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US Clean Energy Tax Credits: New Guidance on Prevailing Wage and Apprenticeship Requirements

The US Inflation Reduction Act of 2022 (the “IRA”) provides numerous tax incentives for domestic clean energy projects. Many of the tax credits and deductions are increased when certain prevailing wage and registered apprenticeship (PWA) requirements are met.

In total, eleven tax credits and one tax deduction have provisions that increase the credit or deduction by five-fold when PWA requirements are met. New solar, wind, hydrogen, carbon sequestration and nuclear projects along with energy storage facilities can achieve substantial increases in their credits/deductions if PWA requirements are met.

On August 30, 2023 the IRS released a [Notice of Proposed Rulemaking \(“NPRM”\)](#) regarding the PWA requirements. This guidance builds upon previous guidance on the PWA requirements—[Notice 2022-61](#)—released on November 29, 2022:

A. Prevailing Wage Requirements

1. Incorporation of Certain Davis-Bacon Act Guidance

The Davis-Bacon Act of 1931 (the “DBA”) requires Federal agencies to pay at least the minimum local prevailing wages for laborers and mechanics on public works projects.¹ All of the tax provisions that have PWA requirements reference the DBA when discussing prevailing wage determinations.

The proposed regulations largely incorporate existing DBA guidance—such as the definition of contractor and subcontractor.² Moreover, consistent with the DBA for purposes of prevailing wage requirements, a laborer or mechanic would be considered employed regardless of whether the individual is an employee or an independent contractor for other Federal tax purposes.³

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2. Definitions

The prevailing wage requirement applies only to “mechanics” and “laborers.” The proposed regulations define these two terms as referring to those individuals whose duties are manual or physical in nature.⁴ These include apprentices and helpers. Moreover, forepersons who devote more than 20% of their time during a workweek to laborer or mechanic duties and who do not meet the criteria for exemption under [29 CFR part 541](#) would be considered laborers and mechanics for the time spent doing the relevant activity.

Excluded from the prevailing wage requirement are individuals whose duties are primarily administrative, executive, or clerical and those who are in an executive, administrative, or professional capacity as defined in [29 CFR part 541](#).

Moreover, the prevailing wage requirement applies to “construction, alteration, or repair” which the proposed regulations define according to [29 CFR 5.2](#).⁵ This is broadly construed to include constructing, altering, remodeling, or installing of items fabricated offsite; painting and decorating; and manufacturing or furnishing of materials, articles, and supplies or equipment at the location of the facility. However, regular maintenance work that occurs after a qualifying facility is placed in service is not included—thus workers engaging in maintenance work will not be subject to prevailing wage requirements.

The proposed regulations provide that the relevant locality or geographic area for determining the relevant prevailing wage would be the county, independent city, or other civil subdivision of the State in which the facility or secondary site is located.⁶ In the event that a significant portion of the building or work is constructed at a secondary site for specific use in the designated building or work, workers at that facility may be required to also conform to the prevailing wage requirement according to [29 CFR 5.2](#).

3. Establishing the Prevailing Wage

The prevailing wage is determined by the Department of Labor (the “DOL”) in accordance with the DBA. The DOL publishes a list of wage and bona fide fringe benefit rates determined to be prevailing for laborers and mechanics for the various classifications of work performed with respect to a specified type of construction in a geographic area. The proposed regulations lay out special procedures in which the taxpayer must request supplemental wage determinations when the DOL does not publish applicable rates for the geographic area or for a specific line of work.⁷

The prevailing wage rate is determined and fixed at the start of construction of a facility.⁸ Taxpayers will not be required to update the applicable prevailing wage rates if a new general wage determination is published by the DOL during construction. However, if a contract is changed to include additional, substantial construction, alteration, or repair work not within the scope of work of the original contract or to require work to be performed for an additional time period not originally obligated, the DOL wage determination in effect at the time of such change would apply.

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For repairs and alterations after a facility is placed in service, the applicable wage determination is the one in effect at the start of the new work.

