

Employee Benefit Plan Review

Prevailing Wage and Apprenticeship Requirements – An Analysis of the Final Regulations

BY JEFFREY H. PARAVANO, JEREMIAH L. HART AND NICHOLAS C. MOWBRAY

The Inflation Reduction Act¹ modified and reinstated existing renewable energy credits, enacted new renewable energy credits, and included a mechanism for certain tax credits to increase by a multiple of five if the taxpayer or energy project satisfies certain Prevailing Wage and Apprenticeship Requirements. The Internal Revenue Service (IRS) and Department of the Treasury (Treasury) issued Notice 2022-61 on November 30, 2022, which included guidance related to the Prevailing Wage and Apprenticeship Requirements under § 30C, § 45, § 45L, § 45Q, § 45U, § 45V, § 45Y, § 45Z, § 48, § 48C, § 48E and § 179D.² The IRS and Treasury followed up on Notice 2022-61 on August 29, 2023, with the issuance of a notice of proposed rulemaking addressing the Prevailing Wage and Apprenticeship Requirements.³ The IRS and Treasury received 342 comments regarding the proposed regulations. On June 18, 2024, the IRS and Treasury finalized the proposed regulations.⁴ The final regulations generally took effect beginning August 26, 2024.

In addition to the final regulations, the IRS also released Publication 5983,⁵ which provides taxpayers with a summary of the Prevailing Wage and Apprenticeship Requirements. In addition, the U.S. Department of Labor (DOL) and the IRS will issue in 2024 a memorandum

of understanding regarding the DOL's review of IRS forms and how the DOL and IRS will work together to develop the Prevailing Wage and Apprenticeship Requirements.

This article summarizes the final regulations, looks at where they diverge from the proposed regulations, and offers some observations regarding the final regulations.

OVERVIEW OF THE PREVAILING WAGE REQUIREMENTS AND APPRENTICESHIP REQUIREMENTS

Similar to the statutes and the proposed regulations, the final regulations make clear that projects that began construction before Jan. 29, 2023, and facilities that have a maximum net output of less than one megawatt qualify for increased credit amounts and are thus not required to satisfy the Prevailing Wage and Apprenticeship Requirements. Projects that began construction after Jan. 29, 2023, or that have a maximum net output of greater than one megawatt, must therefore satisfy the Prevailing Wage and Apprenticeship Requirements in order to qualify for the “bonus” credit amount that increases a base credit by a multiple of five.

The Prevailing Wage requirement is satisfied if laborers and mechanics employed by the taxpayer or a contractor or subcontractor working on the construction of such facility or

on repairs or alterations to the facility 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 work is performed (Prevailing Wage Requirement). Similar to the proposed regulations, the final regulations state that what constitutes a prevailing wage is based on statutorily prescribed wage rate requirements and rates published by the DOL for the geographic areas and type of job or labor classification.

The Apprenticeship Requirements are satisfied by ensuring that an applicable percentage of total labor hours with respect to the construction, alteration or repair work is performed by qualified apprentices (Labor Hours Requirement) and that each contractor or subcontractor that employs four or more individuals employs one or more qualified apprentices to perform such work (Participation Requirement). In addition, taxpayers must satisfy certain apprentice-to-journeyman ratios as established by the DOL or applicable state apprenticeship agency (Ratio Requirement).⁶ A qualified apprentice is defined as an individual who is employed by the taxpayer or any contractor or subcontractor and who is participating in a registered apprenticeship program. The final regulations maintain that the Prevailing Wage Requirements and the Apprenticeship Requirements apply to the taxpayer that either claimed the increased credit amount or transferred a specified credit portion under § 6418.

PREVAILING WAGE REQUIREMENTS

The final regulations maintain that taxpayers may rely on general wage determinations published by the DOL. However, the final regulations clarify that the applicable general wage determination is the wage determination in effect for the specified type of construction in the geographic area at the time a contract for the construction, alteration or repair is executed, not when

construction begins. In addition, the final regulations clarify that the relevant geographic area is where the facility is located, and that if there is more than one geographic area, the taxpayer, contractor or subcontractor must use the applicable wage determinations for the work performed in each geographic area. The final regulations are consistent with the proposed regulations in that they state taxpayers do not need to update the applicable prevailing wage rates in the event that the DOL issues a new wage determination after a contract is executed. However, taxpayers that perform an alteration or repair that was not within the scope of the original project and does not constitute work designed to maintain and preserve the existing facility after it is placed in service must use the applicable wage determination in effect at the time the alteration or repair work begins. In addition, wage determinations with respect to an indefinite contract not tied to the completion of any specific work must be updated on an annual basis. A new wage determination is not required if additional time is given to complete a contract's original commitment. Taxpayers should be careful not to confuse an extension of time to complete a contract's original commitment with performing additional work not contemplated in the contract's original commitment.

