# The New Normal for Renewable Energy Projects:

## An Overview of Prevailing Wage and Apprenticeship Requirements under the Inflation Reduction Act

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**Monica Dozier**
704.338.6030
mdozier@bradley.com

**Stephanie Gaston**
713.576.0355
sgaston@bradley.com

**Amy Puckett**
704.338.6042
apuckett@bradley.com

Bradley

Bradley

**An Overview of Prevailing Wage and Apprenticeship Requirements under the Inflation Reduction Act after Initial Treasury Guidance**

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Introduction

The Inflation Reduction Act (H.R. 5376) (the "**IRA**"), enacted on August 16, 2022, offers approximately $270 billion in tax incentives to help combat climate change. In order for taxpayers to realize the 30% federal investment tax credit for renewable energy facilities, they must ensure projects meet certain requirements, including paying a "prevailing wage" to workers, employing certain percentages of qualified apprentices, and maintaining required ratios through registered apprenticeship programs. Because these requirements extend to "alteration and repair" of qualified facilities, they also apply to operations and maintenance vendors.

On November 30, 2022, the Department of the Treasury (the "**Treasury**") and the IRS published initial guidance (the "**Guidance**") on prevailing wage and apprenticeship requirements in the IRA in the Federal Register. A full copy of the Guidance is attached hereto as **Exhibit A**. Qualifying projects that did not begin construction (by meeting the physical work or safe harbor standards established pursuant to IRS Notice 2013-29) on or before January 29, 2023, must meet these prevailing wage and apprenticeship requirements to be eligible for the full 30% investment tax credit for renewable energy facilities. Projects that fail to meet these requirements will be eligible for only 20% of such investment tax credit (in other words, a 6% investment tax credit).

The Guidance provides little clarity on the actual implementation of IRA prevailing wage and apprenticeship requirements, although it indicates that the Treasury and the IRS may later issue regulations and/or additional guidance on these requirements. As the renewable energy industry begins to implement processes and procedures around compliance with these requirements, this whitepaper provides initial analysis for taxpayers (developers) and contractors seeking to understand the various issues presented by such compliance efforts.

A primary policy goal of the IRA is to incentivize the use of union labor in the development and construction of renewable energy facilities. From a practical perspective, labor unions have long established registered apprenticeship programs that are open only to members. Labor

unions are also accustomed to setting and maintaining certified payrolls and often set the prevailing wage for skilled labor in their markets. In states with limited labor union presence, however, and where contractors tend to be open shop, compliance with IRA prevailing wage and apprenticeship requirements necessitates a shift in business methods.

Prevailing Wage Requirements

The IRA states clearly that laborers and mechanics employed by the taxpayer (the owner of the project when placed in service) and all contractors and subcontractors engaged by the taxpayer must be paid prevailing wages of the locality for the specific profession and classification during the construction, alteration, or repair of a covered facility. "**Employed**" for purposes of prevailing wage requirements is broadly defined and includes any individual who gets paid money for their services, regardless of whether the individual is an employee or an independent contractor under the IRS or other traditional tests. Importantly, based on this initial Guidance, and unlike the requirements of the Davis-Bacon and Related Acts ("**DBRA**"), the IRA does not appear to require certified payroll be submitted to the U.S. Department of Labor ("**DOL**"). The Guidance, however, otherwise adopts the definitions of some fundamental terms (including "**wages**," "**laborer**," and "**construction**") from the DBRA.

In describing how stakeholders will determine the applicable prevailing wage, the Guidance directs taxpayers to wage determinations published by the U.S. Secretary of Labor at www.sam.gov. The DOL guide to using www.sam.gov is attached hereto as **Exhibit A**. A list of wage classifications may be found here.

If a particular type of construction project, geographic area, job, or classification is not listed on this website, taxpayers are instructed to request a wage determination or rate from the DOL via email at IRAprevailingwage@dol.gov. Taxpayers should also direct questions regarding the applicability of a wage determination or its listed classifications to the DOL via the same email.

