accountability for apprenticeship within the State. Only a State Apprenticeship Agency may seek recognition by the Office of Apprenticeship as an agency which has been properly constituted under an acceptable law or Executive Order, and authorized by the Office of Apprenticeship to register and oversee apprenticeship programs and agreements for Federal purposes.

Wages, 29 CFR 5.2(p)	Basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan of program, which was communicated in writing to the laborers and mechanics affected. The fringe benefits enumerated in the Davis–Bacon Act include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits. Fringe benefits do not include benefits required by other Federal, State, or local law.

Footnotes

[1] On December 7, 2022, IRS issued a correction to Notice 2022-61, providing that the prevailing wage and apprenticeship requirement applicability date is January 29, 2023, not January 30, 2023 as previously published.
[2] Section 45(b)(7)(A).
[3] Section 45(b)(8)(A).
[4] Notice 2013-29, Notice 2013-60, Notice 2014-46, Notice 2015-25, Notice 2016-31, Notice 2017-04, Notice 2018-59, Notice 2019-43, Notice 2020-41, Notice 2021-5, Notice 2021-41, and Notice 2020-12.