

December 2022

Follow @Paul\_Hastings



# *IRS Publishes Initial Tax Credit Guidance on Prevailing Wage and Apprenticeship Requirements*

By [Michael Haun](#), [Kami LaBerge](#) & [Lena Son](#)

The Inflation Reduction Act of 2022 (the “IRA”) added and modified certain tax credit and deduction provisions of the U.S. Internal Revenue Code of 1986, as amended (the “Code”).<sup>1</sup> One significant addition is that taxpayers must satisfy certain prevailing wage and apprenticeship requirements to qualify for full tax credit or deduction amounts. These requirements generally apply to the Section 45 production tax credit, the Section 48 investment tax credit, the Section 45Q carbon capture credit, the Section 30C alternative fuel vehicle refueling property credit, the Section 45V clean hydrogen production credit, the Section 45Y production tax credit, the Section 48E investment tax credit, and the Section 179D energy efficient commercial building deduction.

Under the IRA, the prevailing wage and apprenticeship requirements do not apply to facilities that begin construction (or installation in the case of Code Section 179D) before the date that is 60 days after Treasury publishes guidance on the requirements.

On November 29, 2022, the Internal Revenue Service (“IRS”) issued [Notice 2022-61](#) (the “Notice”) to provide initial guidance on the prevailing wage and apprenticeship requirements. The publication of the Notice in the Federal Register on November 30, 2022 began the 60-day period with respect to the applicability of these requirements, and thus those requirements will apply to facilities that begin construction on or after January 30, 2023.

The Notice includes guidance on the following items:

## **I. Prevailing Wage Requirement**

The IRA provides that for a taxpayer to satisfy the prevailing wage requirement with respect to a facility, all laborers and mechanics employed at the facility or any contractors or subcontractors employed to construct, alter, or repair the facility must be paid wages at prevailing rates, as determined by the Department of Labor (“DOL”).

The Notice clarifies this prevailing wage requirement, providing that it will be satisfied if (1) the taxpayer pays the prevailing wage rates “to any laborer or mechanic employed in the construction, alteration, or repair of the facility, property, project, or equipment by the taxpayer or any contractor or subcontractor of the taxpayer” and (2) the taxpayer maintains sufficient records to establish that those laborers and mechanics were paid wages not less than the prevailing rates.

A taxpayer (or any contractor or subcontractor) is considered to “employ” an individual for purposes of this rule if that individual performs services in exchange for remuneration, regardless of whether that individual is characterized as an employee or independent contractor for tax purposes. Terms such as “wage,” “laborer or mechanic,” and “construction, alteration, or repair” are defined to have the same meanings as in published DOL regulations.<sup>2</sup>

The Notice also provides guidance on how a taxpayer should determine the prevailing wage rates that apply to a facility. If a prevailing wage determination has been published by the DOL<sup>3</sup> for the geographic area and type of construction applicable to the facility, the rates contained in that prevailing determination apply. But if such a prevailing wage determination has not been published (or if one or more labor classifications is not listed in a published determination), the taxpayer may use procedures to request a wage determination or wage rate and must notify the DOL via email of its intent to rely on the wage determination or rate provided in response. In addition, a lower prevailing wage rate may apply for qualified apprentices hired through a registered apprenticeship program.

The Notice also sets forth examples to further illustrate when the prevailing wage requirement is satisfied.

## **II. Apprenticeship Requirement**

The IRA generally provides that for a taxpayer to satisfy the apprenticeship requirement with respect to a facility, no fewer than an “applicable percentage” of total labor hours of the construction, alteration, or repair work with respect to the facility must be performed by qualified apprentices. The “applicable percentage” is 12.5% for facilities that begin construction in 2023 and 15% for facilities that begin construction after 2023.<sup>4</sup>

The Notice clarifies this apprenticeship requirement, providing that it will be satisfied with respect to a facility if (1) no fewer than the applicable percentage of the total labor hours of the construction, alteration, or repair work on the facility are performed by qualified apprentices, subject to any applicable apprentice-to-journeyworker ratio requirements of the DOL or the applicable State Apprenticeship Agency, (2) each taxpayer (or contractor or subcontractor) who employs four or more individuals to perform construction, alteration, or repair work with respect to the construction of the facility employs at least one qualified apprentice to perform that work, and (3) the taxpayer complies with general recordkeeping requirements in sufficient form to establish that the above requirements have been satisfied.

