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IRS and Treasury Issue Proposed Regulations Providing Guidance on Prevailing Wage and Apprenticeship Requirements Applicable to Clean Energy Credits

Client Alert | September 6, 2023

On August 30, 2023, the IRS and Treasury published proposed Treasury regulations (the "Proposed Regulations") providing expansive guidance on the prevailing wage and apprenticeship requirements (the "PWA Requirements") that taxpayers must[1] satisfy to receive the full credit amount[2] available under various revised and new tax credits provided for in the Inflation Reduction Act of 2022 (the "IRA").[3] Taxpayers are permitted to rely on the Proposed Regulations with respect to a facility[4] on which construction began on or after January 29, 2023 but before final regulations are published.[5]

The Proposed Regulations are detailed, and a comprehensive discussion of them is beyond the scope of this alert. Instead, this alert begins with some background regarding these requirements, then provides a short summary of the Prevailing Wage Requirement and the Apprentice Requirements (including, with respect to each requirement, a short description of the consequences of noncompliance, remediation opportunities, and recordkeeping obligations), and concludes with observations regarding key implications of the guidance for market participants.

Background

The IRA introduced the PWA Requirements with the intent of "creating good-paying union jobs" in the clean energy, manufacturing, and construction sectors.[6] At a high level, the "Prevailing Wage Requirement" requires that all laborers and mechanics employed by a taxpayer (or a contractor or subcontractor of such taxpayer) claiming an applicable credit[7] are paid wages for construction, alteration, or repair of the applicable facility that are not less that the "prevailing" wage for that type of work. The Apprenticeship Requirements (as defined below) are focused on making sure that project developers make on-the-job training opportunities available to the next generation of skilled tradesmen.

Key Prevailing Wage Requirements

The Proposed Regulations provide substantial practical guidance on compliance with the Prevailing Wage Requirement. The Proposed Regulations clarify which workers must be paid prevailing wages, describe the types of work that constitutes construction, alteration, or repair of a facility, and explain how to determine and pay prevailing wages. The subsections below describe some of the most significant aspects of the guidance on these topics.

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Workers Subject to the Prevailing Wage Requirement

Workers engaging in construction, alteration, or repair of a facility (described below) must be paid at or above the prevailing wage if they are **laborers** or **mechanics employed** by the **taxpayer** or its **contractor** or **subcontractor**. The Proposed Regulations provide clarity on the meaning of these terms.

- A **laborer** or **mechanic** is any worker whose duties are manual or physical in nature and includes apprentices and helpers. Generally, this definition excludes individuals with roles that are primarily administrative, executive, or clerical. The IRS and Treasury are seeking comments regarding the treatment of persons whose roles are not primarily physical in nature, such as a foreperson, owner, or administrator, but who perform certain duties that are physical in nature.[8]

- A person is **employed** if the person performs the duties of a laborer, mechanic, contractor, or subcontractor. The term "employed" is intended to be significantly broader in the prevailing wage context than in the employment tax context.[9] Accordingly, workers, regardless of whether they would be viewed as employees or independent contractors for other purposes of the Code, may be "employed" by the taxpayer, its contractor, or its subcontractor.

- The **taxpayer**[10] can be any person subject to taxation under the Internal Revenue Code (including a partnership and an entity that is permitted to make a "direct pay" election under section 6417[11]).

- A **contractor** is any person that enters into a contract with the taxpayer for construction, alteration, or repair of a qualified facility and a **subcontractor** is any person that agrees to perform or be responsible for any part of such a contract.

Scope of Construction, Alteration, or Repair of the Facility

The Proposed Regulations clarify that "construction, alteration, or repair" (*i.e.*, the types of work covered by the Prevailing Wage Requirement) should be construed expansively, but do clarify that ordinary maintenance work (*i.e.*, work that is intended to sustain the existing functionality of the facility) is not covered by the Prevailing Wage Requirement.[12] In addition, work that would fit within the broad definition of "construction, alteration, or repair" is subject to the Prevailing Wage Requirement only if the physical work occurs at the physical site of the facility (including any adjacent or virtually adjacent dedicated support site) or at a secondary site that is established specifically for or dedicated exclusively to the construction of such facility for a meaningful time.[13]

For example, if a taxpayer builds a wind farm, the construction at the site where the wind farm will be located would be subject to the Prevailing Wage Requirement. If a significant portion of the facility is constructed at an off-site warehouse that was established specifically to assist with, or dedicated exclusively for a specific period of time to, the construction of the wind farm, work completed at the off-site warehouse also would be subject to the Prevailing Wage Requirement. However, if the step-up transformer is constructed at an off-site location that (during the transformer's construction) is building transformers for other wind farms, the labor performed on the transformer at that location is generally not subject to the Prevailing Wage Requirement, at least with respect to the construction of the taxpayer's wind farm.

