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## Updated prevailing wage and apprenticeship requirements for Inflation Reduction Act tax incentives

Last week, the Treasury released Notice 2022-61 (the “Notice”) with additional guidance on the “prevailing wage and apprenticeship” requirements tied to many of the new or updated tax incentives in the Inflation Reduction Act.

Two important takeaways:

1. While we did receive some new information on how the wage and apprenticeship requirements will work (more on that below), this additional guidance is pretty sparse and some key questions are still left unanswered. The Notice did say that further guidance would be forthcoming, possibly as proposed regulations, so we know that more is on the way.
2. The Notice made clear that the “60-day clock” to begin construction is now ticking. Many of the tax credits in the Inflation Reduction Act to which the prevailing wage and apprenticeship requirements apply allow a project to claim a higher credit amount even without satisfying the wage and apprenticeship requirements, but only if those projects “begin construction” before 60 days post-release of clarifying guidance. The Notice serves as that guidance, so any project that begins construction on or after January 29, 2023 will have to satisfy the wage and apprenticeship requirements to be eligible for the higher credit amount.

### Beginning of construction

Helpfully, the Notice confirmed that two existing methods can be used to confirm when construction begins on an applicable project. Under the “Physical Work Test,” construction begins when work of a significant nature is performed, and under the “Five Percent Safe Harbor,” construction begins when a taxpayer has paid or incurred 5% of the total cost of a project. These methods require either continuous

construction or continuous efforts after a project starts construction, but there is a safe harbor under which this continuity requirement is deemed satisfied if the project is placed in service by the end of the fourth calendar year after the year construction begins.

### Prevailing wage requirement

Under the prevailing wage requirement, the project owner must ensure that any laborers and mechanics employed by contractors and subcontractors are paid “prevailing wages” for any construction, repairs, or alterations during the applicable tax credit period. The term prevailing wages refers to wages at rates for similar work in the location of the project site as determined by the U.S. Secretary of Labor.

The Notice essentially points taxpayers to a Department of Labor (DOL) wage determination website. If the DOL has published a wage determination on [www.sam.gov](http://www.sam.gov) for the geographic area and type or types of construction applicable to the project, and the determination includes all labor classifications for the construction, alteration, or repair work that will be done on the facility by laborers or mechanics, then those are the prevailing wages to use.

On the other hand, if the DOL has either not published a wage determination on [www.sam.gov](http://www.sam.gov) for the geographic area and type or types of construction applicable to the project, or one or more labor classifications for the construction, alteration, or repair work that will be done on the project by laborers or mechanics is not listed, then you have to email the DOL, Wage and Hour Division at [IRApprevailingwage@dol.gov](mailto:IRApprevailingwage@dol.gov) and ask what the prevailing wages should be. It is not clear what the expected response time for these emails is intended to be, or what you are supposed to do in the meantime, so there are still plenty of questions here.

## Apprenticeship requirement

Under the apprenticeship requirement, a minimum percentage of the total labor hours (10% to 15% depending on when the project begins construction) spent to construct the project must be performed by “qualified apprentices” who participate in a registered apprenticeship program that complies with certain federal requirements. Additional apprentice-to-journeyworker ratios of the DOL or an applicable state apprenticeship agency may apply. There is also a minimum participation requirement of one or more qualified apprentices if you have four or more employees on a project.

Under a “good faith exception”, you can be deemed to meet the apprenticeship requirements if you request qualified apprentices from a registered apprenticeship program and the request has been denied or the registered apprenticeship program does not respond within five business days.

## Recordkeeping requirements

The Notice makes a point of saying that it is important to maintain and preserve sufficient records, both for the prevailing wage and apprenticeship requirement. So keep a strong file with wage information, as well as total labor hours and any records relating to qualified apprentices (and requests for qualified apprentices).

## Next steps

While we continue to wait for more guidance from the IRS and Treasury Department, and the DOL as applicable, we understand that projects are moving ahead and decisions need to be made. Reach out to a member of the Hogan Lovells tax or energy teams with questions or otherwise to discuss your project.

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*This Tax update is a summary for guidance only and should not be relied on as legal advice in relation to a particular transaction or situation. If you have any questions or would like any additional information regarding this matter, please contact your relationship partner at Hogan Lovells or any of the lawyers listed in this update.*

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