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INSIGHTS

IRS and Treasury Department Release Initial Guidance for Labor Requirements Under Inflation Reduction Act

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On November 30, 2022, the IRS and the Treasury Department published ***Notice 2022-61*** (the Notice) in the Federal Register. The Notice provides guidance regarding the prevailing wage requirements (the Prevailing Wage Requirements) and the apprenticeship requirements (the Apprenticeship Requirements and, together with the Prevailing Wage Requirements, the Labor Requirements) that taxpayers must satisfy to be eligible for increased amounts of the following clean energy tax credits under the Internal Revenue Code of 1986 (the Code), as amended by the Inflation Reduction Act of 2022 (the IRA):

- the alternative fuel vehicle refueling property credit under section 30C of the Code (the Vehicle Refueling PC);
- the production tax credit under section 45 of the Code (the PTC);
- the energy efficiency home credit under section 45L of the Code;
- the carbon sequestration tax credit under section 45Q of the Code (the Section 45Q Credit);
- the nuclear power production tax credit under section 45U of the Code;
- the hydrogen production tax credit under section 45V of the Code (the Hydrogen PTC);
- the clean electricity production tax credit under section 45Y of the Code (the Clean Electricity PTC);
- the clean fuel production tax credit under section 45Z of the Code;
- the investment tax credit under section 48 of the Code (the ITC);
- the advanced energy project tax credit under section 48C of the Code; and
- the clean electricity investment tax credit under section 48E of the Code (the Clean Electricity ITC).***[1]***

The IRA, including the Labor Requirements, was described in ***a previous update***.

Start of Sixty-Day Period

The IRA provides an exemption from the Labor Requirements (the Exemption) for projects and facilities otherwise eligible for the Vehicle Refueling PC, the PTC, the Section 45Q Credit, the Hydrogen PTC, the Clean Electricity PTC, the ITC, and the Clean Electricity ITC, in each case, that begin construction before the sixtieth (60th) day after guidance is released with respect to the Labor Requirements.***[2]*** The Notice provides that it serves as the published guidance that begins such sixty (60)-day period for purposes of the Exemption.

The version of the Notice that was published in the Federal Register on November 30, 2022, provides that the sixtieth (60th) day after the date of publication is January 30, 2023. January 30, 2023, however, is the sixty-first (61st) day after November 30, 2023, when the Notice was first published; January 29, 2023 is the sixtieth (60th) day. Currently, it is unclear whether the Notice erroneously designated January 30, 2023 as the sixtieth (60th) day or whether the additional day to begin construction and qualify for the Exemption was intended, possibly because January 29, 2023 falls on a Sunday. In any event, unless and until clarification is provided, we expect conservative taxpayers planning to rely on the Exemption to start construction on creditable projects and facilities before January 29, 2023, rather than before January 30, 2023.***[3]***

Beginning Construction for Purposes of the Exemption

The Notice describes the requirements for a project or facility to be deemed to begin construction for purposes of the Exemption. As was widely expected, for purposes of the PTC, the ITC, and the Section 45Q Credit, the Notice adopts the requirements for beginning of construction contained in previous IRS notices (the Prior Notices).***[4]*** Under the Prior Notices, construction of a project or facility is deemed to begin when physical work of a significant nature begins (the Physical Work Test) or, under a safe harbor, when five percent or more of the total cost of the project or facility is incurred under the principles of section 461 of the Code (the Five Percent Safe Harbor). In addition, in order for a project or facility to be deemed to begin construction in a particular year, the taxpayer must demonstrate either continuous construction or continuous efforts until the project or facility is completed (the Continuity Requirement). Under a safe harbor contained in the Prior Notices, projects and facilities that are placed in service no more than four calendar years after the calendar year during which construction of the project or facility began generally are deemed to satisfy the continuous construction or continuous efforts requirement (the Continuity Safe Harbor).***[5]***

In the case of a project or facility otherwise eligible for the newly-created Vehicle Refueling PC, Hydrogen PTC, Clean Electricity PTC, or Clean Electricity ITC, the Notice provides that:

- "principles similar to those under Notice 2013-29" will apply for purposes of determining whether the project or facility satisfies the Physical Work Test or the Five Percent Safe Harbor, and a taxpayer satisfying either test will be deemed to have begun construction on the project or facility;

- "principles similar to those under" the Prior Notices will apply for purposes of determining whether the project or facility satisfies the Continuity Requirement; and

- "principles similar to those provided under section 3 of Notice 2016-31" will apply for purposes of determining whether the project or facility satisfies the Continuity Safe Harbor, with the Notice specifying that the safe harbor period is four (4) years.

Taxpayers and commentators have observed that the existing guidance in the Prior Notices is not, in all cases, a good fit for the newly-created clean energy tax credits. Additional guidance will likely be required to ensure that the principles of the Prior Notices may be effectively applied to the newly-created tax credits.

Prevailing Wage Determinations

The Notice provides that, for purposes of the Prevailing Wage Requirements, prevailing wages will vary by the geographic area of the project or facility, the type of construction to be performed, and the classifications of the labor to be performed with respect to the construction, alteration, or repair work. Taxpayers may rely on wage determinations published by the Secretary of Labor on www.sam.gov to establish the relevant prevailing wages for a project or facility. If, however, the Secretary of Labor has not published a prevailing wage determination for a particular geographic area or type of project or facility on www.sam.gov, or one or more types of labor classifications that will be performed on the project or facility is not listed, the Notice provides that the taxpayer must contact the Department of Labor (the "DOL") Wage and Hour Division via email requesting a wage determination based on various facts and circumstances, including the location of and the type of construction and labor to be performed on the project or facility in question. After review, the DOL will notify the taxpayer as to the labor classifications and wage rates to be used for the geographic area in which the facility is located and the relevant types of work.