How to Determine Prevailing Wages

The Wage and Hour Division of the Department of Labor is responsible for making prevailing wage determinations. The prevailing wage is based on the type of construction, the type of labor performed, and the geographic area in which the labor is performed. The Proposed Regulations indicate that, when a taxpayer plans to construct, alter, or repair a facility, the taxpayer (and its contractors or subcontractors) will be able to find the

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prevailing wage for the applicable type of construction and location for each type of labor they expect to require on a website approved by the Department of Labor (currently www.sam.gov), rather than being required to seek an individualized, project-specific ruling.

In general, taxpayers can pay registered apprentices less than the prevailing wage rate that would need to be paid to a journeyworker[14] performing the same type of work, but not less than the rate (and fringe benefits) specified by the registered apprenticeship program.[15] For any hours worked by an apprentice in excess of the ratio permitted by the Ratio Requirement (a requirement described below requiring an appropriate ratio of apprentices to more experienced workers), the Proposed Regulations provide that the apprentice must be paid not less than the wage rate that would need to be paid to a journeyworker for the same type of work.

As noted above, the IRS and Treasury expect that prevailing wages will be available from the website approved by the Department of Labor. The Proposed Regulations make clear, however, that a supplemental, facility-specific wage determination can be requested from the Department of Labor if (i) the facility spans more than one geographic area,[16] (ii) there is no general wage determination currently available for a particular geographic area or type of work, or (iii) the wages for certain labor classifications are not listed on the generalized Department of Labor website.[17] If a taxpayer only discovers that it has not paid prevailing wages when the Department of Labor subsequently makes a determination of the prevailing wage rate, the taxpayer has 30 days from the date of determination to remediate the failure by making "catch-up" payments to the laborers and mechanics who have received insufficient wages.

The Proposed Regulations helpfully clarify that, in general, applicable prevailing wages are required to be determined only at the outset of the work, although wage rates must be refreshed if a contract is expanded to cover additional work not within its original scope. In addition, for any alteration or repair work on a facility that occurs after the facility is placed in service, taxpayers must use the prevailing wage in effect at the time the alteration or repair work begins.

How to Pay and How Long to Pay the Prevailing Wage

After determining both which workers are subject to the Prevailing Wage Requirement and the prevailing wage rates applicable to those workers, employers must pay workers prevailing wages through regular payroll practices, without subsequent deduction or rebate of any kind (except as required by law or permitted by regulations issued by the Secretary of Labor). For production tax credit facilities, the Prevailing Wage Requirement generally applies during the life of the production tax credit, whereas for an investment tax credit facility the relevant period is, in general, five years (*i.e.*, the recapture period).

Apprenticeship Requirements

In addition to the Prevailing Wage Requirement, taxpayers must abide by three apprenticeship requirements (the "Apprenticeship Requirements") in connection with construction, alteration, or repair of a facility to receive full tax amounts for certain tax credits.[18] First, the "Labor Hours Requirement" specifies the required percentage of labor hours that must be performed by qualified apprentices.[19] Second, the "Ratio Requirement" mandates that the taxpayer abide by the applicable apprentice-to-journeyworker ratio, as determined by the Department of Labor or applicable state apprenticeship agency. Third, under the "Participation Requirement," each taxpayer, contractor, or subcontractor that employs four or more individuals to perform construction, alteration, or repair work with respect to the construction of the qualified facility must employ one or more qualified apprentices to perform that work. The Proposed Regulations clarify the relationship among the Apprenticeship Requirements and provide further explanation and rules that generally tighten the requirements.

Labor Hours Requirement

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The Proposed Regulations reiterate that, under the Labor Hours Requirement, the "applicable percentage"[20] of total labor hours must be performed by qualified apprentices.[21] The Proposed Regulations make clear that the Labor Hours Requirement is subject to the Ratio Requirement, meaning that hours worked by a qualified apprentice that do not comply with the Ratio Requirement will not be counted as labor hours by a qualified apprentice for purposes of meeting the Labor Hours Requirement.

