



Treasury and IRS Issue Proposed Regulations on Prevailing Wage and Apprenticeship Requirements for Inflation Reduction Act's Increased Energy Credit or Deduction Amounts

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The Inflation Reduction Act of 2022 (IRA) provides increased tax credit or deduction amounts, in many instances a five-times-multiplier bonus, for taxpayers meeting prevailing wage and apprenticeship requirements for certain clean energy projects. Recently, on August 29, 2023, the Treasury and the IRS released proposed regulations providing important clarity for the satisfaction of those prevailing wage and apprenticeship requirements, as well as certain exceptions where taxpayers might be eligible to claim the five times increase without meeting the prevailing wage and apprenticeship requirements.

The proposed regulations also provide guidance for taxpayers who initially fail to satisfy the prevailing wage or apprenticeship requirements but later comply, as well as penalty procedures in order to claim the increased tax incentive amounts. Lastly, the proposed regulations address specific recordkeeping and reporting standards for taxpayers claiming the increased amount for the tax incentives.

The IRS also published a frequently asked questions document regarding the proposed regulations and issued Publication 5855, which provides an overview. The frequently asked questions can be found [here](#), and Publication 5855 can be found [here](#).

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Prevailing Wage Rate

The prevailing wage requirements of the IRA require that laborers or mechanics employed by the taxpayer or any contractor or subcontractor (collectively, the "Covered Employers") performing work on a qualified project be paid wages at rates that are not less than the prevailing rates proscribed by the Secretary of Labor in accordance with the Davis-Bacon Act.

The prevailing wage rate applies to laborers and mechanics employed by a Covered Employer on the construction, alteration, or repair of a qualified facility, project, property, or equipment. Under the proposed regulations, the terms "laborer" and "mechanic" mean those individuals whose duties are manual or physical in nature and does not include individuals whose duties are primarily administrative, executive, or clerical. A worker would be covered if the worker performs the duties of a laborer or mechanic for the taxpayer (or contractor or subcontractor), regardless of whether the individual would be classified as an employee for Federal tax purposes. For example, laborers and mechanics who are independent contractors for employment tax purposes may be considered employed for purposes of the IRA prevailing wage requirements.

The term construction, alteration, or repair generally means all types of work performed at the location of the facility. However, under the proposed regulations, the prevailing wage requirements also apply to work performed at a secondary work site that is established for work at the facility (and the prevailing wage rate is determined based on the geographic area in which the secondary site is located).

The prevailing wage is the combination of the basic hourly wage rate and any fringe benefits rate paid to workers. General wage determinations are published by the Wage and Hour Division of the US Department of Labor's System for Award Management and are available here. Further, the proposed regulations provide a process for taxpayers (or contractors or subcontractors) to request a supplemental wage determination from the Wage and Hour Division of the Department of Labor by emailing iraprevailingwage@dol.gov.

Taxpayers are required to maintain and preserve sufficient records to establish compliance with the requirement that all laborers and mechanics used by a Covered Employer be paid wages at rates not less than the applicable prevailing rates, described in more detail below.

Apprenticeship Program

The apprenticeship requirements of the IRA require that, generally, a certain percentage of the covered work be performed by qualified apprentices from a registered apprenticeship program. A qualified apprentice is an individual employed by a Covered Employer and participating in a Registered Apprenticeship program registered under the National Apprenticeship Act. Under the proposed regulations, a Covered Employer that employs four or more laborers or mechanics on the project must also hire at

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least one qualified apprentice and must ensure that 12.5% or 15% of the total labor hours performed are performed by qualified apprentices from a registered apprenticeship program, and the number of apprentices meets required ratios established by the registered apprenticeship program.

Under the proposed regulations, apprentices must be paid at no less than the rate specified by the registered apprenticeship program for the apprentice's level of progress for the apprentice's classification in the applicable wage determination. However, apprentices may be paid at less than the prevailing rate for work under certain circumstances.

The proposed regulations provide a "good faith" exception to the apprenticeship requirements. The good faith effort exception is satisfied if the Covered Employer makes a written request for apprentices from a registered apprenticeship program that meets certain requirements (e.g., geographic area of operation, can be reasonably expected to provide apprentices, etc.) and either the request was denied (unrelated to a refusal of the requesting entity to comply with the program's standards and requirements), or the program failed to respond within five business days of receiving a request. If a request was not responded to or was denied, the taxpayer must submit an additional request(s) to a registered apprenticeship program after 120 days to continue to be eligible for the good faith effort exception.

Taxpayers are required to maintain and preserve records to establish compliance with the apprenticeship requirements (e.g., any written requests for apprentices, agreements entered into, records reflecting the required ratio of apprentices to journeyworkers prescribed, etc.), described in more detail below.

Exceptions to the Prevailing Wage and Apprenticeship Requirements

One Megawatt Exception. For energy generation credits under Sections 45, 45Y, 48, and 48E, a facility that has a maximum net output of less than one megawatt of electrical energy (as measured in alternating current), thermal energy, or energy storage technology may be eligible for the increased credit amount without satisfying the prevailing wage and apprenticeship requirements.

