



KPMG report: Final regulations on prevailing wage and apprenticeship requirements under clean energy tax incentives

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The U.S. Treasury Department and IRS on June 18, 2024, issued final regulations on prevailing wage and apprenticeship (PWA) requirements under the Inflation Reduction Act of 2022 (Act). These PWA requirements must be satisfied for taxpayers to qualify for increased credit or deduction amounts under the Act.

In addition to these final regulations, the IRS released or updated the following publications and “frequently asked questions” (FAQs) to help taxpayers comply with the PWA requirements:

- Publication 5983, *IRA Prevailing Wage and Apprenticeship Requirements Fact Sheet*
- Updated Publication 5855, *IRA Prevailing Wage & Registered Apprenticeship Overview*
- Prevailing wage and apprenticeship FAQs

The Treasury Department and IRS on August 29, 2023, released proposed regulations (REG-100908-23) regarding these rules. Read a [KPMG report](#) providing a summary of the rules and observations of the proposed regulations. Additionally, the Treasury Department and IRS on November 29, 2022, provided guidance on the PWA requirements in Notice 2022-61. Read a [KPMG report](#) on this initial guidance.

As indicated by the 342 comments reviewed by the Treasury Department and IRS, the final regulations offer much needed clarity for taxpayers whose credit calculations depend on satisfying these requirements. This report will highlight notable clarifications and modifications from the proposed regulations.

It should be noted that taxpayers may elect to comply with the proposed regulations—instead of the final regulations—if the construction of the property began prior the date of the publication of the final regulations (i.e., June 25, 2024), so long as they do so fully and consistently until the property is placed in service.

General PWA application

For taxpayers that satisfy the PWA requirements, an increased credit amount is available for credits under sections 30C (alternative fuel vehicle refueling property), 45 (electricity produced from certain renewable resources), 45Q (credit for carbon oxide sequestration), 45V (credit for production of clean hydrogen), 45Y (clean electricity production credit), 45Z (clean fuel production credit), 48 (energy credit), 48C (qualifying advanced energy production credit), and 48E (clean electricity investment credit), 45L (new energy efficient home credit), and 45U (zero-emission nuclear power production credit). In addition, taxpayer that satisfy the PWA requirements are eligible for an increased deduction amount under section 179D (energy efficient commercial building deduction). The increased credit or deduction amount is generally five times the base amount. For credits available under sections 45L and 45U, only the prevailing wage requirements need to be met to achieve a higher rate.

The PWA rules generally require contractors and subcontractors that are constructing, installing, altering or repairing a project that qualifies for the credits above to pay “prevailing wages”—generally, wage and benefit rates set by the Department of Labor pursuant to the Davis Bacon Act (DBA). They further require that a certain number of labor hours incurred at the project site must be performed by qualified apprentices registered with a qualified apprenticeship program.

PWA transition rule and 1 MW exception

There are two situations in which the taxpayer may qualify for the increased credit or deduction amount even if the PWA requirements aren’t satisfied—the begin construction exception and the one megawatt exception.

If a project begins construction prior to January 29, 2023, it is deemed to have satisfied the PWA requirements (the “BOC exception”).

The final regulations incorporate the BOC exception definitions from the proposed regulations without change. In general, the final regulations provide that if the taxpayer performed significant physical work or paid or incurred 5% of qualifying expenditures prior to January 29, 2023, the PWA requirements do not need to be satisfied.

The BOC exception does not apply to sections 45L, 45U, 45Z and 48C. Several commenters requested that the final regulations clarify whether the PWA requirements apply to work performed before January 29, 2023, both with respect to Code sections with a BOC exception and those without a BOC Exception. Commenters stated that it would be unfair to require taxpayers to comply with the PWA requirements retroactively.

In response to these comments, the Treasury Department and IRS determined that a transition rule is appropriate for sections 45L, 45Z and 48C. Thus, the final regulations provide that taxpayers are deemed exempt from the PWA requirements for any qualified work that took place before January 29, 2023. Therefore, taxpayers must only comply with the PWA requirements for the construction, alteration, or repair work (as applicable) occurring on or after January 29, 2023.