Ratio Requirement

The Ratio Requirement is intended to ensure there are sufficient supervising journeyworkers onsite.[22] The applicable apprentice-to-journeyworker ratio for a particular apprentice will be determined by the registered apprenticeship program in which that apprentice is participating, and also would be subject to the requirements of the Department of Labor and applicable state apprenticeship agencies. The Proposed Regulations clarify that the Ratio Requirement applies on a daily basis.

Participation Requirement

The Participation Requirement requires that each taxpayer, contractor, or subcontractor who employs four or more individuals to perform construction, alteration, or repair work with respect to the construction of a qualified facility must employ one or more qualified apprentices to perform such work. The Proposed Regulations clarify that the Participation Requirement is not a daily requirement. Because the Participation Requirement is designed to prevent taxpayers from satisfying the Labor Hours Requirement by only hiring apprentices to perform one type of work, the Proposed Regulations provide that the Participation Requirement must be satisfied separately by the taxpayer and each contractor and subcontractor (if any such person has four or more employees who perform relevant work on the facility); however, the taxpayer ultimately must ensure that each of its contractors and subcontractors (if applicable) has satisfied the Participation Requirement.

Noncompliance Rules and Remedies

Prevailing Wage Requirement – Penalties and Correction Payments

Under the Proposed Regulations, if a taxpayer fails to satisfy the Prevailing Wage Requirement, the taxpayer may cure that failure and retain the credit by making a correction payment to all impacted laborers and mechanics, as well as paying any applicable penalties.

For any period during which a laborer or mechanic was paid wages that failed to satisfy the Prevailing Wage Requirement, the correction payment is calculated as the difference between the wages that should have been paid under the Prevailing Wage Requirement and all wages paid to that laborer or mechanic for the period, plus interest.[23] The Proposed Regulations require that a correction payment must be made even if the taxpayer is not able to locate one or more of the impacted laborers or mechanics, requiring taxpayers to comply with, for example, state-administered unclaimed wage programs.

In addition to any back wages and interest, taxpayers are required to pay a $5,000 penalty for each laborer or mechanic who was underpaid for each applicable year. Helpfully, the Proposed Regulations provided that this penalty is waived automatically in certain quickly discovered and corrected situations. The automatic waiver has two conditions:

1. The taxpayer makes the correction payment not later than the earlier of (i) 30 days after the date taxpayer becomes aware of the error and (ii) the date on which the tax return claiming the credit is filed; and

2. Either (i) the laborer or mechanic was underpaid for not more than 10 percent of all relevant periods or (ii) the underpayment was not greater than 2.5 percent of what the laborer or mechanic should have been paid under the Prevailing Wage

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Requirements.

If the IRS determines that any failure to satisfy the Prevailing Wage Requirements was due to intentional disregard, the required correction payment amount is increased by a multiple of three and the penalty rate is increased from $5,000 to $10,000.[24] The Proposed Regulations provide a non-exclusive list of facts that might be considered in the determination of whether a failure to meet the Prevailing Wage Requirements is due to intentional disregard, including whether (i) the failure to pay prevailing wages by the taxpayer is part of a pattern of conduct, (ii) the taxpayer promptly cured any failures to pay prevailing wages, (iii) the taxpayer included (and caused to be included) provisions in contracts with contractors and subcontractors ensuring compliance with the Prevailing Wage Requirement, and (iv) the taxpayer provided notice to laborers and mechanics of the Prevailing Wage Requirement (such as by posting information prominently at the site of work). Notably, the Proposed Regulations provide a rebuttable presumption that a failure was not intentional with respect to the Prevailing Wage Requirements if the taxpayer makes all correction and penalty payments before receiving a notice from the IRS, giving taxpayers a meaningful incentive to take steps proactively to monitor compliance with the Prevailing Wage Requirement.[25]

The Proposed Regulations also clarify that, for credits sold pursuant to section 6418, credit sellers would be responsible for any correction payments and penalties with respect to the Prevailing Wage Requirements, although credit buyers would still remain liable for any resulting excessive credit transfer tax resulting from the failure to meet the Prevailing Wage Requirements.