4. Correction and Penalty Provisions

In the event a taxpayer files a return that claims an increased credit due to PWA but fails to meet the requirements, the relevant statutes and proposed regulations establish a procedure that requires the taxpayer to pay a penalty and cure the failure.⁹

If the IRS finds that there was “intentional disregard” in failing to pay laborers and mechanics the prevailing wage, the correction payment is tripled and the amount of the penalty payment is doubled.¹⁰

On the other hand, if the error is promptly fixed and is sufficiently small (as defined in the proposed regulations), the penalty payment requirement may be waived by the IRS.¹¹

B. Apprenticeship Requirements

The apprenticeship requirement requires that the “Labor Hours Requirement,” and “Participation Requirement” are satisfied. The proposed regulations explain the details of these requirements.

1. Labor Hours Requirement

Under the Labor Hours Requirement, the taxpayer must ensure that no less than the “applicable percentage” of the total labor hours are performed by qualified apprentices. The applicable percentage is 10% for projects that started before Jan. 1, 2023, 12.5% for projects that start after December 31, 2022 and before January 1, 2024, and 15% for projects that start after December 31, 2023.¹²

Under the proposed regulation, hours worked under a pre-apprenticeship program would not count toward the Labor Hours Requirement.

The Labor Hours Requirement is subject to an additional rule, which provides that the hours worked by registered apprentices on a particular day do not count towards the Labor Hours Requirement unless the applicable apprenticeship-to-journeyworker ratio, as established by either the DOL or the applicable State apprenticeship agency, is satisfied on such day.¹³

The proposed regulations also provide that in the event the ratio is not satisfied, the registered apprentices in excess of the applicable ratio must be paid the full prevailing wage rate.

2. Participation Requirement

The Participation Requirement is designed to prevent taxpayers from satisfying the Labor Hours Requirement by only hiring apprentices to perform one type of work. The proposed regulation mandates that any line of work on a qualifying project with four or more employees must have at least one apprentice.¹⁴

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3. Good Faith Effort Exception

In the event apprentices cannot be found, a “Good Faith Effort Exception” allows taxpayers to satisfy the Apprenticeship Requirements through special procedures. Notice 2022-61 provided that taxpayers could satisfy this exception if the taxpayer requested apprentices “in accordance with usual and customary business practices for registered apprenticeship programs in a particular industry.”

The proposed regulation provides further guidance on the “usual and customary standard.”¹⁵

4. Opportunity to Cure

In the event of failure to meet the Apprenticeship Requirements or the Good Faith Effort Exception, taxpayers have the opportunity to cure by paying a penalty to the Secretary.¹⁶ The proposed regulations establish the formula in calculating the penalty, and there is a ten-fold increase in the penalty in the event of “intentional disregard,” which is defined as being “knowing or willful” considering all relevant facts and circumstances.¹⁷

C. Reporting and Recordkeeping Rules

The proposed regulations provide that taxpayers must establish compliance with the PWA at the time of filing a tax return claiming the increased credit.¹⁸ The proposed regulations list the various types of information required to be reported at filing. Additionally, the proposed regulations impose recordkeeping requirements. Recordkeeping related to prevailing wage requirements is largely consistent with the existing DBA regime. For apprenticeship-related recordkeeping, the regulations establish the taxpayer’s responsibility to maintain relevant records for each apprentice, regardless of whether the apprentice is employed by the taxpayer, a contractor, or a subcontractor. In cases of transferred credits, the PWA recordkeeping requirements will remain with the transferor.¹⁹