Section 45U is not subject to the transition rule because, as provided in the statute, the prevailing wage requirements only apply to alterations or repairs of a qualified nuclear power facility that occur after December 31, 2023.

If a project’s capacity is under one megawatt (1 MW), it is also deemed to have satisfied the PWA requirements (the “1 MW exception”).

The proposed regulations provided a multi-factor test to determine whether qualified energy properties or qualified facilities have to be “grouped” for purposes of determining whether the 1 MW threshold was exceeded. The multi-factor test in the proposed regulations was finalized without change.

Determining when construction “begins” for PWA requirements

In situation in which the BOC exception is not satisfied (e.g., began construction after January 28, 2023) or does not apply (e.g., work beginning after January 28, 2023), the proposed regulations provided that the DBA definition of construction is to be used to determine when the obligation to begin to comply with PWA requirements begins. The final regulations incorporate these rules without change.

Therefore, unless an exception applies, taxpayers are required to comply with the PWA requirements once a laborer or mechanic performs any work that is considered construction, alteration, or repair of the qualified facility or qualified property (including work on the qualified facility that occurs at a secondary site) as defined under the DBA.

KPMG observation

A result of this is that some preliminary work that would not be considered the beginning of construction for the BOC exception or for other relevant provisions under existing IRS BOC guidance, would trigger the start of PWA compliance requirements.

Construction, alteration or repair after placed in service

Under Code section 48 and 48E, the prevailing wage requirements need to be satisfied with respect to the construction, alteration, or repair of energy property for a five-year period after the property is placed in service. Under Code section 45 and 45Y, the prevailing wage requirements need to be satisfied with respect to the construction, alteration, or repair of a qualified facility for a 10-year period after the facility is placed in service.

The proposed regulations provided that the definition of construction, alteration and repair was to be defined by reference to the definitions found in the DBA. The final regulations follow the proposed rules but provide some additional commentary on how those rules must be applied in this context.

The proposed regulations provided that construction, alteration, or repair generally excluded maintenance work that occurs after a facility is placed in service. The final regulations revise the proposed regulations to more clearly distinguish maintenance work and alteration and repair. Under the final regulations, the term maintenance work includes work that is routinely scheduled and continuous or recurring and involves the activity of keeping the facility or property in its current condition. However, the final regulations state that maintenance performed prior to placing the facility in service is considered construction.

Further, the final regulations define repair work as generally including improvements to the facility by fixing non-functional elements or enhancing the facility's existing condition. This includes addressing individual problems as separate and distinct incidents (not continuous or recurring) or enhancing the facility's structural strength, stability, safety, capacity, efficiency, or usefulness.

Curing underpayment

The proposed regulations provided that a penalty for failing to timely pay prevailing wages would not be imposed if the failure was cured in a timely fashion and the underpayment was below a stated threshold. The final regulations provide additional relief.

In the final regulations, the stated threshold was increased from 2.5% to 5% of all amounts required to be paid in a calendar year. In addition, the period for making the correction payment was changed from 30 days after the taxpayer first became aware of the failure to the last day of the first month following the end of the calendar quarter in which the failure occurred.

Applicable scope of PWA requirements

Under the proposed regulations, taxpayers would have been required to meet with PWA requirements respect to the construction of a *qualified facility*. The proposed regulations did not define a qualified facility for purposes of applying the PWA requirements, so commenters sought clarity on this point.

The preamble to the final regulations provides that the PWA requirements apply only to labor performed with respect to property that qualifies for the applicable credit. So, for production type credits, such as section 45, 45Y, 45V, 45Z, and 45Q, labor incurred to construct assets that are not part of the production

assets (e.g., fencing, buildings) are not subject to the PWA rules. Similarly, for investment type credits or deductions, such as 30C, 48C, 45L, 48E and 179D, labor incurred to construct assets that are not eligible for the credit are not subject to the PWA rules.