The final regulations generally maintain the proposed regulations' rules regarding supplemental wage determinations. Under the final regulations, a taxpayer must use a supplemental wage determination or an additional classification and wage rate issued by the DOL if there is no general wage determination for the relevant geographic area or the existing wage determination does not list the applicable labor classification. A taxpayer makes a supplemental request by submitting a request to the DOL by email at IRAPrevailingWage@dol.gov. However, the final regulations allow taxpayers to make a supplemental request up to 90 days prior to the execution of the

contract. The final regulations additionally provide that the DOL will within 30 days from the receipt of a request either resolve the request or advise the requester that additional time is needed.

Observations

- Significant changes in the scope of work or indefinite periods for construction, alterations and repairs may require taxpayers to reference a new wage determination by the DOL.
- The final regulations move away from the concept of when construction begins to the concept of when the contract is executed. In addition, taxpayers may make specific wage determination requests up to 90 days prior to the execution of a contract. Both of these should improve cost controls and the planning for renewable energy projects.

APPRENTICESHIP REQUIREMENTS

Apprentices that are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the DOL or with a state apprenticeship agency recognized by the DOL may be paid less than the predetermined rate for the work they perform. Their wages, however, must not be less than the rate specified by the apprenticeship program. In addition, the Ratio Requirement must be met in order to pay apprentices this reduced wage. The final regulations maintain that the Ratio Requirement must be met on a daily basis. If it is not met on any given day, the apprentices must be paid a prevailing wage for that day.

The final regulations clarify that the Apprenticeship Requirements apply during the construction of a facility only, and not to alterations or repairs. The final regulations additionally expand the Ratio Requirement by requiring apprentices to be used across the full range of work performed. A taxpayer

cannot comply with the Participation Requirement if there are multiple types of work performed and the type of work performed by apprentices is limited.

Observations

- The clarification that the Apprenticeship Requirements apply only to the construction of a project will be welcomed by taxpayers.
- Applying the Participation Requirement across the full range of work performed is a strict interpretation of the statute and likely will cause pain points for taxpayers unable to track it in the aggregate.

CORRECTIONS AND PENALTIES RELATED TO FAILURE TO SATISFY THE PREVAILING WAGE REQUIREMENTS

The final regulations further clarify how taxpayers may cure their failure to comply with the Prevailing Wage Requirements. In order to correct their failure and be deemed to satisfy the Prevailing Wage Requirements, a taxpayer must pay any laborer or mechanic who was paid wages at a rate below a prevailing wage (1) an amount equal to the difference between the amount of wages paid to such laborer or mechanic and the amount of prevailing wages required to be paid to such laborer, and (2) interest equal to the federal short-term rate plus 6 percent. A taxpayer must also pay a penalty equal to \$5,000 multiplied by the total number of laborers or mechanics who were paid wages at a rate below the prevailing wage rate. The correction payment amount increases by a multiple of three and the penalty amounts increase to \$10,000 if the failure to satisfy the Prevailing Wage Requirements is intentional. An eligible taxpayer that elects to

transfer a specified credit portion under § 6418 remains obligated to make correction and penalty payments pursuant to the proposed regulations.

The obligation to satisfy the Prevailing Wage Requirements becomes binding upon the earlier of (1) the filing of the eligible taxpayer's return for the taxable year for which the specified credit portion is determined with respect to the eligible credit, and (2) the filing of the return of the transferee taxpayer for the year in which the transferred specified credit portion is taken into account. A taxpayer generally has 180 days after a final determination by the IRS to correct their failure to satisfy the Prevailing Wage Requirements.