Apprenticeship Requirements – Penalties

If a taxpayer does not satisfy the Apprenticeship Requirements or the Good Faith Effort Exception (discussed below), the taxpayer may still receive the full tax credit amount if the taxpayer pays a $50 penalty ($500 for intentional disregard) for each labor hour for which the taxpayer failed to meet the Labor Hours Requirement or the Participation Requirement. For the Labor Hours Requirement, the penalty is applied to the shortfall by which the “applicable percentage” of labor hours exceeded the hours actually worked by qualified apprentices (a single aggregate computation). For the Participation Requirement, the penalty is computed separately for the taxpayer and each of its contractor(s) and subcontractor(s) (but the penalty is payable only by the taxpayer) and is applied to the quotient of the total number of relevant labor hours worked by all individuals employed by the non-compliant employer divided by the total number of such individuals employed by such non-compliant employer.

Similar to the Prevailing Wage Requirement, the Proposed Regulations provide a non-exclusive list of facts that might be considered in the determination of whether a failure to meet the Apprenticeship Requirements is due to intentional disregard, including whether (i) the failure was part of a pattern of conduct by the taxpayer, (ii) the taxpayer promptly cured the failure, (iii) the taxpayer included (and caused to be included) provisions in contracts with contractors and subcontractors ensuring compliance with the Apprenticeship Requirements, and (iv) the taxpayer had been required to make a penalty payment in respect of the Apprenticeship Requirements in prior tax years. As with the Prevailing Wage Requirements, the Proposed Regulations also provide a rebuttable presumption that a failure was not intentional if the taxpayer makes all penalty payments before receiving a notice from the IRS.

As is the case for the Prevailing Wage Requirements, credit sellers under section 6418 would be responsible for any penalties with respect to the Apprenticeship Requirement, but credit buyers would still remain liable for any resulting excessive credit transfer tax resulting from the failure to meet the Apprenticeship Requirements.

Qualifying Project Labor Agreement

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The Proposed Regulations would provide that penalty payments will not be required if there is a Qualifying Project Labor Agreement in place and if a correction payment is paid to a laborer or mechanic on or prior to the date on which the tax credit is claimed. In general, a Qualifying Project Labor Agreement is a pre-hire collective bargaining agreement with one or more labor organizations for a specific construction project that meets criteria detailed in the Proposed Regulations.[26]

Good Faith Effort Exception

The Code excuses taxpayers from complying with the Apprenticeship Requirements if they have requested qualified apprentices from a registered apprenticeship program and either the request is denied for a reason other than noncompliance with the standards or requirements of the program or the program does not acknowledge receipt of the request or otherwise respond to the taxpayer within five business days after receiving a request (the "Good Faith Effort Exception").[27]

Generally, the Proposed Regulations would require additional effort by a taxpayer to satisfy the Good Faith Effort Exception. One key modification is that the Proposed Regulations would require a written request be made to at least one registered apprenticeship program that trains apprentices in the necessary occupation(s) and has a customary business practice of entering into agreements with employers to place apprentices in their trained occupation.[28] In addition, the registered apprenticeship program to which the taxpayer submits the written request either must (i) operate within the geographic area that includes the location of the facility or (ii) reasonably be expected to be able to provide apprentices to the facility's location. The IRS expects that taxpayers may need to submit requests to multiple apprenticeship programs, depending on the number of occupations involved in the project and the anticipated number of required apprentice labor hours.

Under the Proposed Regulations, a denial of a written request from a registered apprenticeship program, or a non-response to such a written request, will permit a taxpayer to rely on the Good Faith Effort Exception only for 120 days after the date on which the request was submitted. Thereafter, the taxpayer would be required to submit an additional request to continue to rely on the Good Faith Effort Exception. As a result, to continue to rely on the Good Faith Effort Exception, a taxpayer would have to submit requests to a registered apprenticeship program and have those requests be denied by the registered apprenticeship program on a rolling 120-day basis. Further, a partially denied request is to be treated as a denial solely with respect to that part of the request that is denied.

Recordkeeping and Reporting Requirements

The Proposed Regulations specify certain records that taxpayers must maintain to substantiate that the Prevailing Wage Requirement and Apprenticeship Requirements have been satisfied, including (at a minimum) payroll records that reflect the wages paid to laborers, mechanics and qualified apprentices engaged in the construction, alteration, or repair of the facility, regardless of whether the laborers and mechanics are employed by the taxpayer, a contractor, or a subcontractor.