Determining applicable prevailing wage rate

The DOL regularly updates the prevailing wage rates. The proposed regulations provided that contractors and subcontractors needed to use the rates that were posted by the DOL as of the date construction began on the project. This rule was difficult to implement by contractors and subcontractors because they need to estimate labor costs at the time a contract is entered into.

The final regulations clarify that the applicable prevailing wage rates are those in effect at the time the construction contract is executed, not when construction begins. This change ensures consistency in wage determinations across contractors and subcontractors by tying the timing to the contract execution.

The final regulations further clarify that if additional, substantial construction, alteration, or repair work is performed that is not within the scope of work of the original contract and is the subject of a contract amendment, the contractor must include the most recent revision of any wage determinations at the time the contract amendment is executed. It should be noted that “substantial” refers to additional work that requires a further contract execution. This rule does not apply if the contractor is simply given more time under the pre-existing contract.

Curing procedures and intentional disregard

If a taxpayer didn't meet the PWA requirements during the construction period, the taxpayer must, by the due date for the tax return on which the credit will be claimed: (i) pay, through its contractors or subcontractors, the wage differential plus interest and (ii) pay a penalty. Generally, the penalty is \$5,000 times the number of underpaid workers and \$50 for each labor hour that the apprenticeship requirement was not satisfied. However, if the underpayment is deemed intentional, the penalty and correction amounts are increased.

On audit, if the IRS concludes that the taxpayer did not satisfy the PWA requirements, the taxpayer has 180 days to come into compliance.

The final regulations incorporate the correction and penalty requirements from the proposed regulations.

The final regulations provide that taxpayers must maintain adequate records on PWA compliance and cannot rely solely on third parties to ensure compliance.

The final regulations also address intentional disregard of prevailing wage requirements. If a contractor or taxpayer intentionally fails to pay the required prevailing wages, the penalties are severe. For instance, the correction payments are tripled, and the penalty payments are double that of a normal curing payment.

Intentional disregard is determined by considering all relevant facts and circumstances, such as a pattern of repeated failures, lack of steps to determine correct wages, or failure to correct issues promptly. The final regulations provide a list of factors to assess intentional disregard but allow for additional considerations based on specific situations.

Commenters generally supported stricter penalties for intentional violations but suggested the IRS should offer more education on distinguishing between intentional and unintentional violations.

The final regulations provide that the IRS will consider taxpayer conduct before filing tax returns, such as whether they regularly reviewed wage determinations and provided notices to workers about prevailing wage rates. Additional factors include providing pay stubs, investigating complaints, and ensuring contractors are not debarred from public projects. The final regulations emphasize that taxpayers must ensure compliance across all contractor and subcontractor levels, regardless of the number of contracts.

KPMG observation

Some questions still remain around the procedures for making penalty payments to the IRS. The final regulations indicate taxpayers can make penalty payments as soon as an underpayment is identified and as late as 180 days after a final IRS determination, however it is not clear in either the final regulations or the relevant IRS Forms where a taxpayer identifies amounts owed/paid as penalties and how a taxpayer actually pays the penalty.

Exceptions to apprenticeship requirements (good faith exception)

A taxpayer is deemed to have satisfied the apprenticeship requirements for a qualified facility or an energy property if the taxpayer has requested qualified apprentices from a registered apprenticeship program and either the request has been denied, or the registered apprenticeship program fails to respond to the request within five business days after receiving it (“good faith exception”).

The final regulations clarify that the request must be a written request so there is an ability to document the request.

Additionally, the final regulations clarify a few areas for the purposes of meeting the good faith exception. First, the Treasury Department and IRS clarify that partial responses qualify for the exception to the extent the request was denied, as long as the taxpayer hires those qualified apprentices who were in fact available within the partial denial. The exception is also met if there are no registered apprenticeship programs within a geographic area of the project. Further, an auto-generated email response to a request for an apprentice does not toll the five-business day clock. Lastly, and most notably, the maximum duration of a request is now 365 days (up from 120 days) from the originally denied request or lack of response.

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