TABLE OF TAX CREDITS WITH PWA MULTIPLIERS

<u>Provision</u>	<u>Description</u>	<u>Results of Meeting PWA Requirements</u>
26 U.S.C § 30C	Alternative fuel vehicle refueling property credit	Amount of credit multiplied by five. 26 U.S.C § 30C(g)
26 U.S.C § 45	Tax credit for electricity produced from renewable resources.	Amount of credit multiplied by five. 26 U.S.C § 45(b)(6)
26 U.S.C § 45L	Energy efficient home credit.	Amount of credit multiplied by five. 26 U.S.C § 45L(g)(1). No Apprenticeship Requirements.
26 U.S.C § 45Q	Credit for carbon dioxide sequestration	Amount of credit multiplied by five. 26 U.S.C § 45Q(h)(1)

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<u>Provision</u>	<u>Description</u>	<u>Results of Meeting PWA Requirements</u>
26 U.S.C § 48	Energy Credit (covering various energy generation projects—solar, geothermal, wind—along with energy storage projects)	Amount of credit multiplied by five. 26 U.S.C § 48(a)(9)(A)(i)
26 U.S.C § 48C	Qualifying Advanced Energy Project Credit	Amount of credit multiplied by five. 26 U.S.C § 48C(h)(1)
26 U.S.C § 179D	Energy Efficient Commercial Buildings Deduction	Amount of deduction multiplied by five. 26 U.S. Code § 179D
26 U.S.C § 45U	Zero-emission Nuclear Power Production Credit	Amount of credit multiplied by five. 26 U.S.C § 45U(d)(1). No Apprenticeship Requirements.
26 U.S.C § 45V	Hydrogen Production Tax Credit.	Amount of credit multiplied by five. 26 U.S.C § 45V(e)(3)(A)
26 U.S.C § 45Y	Clean Energy Production Credit	Amount of credit multiplied by five. 26 U.S.C § 45Y(a)(2)(B)(iii)
26 U.S.C § 45Z	Clean Fuel Production Credit	Amount of credit multiplied by five. 26 U.S.C § 45Z(a)(2)(B)
26 U.S.C § 48E	Clean Energy Investment Credit	Amount of credit multiplied by five. 26 U.S.C § 48E(a)(2)(ii)

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Questions regarding the matters discussed in this publication may be directed to [Isaac Wheeler](#), [Inosi Nyatta](#), [Saul Brander](#), [Sam Saunders](#), and [Ellen Kim](#) or any Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. Additional S&C resources about energy transition matters may be found [here](#). This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice.

ENDNOTES

- 1 40 U.S.C. 3141 *et seq.*
- 2 Prop. Reg. § 1.45–7(d)(3), (8).
- 3 Prop. Reg. § 1.45–7(d)(5) .
- 4 Prop. Reg. § 1.45–7(d)(7).
- 5 Prop. Reg. § 1.45–7(d)(2).
- 6 Prop. Reg. § 1.45–7(d)(6).
- 7 Prop. Reg. § 1.45–7(a)(3).
- 8 Prop. Reg. § 1.45–7(b)(2).
- 9 Prop. Reg. § 1.45–7(c).
- 10 The proposed regulations define the legal standard of “intentional disregard” as being “knowing or willful,” and the IRS would consider whether the failure was part of a pattern of conduct. Prop. Reg. § 1.45–7(c)(3).
- 11 Prop. Reg. § 1.45–7(c)(6).
- 12 Prop. Reg. § 1.45–8(b)(2)).
- 13 The proposed regulation adopts the definition of “journeyworker” in 29 CFR 29.2—“a laborer or mechanic 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.” Prop. Reg. § 1.45–8(c).
- 14 Prop. Reg. § 1.45–8(d).
- 15 To meet the standard, the taxpayer, contractor, or subcontractor must make a written request to at least one registered apprenticeship program in the geographic area of operation. The request must contain certain information set out in the proposed regulation. If the request is denied, the taxpayer, contractor, or subcontractor must submit an additional request within 120 days. Prop. Reg. § 1.45–8(e)(1).
- 16 Prop. Reg. § 1.45–8(e)(2).
- 17 Prop. Reg. § 1.45–8(e)(2)(ii).
- 18 Prop. Reg. § 1.45–12.
- 19 Prop. Reg. § 1.45–12(a).