Taxpayers and commentators have observed that the Notice provides no insight as to the DOL's decision-making process. For instance, the Notice does not describe the criteria that the DOL will use to make a prevailing wage determination; it does not offer any type of appeal process; and, it does not indicate the DOL's anticipated response time to taxpayers. The lack of guidance on these topics has created significant uncertainty around the Prevailing Wage Requirements, particularly given that published wage determinations are lacking for many geographical areas.

Certain Defined Terms under the Prevailing Wage Requirements

The Notice provides definitions for certain key terms that are relevant to the Prevailing Wage Requirements, including:

- **Employ**. A taxpayer, contractor, or subcontractor is considered to "employ" an individual if the individual performs services for the taxpayer, contractor, or subcontractor in exchange for remuneration. Individuals otherwise classified as independent contractors for federal income tax purposes are deemed to be employed for this purpose and therefore their compensation generally would be subject to the Prevailing Wage Requirements.

- **Wages**. The term “wages” includes both hourly wages and bona fide fringe benefits.

- **Construction, Alteration, or Repair**. The term “construction, alteration, or repair” means all types of work (including altering, remodeling, installing, painting, decorating, and manufacturing) done on a particular project or facility. Based on this definition, it appears that off-site work, including off-site work used to satisfy the Physical Work Test, should not constitute “construction, alteration, or repair” and therefore should not be subject to the Prevailing Wage Requirements. It is not clear, however, whether “construction, alteration, or repair” should be read to include routine operation and maintenance (O&M) work on a project or facility.

The Good Faith Exception to the Apprenticeship Requirements

The IRA provides an exception to the Apprenticeship Requirements for taxpayers that make good faith attempts to satisfy the Apprenticeship Requirements but fail to do so due to certain circumstances outside of their control (the Good Faith Exception). The Notice provides that, for purposes of the Good Faith Exception, a taxpayer will be considered to have made a good faith effort to request qualified apprentices if the taxpayer (1) requests qualified apprentices from a registered apprenticeship program in accordance with usual and customary business practices for registered apprenticeship programs in a particular industry and (2) maintains sufficient books and records establishing the taxpayer’s request for qualified apprentices from a registered apprenticeship program and the program’s denial of the request or lack of response to the request, as applicable.

Certain Defined Terms under the Apprenticeship Requirements

The Notice provides definitions for certain key terms that are relevant to the Apprenticeship Requirements, including:

- **Employ**. The Notice provides the same definition for “employ” as under the Prevailing Wage Requirements.

- **Journeyworker**. The term “journeyworker” means a worker who has attained a level of skill, abilities, and competencies recognized within an industry as having mastered the skills and competencies required for the relevant occupation.

- **Apprentice-to-Journeyworker Ratio**. The term “apprentice-to-journeyworker ratio” means a numeric ratio of apprentices to journeyworkers consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements, except where the ratios are expressly prohibited by the collective bargaining agreements.

- **Construction, Alteration, or Repair**. The Notice provides the same definition for "construction, alteration, or repair" as under the Prevailing Wage Requirements. This suggests that, like the Prevailing Wage Requirements, off-site work is not subject to the Apprenticeship Requirements. In addition, the same open question regarding O&M work under the Prevailing Wage Requirements applies for purposes of the Apprenticeship Requirements.

Record Keeping Requirements

The Notice requires that taxpayers maintain and preserve sufficient records in accordance with the general recordkeeping requirements under section 6001 of the Code and the accompanying Treasury Regulations to establish that the Prevailing Wage Requirements and Apprenticeship Requirements have been satisfied. This includes books of account or records for work performed by contractors or subcontractors of the taxpayer.

Other Relevant Resources

The DOL has published a series of ***Frequently Asked Questions*** with respect to the Labor Requirements on its website. In addition, the DOL has published additional ***resources with respect to the Apprenticeship Requirements***, including Frequently Asked Questions, on its Apprenticeship USA platform. It is generally understood that, in the case of any conflict between information on these websites and information in the Notice, the Notice should control.

[1] The Labor Requirements also are applicable to the energy efficient commercial buildings deduction under section 179D of the Code.

[2] The IRA provides a separate exemption from the Labor Requirements for projects or facilities otherwise eligible for the ITC or the PTC with a maximum net output of less than one megawatt.

[3] Interestingly, the DOL online resources described below observe that projects and facilities that begin construction on or after January 29, 2023 are not eligible for the Exemption, which appears to recognize that January 29, 2023, and not January 30, 2023, is the sixtieth (60th) after publication of the Notice.

[4] Notice 2013-29, 2013-20 I.R.B. 1085; Notice 2013-60, 2013-44 I.R.B. 431; Notice 2014-46, 2014-36 I.R.B. 541; Notice 2015-25, 2015-13 I.R.B. 814; Notice 2016-31, 2016-23 I.R.B. 1025; Notice 2017-04, 2017-4 I.R.B. 541; Notice 2018-59, 2018-28 I.R.B. 196; Notice 2019-43, 2019-31 I.R.B. 487; Notice 2020-41, 2020-25 I.R.B. 954; Notice 2021-5, 2021-3 I.R.B. 479; and Notice 2021-41, 2021-29 I.R.B. 17.

[5] In response to procurement, construction, and similar delays attributable to the COVID-19 pandemic, the length of the safe harbor period was extended beyond four (4) years for projects or facilities for which construction began in 2016, 2017, 2018, 2019, or 2020, which we discussed in ***a previous update***.