For the Prevailing Wage Requirement, sufficient records "may include" the labor classification(s) used for determining the prevailing wage rate (and documentation supporting the applicable classification), the hourly rate(s) of wages paid for each applicable labor classification, records supporting fringe benefit calculations (detailed in the Proposed Regulations), the total number of labor hours worked and wages paid per pay period, records to support wages paid to any apprentices (including records reflecting the registration of the apprentices, the applicable wage rates and apprentice-to-journeyworker ratios), and the amount and timing of any correction payments (and documentation reflecting their calculation).

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For the Apprenticeship Requirements, records sufficient to establish compliance may include copies of any written requests for apprentices, any agreements with a registered apprenticeship program, documents verifying participation in a registered apprenticeship program by each apprentice, and the payroll records for any work performed by apprentices. Like the Prevailing Wage Requirement, the Proposed Regulations would provide that it is the responsibility of the taxpayer to maintain the relevant records for each apprentice, regardless of whether the apprentice is employed by the taxpayer, a contractor, or a subcontractor.

The Proposed Regulations do not include detailed reporting requirements, but the preamble indicates that the IRS and Treasury expect that taxpayers will be required to report, at the time of filing a return: (i) the location and type of qualified facility; (ii) the applicable wage determinations for the type and location of the facility; (iii) the wages paid (including any correction payments) and hours worked for each of the laborer or mechanic classifications engaged in the construction, alteration, or repair of the facility; (iv) the number of workers who received correction payments; (v) the wages paid and hours worked by qualified apprentices for each of the laborer or mechanic classifications engaged in the construction, alteration, or repair of the facility; (vi) the total labor hours for the construction, alteration, or repair of the facility by any laborer or mechanic employed by the taxpayer or any contractor or subcontractor; and (vii) the total credit claimed.[29]

Commentary

Many aspects of the Proposed Regulations will facilitate efficient administration of the IRA, though other aspects of the guidance could be clarified further to provide taxpayers with greater guidance as to their obligations under the PWA Requirements.

- *Allocation of Legal Responsibility for PWA Requirements*. The Proposed Regulations make clear that the taxpayers who claim or transfer tax credits (and not the contractors or subcontractors of those taxpayers) are ultimately responsible for complying with the PWA Requirements. Thus, the onus is on the taxpayer to carefully monitor compliance with the PWA Requirements, ensure its contractors and subcontractors comply with the PWA Requirements, and maintain adequate records demonstrating compliance with the PWA Requirements. Well-advised taxpayers likely will seek to include provisions in their agreements with contractors to ensure that the PWA Requirements are satisfied and that necessary records and information substantiating the satisfaction of those requirements is maintained.

- *Incentives for Self-Policing.* The Proposed Regulations encourage taxpayers to carefully monitor failures to meet the PWA Requirements, proactively report these failures to the IRS, and then affirmatively and timely make correction payments. If taxpayers take these steps, as long as the noncompliance is relatively minor, then the Proposed Regulations generally allow taxpayers to avoid the application of penalties. Given these benefits, taxpayers will want to put in place procedures for monitoring compliance, including compliance by contractors and their subcontractors.

- *Useful Begun Construction Rule, with Limits.* Under the Proposed Regulations, prevailing wage determinations generally have to be made only once, in connection with the commencement of construction. This rule does not apply, however, if there is a change in the scope of work originally envisioned. Given that scope changes are relatively common in the course of constructing a facility, this exception could apply relatively frequently. It would be useful if the exception were adjusted to apply in more limited circumstances (*g.*, to major changes that result in a more than 10 percent adjustment to the contract price).[30]

- *Enhanced Apprenticeship Requirements*. The Proposed Regulations would tighten significantly the rules applicable to the Apprenticeship Requirements, including by limiting the scope of the Good Faith Effort Exception by providing that denial of a

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request for qualified apprentices lasts only 120 days after the submission of the request. This rule will make it necessary for developers to approach registered apprenticeship programs repeatedly. The IRS and Treasury's further clarification that it may be necessary to make inquiries to multiple registered apprenticeship programs suggests that the IRS and Treasury are very focused on making sure that apprentices receive training opportunities, even if doing so imposes incremental compliance burdens.

- *Incentives for Entering into Qualifying Project Labor Agreement*. Under the Proposed Regulations, if a Qualifying Project Labor Agreement (*e.g.*, collective bargaining agreement meeting certain criteria) is entered into, various penalties can be eliminated as long as any needed correction payment is made before the credit is claimed. This rule will provide some level of incentive for developers to pursue these types of agreements.