Beginning of Construction Exception. For credits under Sections 30C, 45, 45Q, 45V, 45Y, 48, 48E, and the deduction under 179D, a taxpayer that began construction or installation of a facility before Jan. 29, 2023, may be eligible for the increased credit or deduction amount without needing to satisfy the prevailing wage and apprenticeship requirements.

Corrections and Penalties

If a Covered Employer has not met the prevailing wage or apprenticeship requirements, the statute permits a taxpayer to still receive the increased credit or deduction amounts by making certain corrections and penalty payments.

Treasury and IRS Issue Proposed Regulations on Prevailing Wage and Apprenticeship Requirements for Inflation Reduction Act's Increased Energy Credit or Deduction Amounts

For prevailing wage requirement failures, taxpayers must make correction payments for any underpaid or missing wages (difference between the wages actually paid and the amount that were required to be paid under the prevailing wage requirements) plus interest of 6% to the affected laborers and mechanics, and taxpayers may also owe a penalty payment to the IRS; this penalty is typically \$5,000 times the number of laborers and mechanics paid wages not meeting the prevailing wage requirements. If the Secretary of the Treasury determines the failure of the prevailing wage requirements was due to “intentional disregard” of those requirements, the correction payment is three times higher, and the penalty payment is doubled to \$10,000 per laborer or mechanic.

To cure a failure to meet the apprenticeship requirements, a taxpayer must pay a penalty of \$50 multiplied by the total labor hours for which the apprenticeship requirements were not met. This penalty amount is increased to \$500 per labor hour if the IRS determines the failure was due to intentional disregard of the labor hours requirement or participation requirement.

Determinations of whether failures were due to “intentional disregard” are made by considering all relevant facts and circumstances and center around whether the failure was willful. For both the prevailing wage and apprenticeship requirements, the IRS will generally look at the following facts when determining whether failures to meet the requirements were the result of intentional disregard: (1) whether the failure was part of repeated conduct or systematic failures; (2) whether the taxpayer failed to promptly cure any failures; (3) whether the taxpayer was required to make penalty payments in previous years; (4) whether the taxpayer undertook quarterly or frequent reviews; and (5) whether the taxpayer included provisions in contracts entered into with contractors requiring the contractors and subcontractors to pay laborers and mechanics at or above the prevailing wage rates and the employment of apprentices and to maintain records to ensure compliance with the recordkeeping requirements.

A taxpayer is afforded a rebuttable presumption of no intentional disregard for both the prevailing wage and apprenticeship requirements if the taxpayer makes the correction and penalty payments before receiving notices of an examination by the IRS with respect to a claim for the increased credits.

Recordkeeping Requirements

Generally, taxpayers claiming the increased credit amount by meeting the prevailing wage and apprenticeship requirements are required to meet specific recordkeeping requirements. At a minimum, taxpayers must maintain payroll records for each laborer, mechanic, and qualified apprentice employed by the taxpayer and records of any contractor or subcontractor used in the construction, alteration, or repair of the qualified facility.

Treasury and IRS Issue Proposed Regulations on Prevailing Wage and Apprenticeship Requirements for Inflation Reduction Act's Increased Energy Credit or Deduction Amounts

To meet the prevailing wage recordkeeping requirement, the taxpayer must also maintain payroll records and other records sufficient to demonstrate compliance with the prevailing wage requirements and the proposed regulations provide the following examples: (1) location and type of qualified facility; (2) labor classifications the taxpayer applied to the laborer or mechanic and documentation supporting the classification and the applicable wage determination; (3) each laborer or mechanic's hourly rates (including raters of contributions or costs for bona fide fringe benefits or cash equivalents); (4) total number of labor hours worked per pay period; (5) total wages paid for each pay period (including any deductions from wages); (6) records on apprentices to include wages paid, registration with an apprenticeship program, and applicable wage rates and apprentice to journeyworker ratios; and (7) the amount and timing of any correction payments and documentation reflecting the calculation of the correction payments.

To meet the apprenticeship recordkeeping requirements, the taxpayer must maintain sufficient records, which may include: (1) any written requests for the employment of apprentices from registered apprenticeship programs, including any communication with the U.S. Department of Labor's Office of Apprenticeship or a state apprenticeship agency requesting apprentices from their programs; (2) any agreements with registered apprenticeship programs; (3) documents related to the taxpayer's apprenticeship program to include the applicable ratio requirement; (4) total number of labor hours worked by apprentices; and (5) records of the daily ratio of apprentices to journeyworkers.

Conclusion

Comments on the proposed regulations must be received by **Oct. 30** and can be submitted electronically via the Federal eRulemaking Portal at <https://www.regulations> (indicate IRS and REG-100908-23). Paper submissions can also be submitted to: CC:PA:LPD:PR (REG-100908-23), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. A public hearing on the proposed regulations is scheduled to be held on Nov. 21, 2023, at 10 a.m. ET and requests to attend or speak at the public hearing must be received by Nov. 17, 2023, at 5 p.m. ET by contacting Vivian Hayes at (202) 317-6901 or publichearing@irs.gov.

Burr Forman's Green Energy Team will continue to monitor and update you with legal developments under the Inflation Reduction Act of 2022 and related regulations. If you have any questions, please reach out to John Wall, Matthew Scully, or any member of Burr Forman's Green Energy Team.