In order to make a DOL wage determination request, a taxpayer needs to provide enough information in the email to assist the DOL in making a determination. Such information includes:

- Type of facility (solar is generally considered heavy construction)
- Facility location (usually by county)
- Job description and duties
- Proposed labor classifications for the facility, and any rationale for the proposed classification
- Proposed prevailing wage rates for such classifications

There is no indication in the Guidance as to how much time the DOL will be given to respond, or whether there will be a deadline, nor is there any indication as to whether the DOL's judgment calls on prevailing wages will be published for other taxpayers who may have similar requests. The DOL has published its own overview of prevailing wage requirements pursuant to the IRA, which may be found here.

When the DOL provides its wage determination, that determination is binding upon the project. The IRA and Guidance do not address whether the DOL's wage determination for any particular project or jurisdiction will be made public.

In the event the DOL does not provide a wage determination in sufficient time to allow certainty for project construction schedules, the taxpayer will need to make some assumptions about wages for purposes of compliance with IRA prevailing wage requirements. The IRA does allow a taxpayer to cure a failure to satisfy prevailing wages by making each affected worker whole based on what the worker should have been paid under the prevailing wage, with interest, and by making penalty payments to the IRS of $5,000 per affected worker. Higher payments to workers (3x the difference between actual and prevailing wages) and higher penalties ($10,000 per affected worker) apply where the failure to pay prevailing wages is the result of an intentional disregard of the regulations. All payments and penalties are due within 180 days of a violation determination (likely the date of the DOL wage determination, based on other DOL practice).

This opportunity to cure is likely to be a key element of many project agreements during initial implementation of IRA prevailing wage requirements, as developers and contractors negotiate allocation of the risks around assumptions of wage rates prior to DOL determinations.

Apprenticeship Requirements

The IRA's apprenticeship provisions generally require that: (1) a certain percentage of the total labor hours for the construction, alteration, or repair of a covered facility be performed by qualified apprentices; (2) taxpayers (and their contractors and subcontractors) who employ four or more individuals also employ at least one qualified apprentice; and (3) taxpayers maintain the required ratio of journeymen to apprentices for the duration of the project. The following percentage of total labor hours applies based on when construction begins:

A. When the construction begins before January 1, 2023: at least 10% qualified apprenticeship labor;
B. When the construction begins after December 31, 2022, and before January 1, 2024: at least 12.5% qualified apprenticeship labor; and
C. When the construction begins after December 31, 2023: at least 15% qualified apprenticeship labor.

Notably, these percentages exclude management and administrative personnel (for example, foremen, superintendents, and owners or persons employed in *bona fide* executive, administrative, or professional capacities).

Consistent with the IRA's prevailing wage provisions, "**employ**" under the apprenticeship requirements is broadly defined and means any individual who gets paid money for their services, regardless of whether the individual is an employee or an independent contractor under the IRS or other traditional tests. Also, consistent with the IRA's prevailing wage requirements, taxpayers are admonished to maintain sufficient records to support that apprenticeship requirements have been met or that a good faith effort exception ("**Good Faith Effort Exception**"), as described in further detail below, applies.

The Guidance further provides that to comply, taxpayers must employ apprentices through a "registered apprenticeship program" ("**RAP**") meaning a program registered with the DOL or a State Apprenticeship Agency.

Thus, the taxpayer's options for apprenticeship compliance are: (1) utilize an established registered apprenticeship program, which may involve working with industry associations who

have existing registered apprenticeship programs, or in some states, community colleges available to partner with businesses; or (2) establish and register its own proprietary program that meets the necessary requirements.

Some states, such as North Carolina, have their own State Apprenticeship Agencies ("**SAA**") while other states, such as South Carolina, use the DOL's Office of Apprenticeship ("**OA**"). If an apprenticeship program sponsor wishes to register its program on a national scale, it may seek registration of National Program Standards with the OA. To register a program nationally, a sponsor must meet certain requirements, including submitting a detailed plan to the OA (details of which are provided on pages 3-4 of OA Circular No. 2022-01, attached to this whitepaper as **Exhibit B**), and the OA may decline nationwide registration if it determines the necessary criteria have not been met.

Once registered nationally with National Program Standards, however, a sponsor "does not have to register a National Program Standards program with a State's SAA to operate the program in that state, unless there are specific State-mandated requirements, such as wage and hour provisions or apprentice ratio standards, that necessitate changes to the program's standards to be in alignment with State laws and regulations." Also, apprenticeship programs registered by OA on a nationwide basis under National Program Standards may "nevertheless need to seek separate registration in SAA States when requesting State-specific benefits offered by those States (such as State tax credits)." Additional information on state apprenticeship offices, located nationwide, may be found here. Additionally, taxpayers, contractors, or subcontractors who do not want to create their own RAP may search for sponsors by location or industry. This provides compliance options for smaller businesses who may not have their own programs.