- *Helpful Rule for Offshore Wind Projects*. The Proposed Regulations include a helpful convention for offshore wind projects. Rather than requiring that each offshore wind project make a request for an individualized supplemental wage determination (given that general Department of Labor data is unlikely to cover offshore sites), the Proposed Regulations allow use of the generalized information prepared by the Department of Labor for the closest geographical area.

- *Scope of Apprenticeship Requirements*. The Code contains an ambiguity concerning whether the Labor Hours Requirement and Participation Requirements apply only to the "construction" of a facility (as opposed to the Prevailing Wage Requirements, which apply to both the construction phase of a facility and alteration and repair work performed after the construction phase with respect to the facility). Interestingly, the Proposed Regulations suggest that the Participation Requirement would apply only to the construction phase of a facility (but would apply to all alteration and repair work, if any, occurring during that construction phase). In contrast, the Proposed Regulations suggest that the Labor Hours Requirement would apply to both the construction of the facility *and* alteration and repair work performed after the construction phase with respect to the facility. It would be helpful for the IRS and Treasury to state its interpretation explicitly and to clarify this apparent discrepancy in the preamble to the final regulations. Further, more examples of the application of these and other rules that are more fact-intensive in application (including, for example, the secondary site rule) would be especially helpful.

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[1] Compliance with the prevailing wage and apprenticeship requirements is not required for facilities (i) that have a maximum net output or storage capacity of less than one megawatt or (ii) the construction of which began before January 29, 2023.

[2] Technically, the baseline tax credit is multiplied by five if the PWA Requirements are met, resulting in a tax credit amount that traditionally has been considered the full amount of the federal income tax credits that may be claimed in respect of clean energy technologies. This full credit amount also can be increased by so-called adders, such as the domestic content adder and the energy community adder. Please see our prior client alerts on these adders, which can be found here and here, respectively.

[3] As was the case with the so-called Tax Cuts and Jobs Act, the Senate's reconciliation rules prevented Senators from changing the Act's name, and the formal name of the so-called Inflation Reduction Act is actually "An Act to provide for reconciliation pursuant to title II of S. Con. Res. 14." In addition to tax credit guidance, the proposed regulations also include guidance regarding the PWA Requirements under section 179D, which provides a deduction for the cost of energy efficient commercial building property placed in service during the taxable year.

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[4] Depending on the type of credit at issue, the applicable facility may be a qualified facility, property, project, or certain other equipment or facilities. For the purposes of this alert, we use the term "facility" to refer generally to those assets in respect of which a taxpayer is permitted to claim an applicable credit.

[5] Unless indicated otherwise, all section references are to the Internal Revenue Code of 1986, as amended (the "Code").

[6] *See Fact Sheet: One Year In, President Biden's Inflation Reduction Act is Driving Historic Climate Action and Investing in America to Create Good Paying Jobs and Reduce Costs*, The White House, Aug. 16, 2023, here.

[7] Tax credits with a prevailing wage or apprenticeship requirement include those credits provided for under sections 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, and 48E.

[8] Under the Proposed Regulations, working forepersons who devote more than 20 percent of their time during a workweek to laborer or mechanic duties, and who do not meet the criteria for exemption of 29 CFR part 541, would be considered laborers and mechanics for the time spent conducting laborer and mechanic duties.

[9] The preamble to the Proposed Regulations expressly provides that the term "employed," as used in connection with the PWA Requirements, is not intended to apply for other purposes of the Code.

[10] In the case of any credits that were transferred pursuant to section 6418, the "taxpayer" is the credit transferor, not the transferee. Please see our prior alert on the proposed regulations on credit transferability, which is found here.

[11] Please see our prior client alert on the proposed regulations on direct pay, found here.

[12] The Proposed Regulations provide that maintenance expressly does not include work that improves a facility, adapts it for a different use, or restores functionality as a result of inoperability.

[13] The Proposed Regulations clarify that the work performed by a manufacturer that focuses on constructing components for a particular facility for some limited period of time (measured in hours or days) in order to meet a deadline is not subjected to the Prevailing Wage Requirement. A longer period of exclusive dedication (measured in weeks or months) to the preparation of products made to specifications would potentially subject this type of work to the Prevailing Wage Requirement.

[14] For these purposes, a journeyworker is an individual who has attained a level of skill, abilities, and competencies recognized within an industry as having mastered the skills and competencies required for the occupation (regardless as to whether such skills are acquired through formal apprenticeship or through practical on-the-job experience and formal training).

