

Treasury and IRS Release Guidance on Prevailing Wage, Apprenticeship, and Beginning of Construction Requirements Under the Inflation Reduction Act

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Today, the Treasury Department (Treasury) and the Internal Revenue Service (IRS) published [Notice 2022-61](#), providing guidance on the prevailing wage requirements under Section 45(b)(7)(A) and substantially similar provisions in other sections of the Internal Revenue Code (Code) (Prevailing Wage Requirements) and apprenticeship requirements under Section 45(b)(8) and substantially similar provisions in other sections of the Code (Apprenticeship Requirements), both added to the Code by the [Inflation Reduction Act of 2022 \(IRA\)](#). Taxpayers must satisfy these requirements to qualify for enhanced credit amounts for several clean energy tax credits, including the investment tax credit under Code Sections 48 and 48E (ITC), the production tax credit under Code Sections 45 and 45Y (PTC), and the carbon capture and sequestration credit (Section 45Q Credit), unless construction on the project begins before the date that is 60 days after the Secretary publishes guidance with respect to such requirements, or the applicable project has a maximum net output of less than 1 MW(ac). In the case of the ITC and PTC, such enhanced credit amounts are equal to the pre-IRA full credit amounts without application of any pre-IRA phasedowns. Notice 2022-61 also provides guidance concerning the beginning of construction requirements under the IRA.

Beginning of Construction Requirements

Notice 2022-61 was published in the *Federal Register* today and (as subsequently revised) provides that taxpayers must begin construction of a facility before January 29, 2023 to receive the enhanced credits without meeting the Prevailing Wage Requirements and Apprenticeship Requirements.

Notice 2022-61 explains that the prior IRS notices interpreting beginning of construction will continue to apply for purposes of the PTC, ITC, and Section 45Q credit. This includes the application of the Physical Work Test, the Five Percent Safe Harbor, the Continuity Requirement, and the Continuity Safe Harbors. In addition, Notice 2022-61 applies principles from Notice 2013-29 and Notice 2016-31 for purposes of Sections 30C, 45V, 45Y, 48E, and 179D of the Code.

- Although expected, it was not certain that Notice 2022-61 would extend the application of the prior IRS notices to the Prevailing Wage Requirements and Apprenticeship Requirements. In addition, Notice 2022-61 provides that the prior IRS notices “will continue to apply under each respective Code section,” clarifying that the prior IRS notices will provide “beginning of construction” standards that are uniform for each Code section. These are welcome developments, especially for sponsors that own equipment procured with the intent to satisfy the

Physical Work Test or Five Percent Safe Harbor prior to the enactment of the IRA.

- The 60-day deadline came sooner than some would have liked. Those sponsors hoping to avoid application of the Prevailing Wage Requirements and the Apprenticeship Requirements by beginning construction before the 60-day deadline must now move quickly.
- For the PTC and ITC “beginning of construction” requirements, see our prior analysis on Notices 2013-29, 2013-60, 2014-46, 2015-25, 2016-31, 2017-04, [2018-59](#), 2019-43, and 2020-41 and [2021-41](#). For the Section 45Q Credit, see our prior analysis on Notice 2020-12.

Prevailing Wage Requirements

Notice 2022-61 provides that if the Secretary of Labor has published a prevailing wage determination for the geographic area and type(s) of construction applicable to a facility, including all labor classifications for construction, alteration, or repair work that will be performed by laborers or mechanics, which wage determination contains the prevailing rate upon which taxpayers may rely. If the Secretary of Labor has not published a prevailing wage determination for the geographic area and type of facility on www.sam.gov, or one or more labor classifications that will be performed by laborers or mechanics on the facility is not listed, the taxpayer may rely on certain procedures established by the Secretary of Labor. To rely on the procedures to request a wage determination or wage rate and to rely on the wage determination or rate provided in response to the request, the taxpayer must contact the Department of Labor, Wage and Hour Division via email at IRAPrevailingWage@dol.gov and provide the following information: type of facility, facility location, proposed labor classifications, proposed prevailing wage rates, job descriptions and duties, and any rationale for the proposed classifications. The Wage and Hour Division will notify the taxpayer as to the labor classifications and wage rates to be used for the type of work in question in the applicable geographic area.

Notice 2022-61 provides that a taxpayer, contractor, or subcontractor is considered to “employ” an individual if the individual performs services for the taxpayer, contractor, or subcontractor, regardless of whether the individual would be characterized as an employee or independent contractor. In addition, Notice 2022-61 defines several terms used in the Prevailing Wage Requirements by reference to existing Department of Labor regulations found in 29 CFR § 5.2. For this purpose, the term “wages” includes any bona fide fringe benefits. Furthermore, the term “construction, alteration, or repair” means “construction, prosecution, completion, or repair” as defined under 29 CFR § 5.2(j).

- The cross-reference to 29 CFR § 5.2(j) indicates that the Prevailing Wage Requirements generally should apply only to on-site work with certain limited exceptions, such as off-site work at a location established specifically for the performance of the contract or project. This should provide additional comfort that off-site physical work performed on equipment (*e.g.*, a custom-made transformer) generally would not be subject to the Prevailing Wage Requirements.

The taxpayer must maintain and preserve sufficient records, including books of account or records for work performed by contractors or subcontractors, to establish that the Prevailing Wage Requirements are met.

Notice 2022-61 provides several helpful examples to illustrate these principles, which function as roadmaps for compliance. Each of the examples concludes that the taxpayer will be considered to have satisfied the Prevailing Wage Requirements, provided the procedures outlined in Notice 2022-61 are followed and appropriate records are established and maintained.

Apprenticeship Requirements

The IRA includes a good faith effort exception to the Apprenticeship Requirements under which a taxpayer is treated as meeting the requirements if the taxpayer requests qualified apprentices from a registered apprenticeship program, and either the request is denied or the registered program fails to reply within five business days (the Good Faith Effort Exception). Notice 2022-61 provides that a taxpayer may meet the Good Faith Effort Exception if it requests qualified apprentices from a registered apprenticeship program in accordance with “usual and customary business practices” for registered apprenticeship programs in the particular industry. To locate a registered apprenticeship program, taxpayers are directed to the Office of Apprenticeship’s partner finder tool at <https://www.apprenticeship.gov/partner-finder>. Taxpayers may also find applicable authorized state apprenticeship agencies at <https://apprenticeship.gov/about-us/state-offices>. The taxpayer is required to maintain sufficient books and records to establish the taxpayer’s request of qualified apprentices from a registered apprenticeship program and the denial of or nonresponse to the request. The Apprenticeship Requirements also define “construction, alteration, or repair” by reference to 29 CFR § 5.2(j).

- The cross-reference to 29 CFR § 5.2(j) indicates that the Apprenticeship Requirements generally should apply only to on-site work with certain limited exceptions.
- Though Notice 2022-61 provides helpful tools for location of registered apprenticeship programs, it does not address whether the Good Faith Effort Exception continues to apply throughout construction if a taxpayer contacts a program at the outset but does not make further contact (*e.g.*, upon the engagement of a new contractor or subcontractor or the occurrence of a change in the scope of the construction activity).

Many questions remain unanswered with respect to the Prevailing Wage Requirements and the Apprenticeship Requirements. However, Treasury and the IRS anticipate issuing additional guidance (including proposed regulations) to further address these areas, and Treasury and the IRS have received hundreds of taxpayer comments in response to their request for comments on the Prevailing Wage Requirements and Apprenticeship Requirements in Notice 2022-51. Accordingly, there is reason to hope that there will be future guidance to address the issues that remain.

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