The final regulations slightly amend the proposed regulations with respect to penalty waivers. Penalties are waived if (1) a taxpayer makes a correction payment to the laborer or mechanic by the last day of the first month following the end of the calendar quarter in which the taxpayer became aware of the error or the date on which the increased credit is claimed, and (2) either the laborer or the mechanic is paid wages at rates less than the prevailing wage for less than 10 percent of the pay periods in the calendar year, or the amount of the shortfall is not greater than 5 percent of the amount required to be paid. Penalties are also waived if work is done pursuant to a project labor agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and any correction payment is made on or before the date on which an increased credit is claimed. The final regulations additionally confirm what taxpayers should do if they cannot locate a laborer or mechanic that was not paid a prevailing wage. In these instances, correction payments will be considered to have

been made if the taxpayer complies with the applicable state unclaimed property law and if all federal and state withholding and information reporting requirements with respect to the payments are met.

Eligible taxpayers that fail to meet the Prevailing Wage Requirements and fail to make correction and penalty payments still may claim the lower base credit amount if they meet all of the other requirements to claim the credit (e.g., an eligible taxpayer could claim an investment tax credit equal to 6 percent of the basis of property placed in service if they meet all of the requirements under § 48).

Observations

- The cure provisions are generally beneficial to taxpayers.
- The final regulations clarify that taxpayers may rely on state unclaimed property laws in the event they underpay a worker and cannot locate her to make a correction payment.
- Taxpayers should consider the impact of the cure provisions on their contracts with contractors and subcontractors, and how they can ensure that their contractors and subcontractors have procedures in place to comply with the cure provisions.
- The penalty waivers for project labor agreements demonstrate that, consistent with the overall stance of the Biden administration, the Treasury and the IRS are seeking to incentivize contractors to utilize organized labor.

CORRECTIONS AND PENALTIES RELATED TO FAILURE TO SATISFY THE APPRENTICESHIP REQUIREMENTS

The final regulations maintain a similar approach to the proposed regulations regarding the good faith exception to the Apprenticeship

Requirements, with some clarifications. One such clarification is that a taxpayer must make a formal written request to at least one apprenticeship program that has a geographic area of operation that includes the project; trains apprentices in the occupations needed to construct, alter or repair the facility; and regularly enters into agreements with employers for the placement of apprentices. The written request must be sent electronically or by registered mail and must be made no later than 45 days before the qualified apprentices are requested to start work. In addition, the Apprenticeship Requirements are deemed to be satisfied if there is no apprenticeship program in the geographic area of the project.

The final regulations amend the rules regarding when taxpayers have to make additional requests if their original request was denied or was never responded to. Under the proposed regulations, taxpayers were required to make additional requests within 20 days from their prior request. This period was extended to 365 days. Thus, a taxpayer that submits a request for apprentices and does not receive a response or is told there are no apprentices now must resubmit its request to the same apprenticeship program within 365 days from its original or previous request.

A taxpayer that otherwise fails to satisfy the Apprenticeship Requirements is considered to satisfy them if it pays a penalty equal to \$50 multiplied by the total labor hours for which the requirements were not satisfied. The penalty is increased to \$500 multiplied by the total labor hours if the failure to satisfy the Labor Hour Requirement and Participation Requirement was intentional. Penalties are waived for failing to meet the Labor Hour Requirement and the Participation Requirement if the work is done pursuant to a project labor agreement. Notwithstanding, the taxpayer would still need to address whether the apprentice is paid a

prevailing wage for the days on which the Participation Requirement is not met.

Observations

- The extension from 120 days to 365 days to submit additional requests for apprentices is generally favorable.
- The ability to avoid penalties by using project labor agreements is favorable for taxpayers, but will require taxpayers and contractors that traditionally have not used organized labor, including apprentices from a registered program, to evaluate the makeup of their labor force and their labor strategy if they desire to benefit from the proposed regulations' penalty waivers. This could lead to increased labor costs.

RECORDKEEPING REQUIREMENTS – PREVAILING WAGE REQUIREMENTS AND APPRENTICESHIP REQUIREMENTS

The final regulations confirm the requirement to maintain records demonstrating compliance with the Prevailing Wage Requirements and the Apprenticeship Requirements remains with the eligible taxpayer that determined the credit or transferred the credit. At a minimum, those records include payroll records for each laborer and mechanic employed by the taxpayer in the construction, alteration or repair of the qualified facility. The final regulations discuss the use of third-party service providers to track the Prevailing Wage and Apprenticeship Requirements, but state that these service providers cannot be relied on by taxpayers claiming additional credits since taxpayers are required to substantiate their own U.S. federal tax filing positions.