[15] Registered apprentices are those employed pursuant to an apprenticeship program registered with the Department of Labor's Office of Apprenticeship (or with a state apprenticeship agency recognized by that office). If the apprenticeship program does not require the payment of bona fide fringe benefits, then the Proposed Regulations would require that apprentices be paid the full amount of bona fide fringe benefits listed on the applicable wage determination.

[16] If, however, construction, alteration, or repair of a facility occurs in more than one geographic area, then the Proposed Regulations generally would require that the applicable wage determination for the work performed in each geographic area be used for the work performed in that area, though the preamble to the Proposed Regulations suggests that taxpayers can ensure compliance with the Prevailing Wage Requirement by

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paying the highest rate for each classification in both geographic areas. The Proposed Regulations also include an important rule that benefits developers of offshore wind projects, providing that taxpayers may rely on the general wage determination for the relevant category of construction that is applicable in the geographic area closest to the location of the facility.

[17] The IRS and Treasury generally expect that supplemental wage determinations would be requested no more than 90 days before the beginning of construction, alteration, or repair of a facility.

[18] Section 45L (new energy efficient home credit) and section 45U (zero-emission nuclear power production credit) do not have apprenticeship requirements.

[19] Under the Proposed Regulations, a "qualified apprentice" is "an individual who is employed by the taxpayer or by any contractor or subcontractor and who is participating in a registered apprenticeship program." The preamble to the Proposed Regulations indicate that participants in pre-apprenticeship programs would not be considered "qualified apprentices."

[20] For a facility on which construction begins during 2023, the applicable percentage is 12.5 percent. For a facility on which construction begins in 2024 or later, the applicable percentage is 15 percent.

[21] Under the Proposed Regulations, "labor hours" means the total number of hours devoted to the performance of construction, alteration, or repair work by any individual employed by the taxpayer or by any contractor or subcontractor. Labor hours would not include hours worked by foremen, superintendents, owners, or persons employed in bona fide executive, administrative, or professional capacities.

[22] Under the Proposed Regulations, a journeyworker is any laborer or mechanic that has mastered the skills and competencies required for the applicable occupation. A journeyworker can acquire these skills and competencies either through experience or through a formal apprenticeship.

[23] Interest is imposed at the federal short-term rate as determined under section 6621, but substituting "6 percentage points" for "3 percentage points" in section 6621(a)(2).

[24] The Proposed Regulations do not address specifically whether an automatic waiver of the penalty would potentially be available in the case of intentional disregard, although in practice we do not anticipate automatic waiver relief would be available in that case.

[25] A taxpayer generally is not be permitted to cure non-compliance with the Prevailing Wage Requirement if the taxpayer does not make the penalty payment on or prior to the date that is 180 days after the IRS makes a final determination that a penalty is due.

[26] The agreement needs (i) to be a collective bargaining agreement with a labor organization (*i.e.*, a union), (ii) to include provisions obligating taxpayers to pay prevailing wages and to use qualified apprentices to perform work, and (iii) to provide guarantees against strikes, lockouts, and other similar job disruptions.

[27] Under the Proposed Regulations, a "registered apprenticeship program" is defined as "a program that has been registered by the U.S. Department of Labor's Office of Apprenticeship or a recognized State apprenticeship agency, pursuant to the National Apprenticeship Act and its implementing regulations for registered apprenticeship at 29 CFR parts 29 and 30, as meeting the basic standards and requirements of the Department of Labor for approval of such program for Federal purposes."

[28] The Proposed Regulations also provide additional specificity as to what the contents of such a written request would need to be.

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[29] The IRS and Treasury affirmatively decided not to require certified weekly reporting of payroll records.

[30] There is precedent for using a ten percent standard in determining whether a contract modification is significant. *See*, *e.g.*, PLR 8930013 (concluding that a taxpayer was eligible for transitional relief provisions in the Tax Reform Act of 1986 that exempted property from new depreciation and investment tax credit rules if that property was constructed, reconstructed, or acquired pursuant to a written contract binding on March 1, 1986, notwithstanding later adjustments to the contract that increased its cost by 10.02 percent, relying on legislative history suggesting design changes made for reasons of technical or economic efficiencies of operation that caused an insignificant increase in cost nevertheless were treated as insignificant).

This alert was prepared by Mike Cannon, Matt Donnelly, Josiah Bethards, Alissa Fromkin Freltz, Blake Hoerster, and Hayden Theis.

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