The IRA includes a good faith effort exception for failure to comply with the apprenticeship requirement. Under that exception, the IRS will deem a taxpayer to have satisfied the apprenticeship requirement with respect to a facility if the taxpayer has requested qualified apprentices from a registered apprenticeship program and (a) that request has been denied or (b) the registered apprenticeship program does not respond to the taxpayer’s request within five business days after receipt of such request. The Notice provides that a taxpayer’s request for qualified apprentices must be made in accordance with usual and customary business practices for registered apprenticeship programs in a particular industry. In addition, the Notice states that taxpayers relying on the good faith effort exception must maintain sufficient documentation to establish its request for apprentices and any denial of or non-response to that request.

The Notice also sets forth examples to further illustrate when the apprenticeship requirement is satisfied.

### **III. Beginning-of-Construction Requirement**

Under the IRA, a facility generally must satisfy the prevailing wage and apprenticeship requirements described above to receive the full credit or deduction amounts if construction (or installation for purposes of Code Section 179D) of the facility begins on or after January 30, 2023 (i.e., the date that is 60 days after Treasury publishes guidance with respect to those requirements).

#### **A. Prior Guidance**

The IRS has previously issued numerous IRS Notices (the "Prior Notices") to provide guidance to determine when construction begins on a facility for purposes of the Section 45 production tax credit, the Section 48 investment tax credit, and the Section 45Q carbon capture credit. The Prior Notices provide two methods to determine when construction on a facility begins: (1) when physical work of a significant nature begins on the facility, either on-site or off-site (the "Physical Work Test") or (2) when a taxpayer pays or incurs 5% or more of the total cost of the facility (the "5% Safe Harbor Test"). Both the Physical Work Test and the 5% Safe Harbor Test require that a taxpayer demonstrate either that it maintained a continuous program of construction with respect to the facility or that it made continuous efforts to advance towards the completion of the facility (the "Continuity Requirement"). The Prior Notices provide a "Continuity Safe Harbor" under which a taxpayer will be deemed to satisfy the Continuity Requirement with respect to a facility if the facility is placed in service by the end of the calendar year that is no more than four calendar years after the calendar year in which construction on the facility began. In response to the COVID-19 pandemic, prior notices extended this Continuity Safe Harbor to six years for facilities beginning construction in 2016-2019 and to five years for facilities beginning construction in 2020.

#### **B. Prior Guidance Applies to New and Modified Credits and Deductions**

The Notice provides that for purposes of the Section 45 production tax credit, the Section 48 investment tax credit, and the Section 45Q carbon capture credit, the rules set forth in the Prior Notices will continue to apply.

The Notice further provides that to determine when construction begins for purposes of the Section 30C alternative fuel vehicle refueling property credit, the 45V clean hydrogen production credit, the Section 45Y production tax credit, and the Section 48E investment tax credit, principles similar to those described above regarding the Physical Work Test, the 5% Safe Harbor, the Continuity Requirement, and the 4-year Continuity Safe Harbor apply.

In addition, for purposes of the Section 179D energy efficient commercial building deduction, the Notice states that the IRS will accept that installation has begun if a taxpayer generally satisfies principles similar to the Physical Work Test and the 5% Safe Harbor Test.

### **IV. Additional Future Guidance Is Anticipated**

Although the Notice provides initial guidance on the prevailing wage and apprenticeship requirements for facilities that begin construction on or after January 30, 2023, many questions remain unanswered. The Notice states that the Treasury and the IRS anticipate issuing proposed regulations and additional guidance with respect to these requirements in the future. In the meantime, taxpayers should consider including covenants in their construction contracts and operating and maintenance agreements requiring contractors (and any subcontractors used by those contractors) to comply with the prevailing wage and apprenticeship requirements.



*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Los Angeles lawyers:*

Michael D. Haun  
1.213.683.6119

[michaelhaun@paulhastings.com](mailto:michaelhaun@paulhastings.com)

Kami LaBerge  
1.213.683.6159

[kamilaberge@paulhastings.com](mailto:kamilaberge@paulhastings.com)

Lena Son  
1.213.683.6115

[lenason@paulhastings.com](mailto:lenason@paulhastings.com)

- 
- <sup>1</sup> For a general discussion on the additions and modifications introduced in the Inflation Reduction Act, see our prior Client Alert, [U.S. Senate Passes Inflation Reduction Act](#).
  - <sup>2</sup> The Notice cites to published DOL regulations at [29 C.F.R. § 5.2](#).
  - <sup>3</sup> Such publications are made on [www.sam.gov](http://www.sam.gov).
  - <sup>4</sup> The IRA also provides that “applicable percentage” is 10% for facilities that begin construction before January 1, 2023. Because the prevailing wage and apprenticeship requirements do not apply to facilities that begin construction (or installation in the case of Code Section 179D) before January 30, 2023, the 10% applicable percentage will not be applicable.

#### Paul Hastings LLP

Stay Current is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2022 Paul Hastings LLP.