The IRA implicitly acknowledges the construction industry's constraints arising out of lack of skilled labor by allowing a Good Faith Effort Exception to its apprenticeship requirements. The Good Faith Effort Exception applies if the taxpayer requests a qualified apprentice from a RAP "in accordance with usual and customary business practices" for RAPs in the particular industry ***and*** (1) the request is denied (and the denial is not because the taxpayer, contractor, or subcontractor refused to comply with the "established standards and requirements" of the RAP) ***or*** (2) the RAP fails to respond to the request within five business days after the date the RAP received the request. In terms of documenting this process, the Guidance states that the taxpayer should "maintain sufficient books and records establishing the taxpayer's request of qualified apprentices

from a registered apprenticeship program and the program's denial of such request or non-response to such request, as applicable."

Unfortunately, the Guidance does not provide any additional details, and there is not any clarity right now, on what is considered "usual and customary business practices," particularly with the use of apprentices in the solar industry being a novel requirement. At a minimum, a developer should probably retain any documentation of its request(s) (including the date of the request and anything available to demonstrate it met the RAP's request requirements) as well as any response/denial (if one is received by the RAP) or documentation noting the lack of response after five days of receipt of the request by the RAP.

Currently, there is not any established standard for deliverables or other reporting format needed for taxpayer audit purposes. That said, of course, in addition to documentation of requests to RAPs, taxpayers should keep records of total labor hours, registered apprentices, and registered apprentices' labor hours contributed to the project in order to demonstrate that the IRA's apprenticeship requirements have been met.

Practical Perspectives:

The DOL has published FAQs for apprenticeship requirements here; and for prevailing wage requirements here.

In addition to meeting the prevailing wage and apprenticeship requirements, taxpayers, contractors, and subcontractors should keep meticulous records to support that prevailing wage and apprenticeship requirements have been satisfied or that the Good Faith Effort Exception applies, as applicable.

Apprenticeship records should demonstrate that: (1) apprenticeship labor hours for construction, alternation, or repair were met, (2) apprenticeship participation requirements were met, and (3) apprentice-to-journeyworker ratios of the RAP on each day an apprentice was working were met.

Prevailing wage records should include, at minimum, the names of workers, their duties and responsibilities, the work performed, and the wages paid for all workers employed on the project.

Although it is unclear whether the records will be subject to an audit initiated by the DOL, developers and contractors should maintain sufficient records in the event of such an audit – or more likely, an IRS audit of claimed tax credits. Additionally, if claiming a Good Faith Effort Exception to apprenticeship requirements, as noted above, a taxpayer, contractor, or subcontractor should keep "sufficient books and record" to demonstrate the request for qualified apprentices from a registered apprenticeship program and the program's denial of such request or failure to respond to such a request (if applicable).

Parties should pay particular attention to incorporation of these requirements in EPC and O&M agreements, as well as all downstream subcontracts. Sophisticated developers and contractors should create and implement compliance programs to ensure appropriate record-keeping to substantiate their payment of prevailing wages and use of appropriate apprenticeship programs.

Conclusion:

Overall, while this initial Guidance begins to elaborate on the path to compliance with IRA prevailing wage and apprenticeship provisions, it still leaves renewable energy developers and contractors with significant uncertainty in practical compliance.

Please contact us should you have specific questions or concerns about compliance with prevailing wage requirements, apprenticeship requirements (including establishing your own program or using an existing program), or other inquiries about the IRA and latest Treasury and IRS Guidance.

Exhibit A – Prevailing Wage and Apprenticeship Guidance
Exhibit B – DOL Guide to Using www.sam.gov
Exhibit C – DOL National Program Standards

Please note: In addition to the above exhibits, this whitepaper also contains hyperlinks (in blue text) to additional online resources relating to IRA prevailing wage and apprenticeship requirements.

*Monica Dozier, Stephanie Gaston, and Amy Puckett are attorneys at Bradley Arant Boult Cummings LLP, who regularly advise clients on labor and employment issues in the renewable energy industry.*