Additional records to demonstrate compliance with the Prevailing

Wage Requirements include the following:

- (1) Identifying information, including the name, Social Security or tax identification number, telephone number, and email address of each laborer or mechanic;
- (2) The location and type of qualified facility;
- (3) The labor classification that was applied to the laborer or mechanic;
- (4) The hourly rate of wages paid for each applicable labor classification;
- (5) Records to support fringe benefit payments;
- (6) The total labor hours worked per pay period;
- (7) The total wages paid for each pay period;
- (8) Records to support wages paid to any apprentices, including records to support the registration of the apprentices with a registered apprenticeship program and applicable wage rates and apprentice-to-journeyman ratios prescribed by the program;
- (9) The amount and timing of any correction payments;
- (10) Records to document any failures to pay prevailing wages and efforts taken to mitigate or remedy the failure; and
- (11) Records related to any complaints received by the taxpayer, contractor or subcontractor that it was not paying prevailing wages.

The preamble to the final regulations notes that the final two types of records demonstrate whether a taxpayer did, or did not, intentionally disregarded the Prevailing Wage Requirements. According to the preamble, these records reflect whether a taxpayer conducted regular reviews of the applicable prevailing wage rates that were required to be paid.

Additional records to demonstrate compliance with the Apprenticeship Requirements include the following:

- (1) Any written requests for the employment of apprentices from registered apprenticeship programs, including any contacts with the DOL or state apprenticeship agency regarding requests for apprentices;
- (2) Any agreements entered into with registered apprenticeship programs with respect to construction, alteration or repair of the facility;
- (3) Documents reflecting the standards and requirements of any registered apprenticeship program, including the Ratio Requirement prescribed by the program;
- (4) The total labor hours worked by apprentices;
- (5) Records reflecting the daily Ratio Requirement;
- (6) Records demonstrating compliance with the good faith effort exception;
- (7) The amount and timing of any penalty payments and documentation reflecting the calculation of penalty payments;
- (8) Records to document any failures to satisfy the Apprenticeship Requirements; and
- (9) Records relating to any complaints that the taxpayer, contractor or subcontractor was not satisfying the Prevailing Wage Requirements.

Similar to penalties applicable to the Prevailing Wage Requirements, the preamble to the final regulations notes that the final four types of records demonstrate whether a taxpayer did, or did not, intentionally

disregard the Apprenticeship Requirements.

Observations

- The recordkeeping guidance and the specific types of records needed are expanded in the final regulations. The preamble also notes that these additional types of records demonstrate whether a taxpayer attempted to comply with the Prevailing Wage Requirements and the Apprenticeship Requirements.

KEY TAKEAWAYS

- The Prevailing Wage Requirements and the Apprenticeship Requirements apply to any taxpayer, contractor or subcontractor that employs laborers and mechanics who work on the construction, alteration or repair of a facility that intends to qualify for certain renewable energy tax credits.
- The final regulations attempt to align the rules with guidance issued under the Davis-Bacon Act relating to wage determinations and when new wage determinations are required. In general, this approach is favorable to taxpayers because it avoids creating two separate sets of rules.
- The final regulations move away from the concept of when construction begins to the concept of when the contract is executed. In addition, taxpayers may make

specific wage determination requests up to 90 days prior to the execution of a contract. Both of these should improve cost controls and the planning for renewable energy projects.

- The ability to avoid penalties by using organized labor pursuant to prehire collective bargaining agreements is favorable to taxpayers.
- The recordkeeping guidance and the specific types of records needed are expanded in the final regulations. The preamble also notes that these additional types of records demonstrate whether a taxpayer attempted to comply with the Prevailing Wage Requirements and the Apprenticeship Requirements. 🌟

NOTES

1. P.L. 117-169, <https://www.congress.gov/bills/117/congress/house-bill/5376/text>.
2. Unless otherwise stated herein, “§” references are to the Internal Revenue Code of 1986, as amended (Code).
3. REG-100908-23.
4. T.D. 9998, <https://www.federalregister.gov/documents/2024/06/25/2024-13331/increased-amounts-of-credit-or-deduction-for-satisfying-certain-prevailing-wage-and-registered>.
5. <https://www.irs.gov/pub/irs-pdf/p5983.pdf>.
6. Collectively, the Labor Hours Requirement, Participation Requirement and Ratio Requirement are referred to as the Apprenticeship Requirements.

The authors, attorneys with Baker & Hostetler LLP, may be contacted at jparavano@bakerlaw.com, jhart@bakerlaw.com and nmowbray@bakerlaw.com, respectively.

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