

IRS Publishes Initial Guidance on Wage and Apprenticeship Requirements

November 30, 2022

The Internal Revenue Service (IRS) released its **eagerly-anticipated guidance** (the PWA Notice) regarding the prevailing wage and apprenticeship requirements under the Inflation Reduction Act (IRA). The publication of the PWA Notice in the *Federal Register* today is intended by the IRS to begin the “60-day clock”—most of the tax credits to which the prevailing wage and apprenticeship requirements apply contain an exception if the credit-generating project begins construction prior to the 60th day following the publication of guidance by the IRS. Thus, according to the notice published in the *Federal Register*, projects that have not begun construction (as defined in the PWA Notice) before January 30, 2023, will be subject to the prevailing wage and apprenticeship requirements.

The PWA Notice answers many open questions in the industry regarding the application of the prevailing wage and apprenticeship requirements. While there are several unique definitions created by the IRS through the PWA Notice, the PWA Notice largely provides clarification and definitions through cross-references to existing Department of Labor (DOL) regulations, offices and programs, as well as prior IRS guidance.

Importantly and generally consistent with industry expectations, the PWA Notice confirms that “beginning of construction” on a project will be determined using the existing framework created by the IRS for such an analysis over the last decade. The PWA Notice incorporates the numerous extensions of and taxpayer-friendly modifications to the “continuity requirement” that the IRS has promulgated over the last several years including the extensions for specific years provided by the IRS in response to COVID-19. Practically, this means that many projects that began construction in 2021 and earlier for purposes of grandfathering investment tax credit and production tax credit rates under the pre-IRA rules may be able to rely on those same strategies to be exempt from the prevailing wage and apprenticeship requirements (i.e., no additional activity would be required now to be exempt from the prevailing wage and apprenticeship requirements). However, given the application of a continuity requirement by the IRS and the prevalence of supply chain delays, project developers and owners should be cautious when relying on older vintage beginning of construction strategies.

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Another welcome development in the PWA Notice is the announcement of a DOL email address where taxpayers can direct questions relating to the prevailing wage requirements (IRAprevailingwage@dol.gov). In addition to providing reference to specific DOL regulations, publications and websites to assist taxpayers in identifying the correct wages that needs to be paid, the new email address can be used to obtain specific guidance from DOL when the other DOL publications and websites fail to provide an answer, such as when a worker classification for a particular geographic area is not otherwise listed. Given the lack of existing industry-specific classifications, hopefully DOL responds promptly to requests directed to this new email address. Government contractors often wait months for responses from DOL in similar contexts.

We also view the PWA Notice as providing very helpful clarity on the good faith effort exception to the apprenticeship requirements. The PWA Notice provides that if a request is made to a qualified apprenticeship program, the exception applies if it (1) is denied or (2) a response is not received within five business days. The PWA Notice further provides that the taxpayer will be considered to have made a good faith effort to obtain apprentices if it requests them “in accordance with usual and customary business practices for registered apprenticeship programs in a particular industry” and provides several websites to help locate registered apprenticeship programs.

Important for project developers to take note are specific contemporaneous recordkeeping requirements. The PWA Notice specifies that the prevailing wage and apprenticeship requirements will not be deemed satisfied unless sufficient records are maintained to establish compliance. In an example regarding the prevailing wage requirements, the IRS suggests such records would include but not be limited to identifying the applicable wage determination, the laborers and mechanics who performed the work, the classification of the work they performed, their hours worked in each classification and the wage rates paid for the work. Project developers should remember that the prevailing wage and apprenticeship requirements apply to all laborers and mechanics employed by the taxpayer as well as any contractors or subcontractors, so it is important to ensure that the entire contractor chain involved in any project is complying with the recordkeeping requirements as well as the substantive requirements.

The PWA Notice leaves open or ambiguous certain important questions regarding the application of the prevailing wage and apprenticeship requirements. For example, the definition of “alteration” is still unclear (the requirements generally apply to some or all of “construction, alteration or repair” under the tax statutes). The PWA Notice attempts to provide clarity on this point by defining “construction, alteration, or repair” under the tax statutes by cross-reference to the definition of “construction, prosecution, completion, or repair” as defined in DOL regulations. The problem is that the specific DOL regulation identified by the IRS defines “construction, prosecution, completion, or repair” to include “altering”, thus creating circularity that will now need to be resolved by DOL.

Another remaining uncertainty surrounds the application of the apprenticeship requirements generally. The requirements appear to apply only to the construction of a facility based on the language of the tax statutes, but are applicable to all construction, alteration or repair work in connection therewith and include all construction, alteration or repair hours in the total hours calculation. It would have been helpful for the IRS to state explicitly that only labor hours for construction, alteration or repair performed in connection with the construction of the facility need be included in the total hour

calculation. The PWA Notice fails to address this confusion specifically and the example contained in the PWA Notice effectively assumes the issue away.

In one interesting quirk, the PWA Notice as published in the *Federal Register* today indicates that the 60-day clock results in the prevailing wage and apprenticeship requirements applying to projects that begin construction on and after January 30, 2023. However, the date that is 60-days after the publication of the PWA Notice (November 30, 2022) is actually January 29, 2023. The [press release yesterday from the Department of the Treasury](#) also noted that the Treasury expected the date to be January 29, 2023, assuming the PWA Notice was in fact published in the *Federal Register* on November 30, 2022, as intended. It is not clear if the January 30, 2023, date included in the PWA Notice published in the *Federal Register* is a mistake, but in the absence of any clarification or correction, it would be wise for taxpayers to err on the side of caution and cause construction to begin before January 29, 2023.

In summary, the PWA Notice published in the *Federal Register* today provides significant clarity to the renewables and energy transition industries related to the prevailing wage and apprenticeship requirements under the IRA. This is generally accomplished through cross-referencing existing IRS and Department of Labor regulations and guidance, although there are a few new definitions and a new Department of Labor email address for questions. While certain lingering ambiguities remain, we expect the PWA Notice and Department of Labor processes identified in the PWA Notice will allow many transactions to proceed with sufficient certainty for securing financing and making investment decisions.

We encourage you to contact one of the below attorneys if you have questions regarding this IRS guidance.

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