Holland & Hart



Melissa Browder

Associate
303.295.8421
Denver
mbbrowder@hollandhart.com



Adam M. Cohen

Partner
303.295.8372
Denver
acohen@hollandhart.com

IRS Issues Final Prevailing Wage and Apprenticeship Regulations

Insight — June 28, 2024

On June 25, 2024, the Internal Revenue Service and U.S. Department of Treasury published final Treasury Regulations ("Final Regulations") in the Federal Register on the prevailing wage and registered apprenticeship requirements ("PW&A Requirements") under Sections 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48C, and 179D of the Internal Revenue Code of 1986 (the "Code"). The PW&A Requirements provide rules for taxpayers intending to claim increased amounts of Federal income tax credits or an increased deduction as well as certain recordkeeping and reporting requirements and are comprised of prevailing wage requirements ("Prevailing Wage Requirements") and apprenticeship requirements ("Apprenticeship Requirements").

Some highlights from the Final Regulations include:

1. No Direct Application to Section 48 or 48E Investment Tax Credits: The Final Regulations do not include regulations under the investment tax credits of Section 48 and 48E. The IRS and Treasury Department indicated that the regulations for the PW&A Requirements under these provisions would be finalized later.

2. No PW&A Requirements before January 29, 2023: The IRS provided that any work that would be considered construction, alteration or repair ("CAR") of the qualified facility performed prior to January 29, 2023, is not subject to the PW&A Requirements. This transition rule applies regardless of whether the beginning of construction exception (as described in Section 45(b)(6)(B)(ii) of the Code) ("BOC Exception") applies and regardless of whether the taxpayer initially satisfied the BOC Exception but later failed to satisfy such exception. Rather, PW&A Requirements are applied for work performed only on or after January 29, 2023.

3. Two Different "Beginning of Construction" Tests: The Final Regulations provide that the beginning of CAR will be used to determine the activities that mark the start of the obligation to comply with the PW&A Requirements. But, the IRS Notices on "beginning of construction" will still apply for purposes of determining "beginning of construction" for purposes of the BOC Exception. The IRS has also issued a penalty waiver for taxpayers who (a) applied the IRS Notices for determining when the obligation to pay prevailing wages began, and (b) make the appropriate correction payments, as applicable, within 180 days of the date the PW&A Requirements are published.

Certain Apprenticeship Requirements Highlights

4. No Apprenticeship Post-Placement-in-Service: The Prevailing Wage

Requirements apply with respect to both the construction AND alteration and repair of a facility at any time whereas the Apprenticeship Requirements apply SOLELY with respect to the construction of a facility and any alterations or repairs prior to the placement in service of the facility. Additionally, after a facility is placed in service, a taxpayer is deemed to satisfy the Prevailing Wage Requirements for that particular year if no alterations or repairs are made.

5. No Deadline for Cure Payment for Apprenticeship and May Challenge: Unlike the cure period for the Prevailing Wage Requirements (180 days), there is no such deadline for cure payments with respect to Apprenticeship Requirements and Apprenticeship Requirements cure payments may be challenged through deficiency proceedings.

6. Timing Aspects of Apprenticeship Requests (including Longer Reliance Period on Good Faith Effort Exception):

a. For the "good faith effort" exception to the Apprenticeship Requirements ("Good Faith Effort Exception") to apply, an initial request for qualified apprentices must be made at least forty five (45) days before the qualified apprentice is requested to begin work on the facility and any subsequent request must be made no later than fourteen (14) days before qualified apprentices are requested to begin work on the facility.

b. The maximum duration of a Good Faith Effort Exception applying is 365 days (366 in case of a leap year).

7. Deemed Satisfaction of "Good Faith Efforts" When No Applicable Apprenticeship Program: In the event there is no registered apprenticeship program with a geographic area of operation that includes the location of the facility, a taxpayer is deemed to satisfy the Good Faith Effort Exception with respect to the qualified apprentices that the taxpayer, contractor, or subcontractor would have requested.

8. Choice of Worker When Apprentice-to-Journeyworker Ratio Failed: The taxpayer, contractor, or subcontractor may choose which apprentice(s) receive the prevailing wage rate in a situation where the "ratio requirement" of the Apprenticeship Requirement is not satisfied.

9. Four Worker Test in Participation Requirement is Over All of Construction: The Final Regulations clarify that in the event the taxpayer, a contractor, or a subcontractor employes four individuals for CAR of the qualified facility over the entire course of the construction, the "participation requirement" of the Apprenticeship Requirements must be satisfied, regardless of whether such individuals are employed at the same location or at the same time.

10. Clarifications of Labor Hours Requirement: The satisfaction of the "labor hours" requirement of the Apprenticeship Requirements is calculated on an aggregate basis for the entire project, and training hours conducted at the "site of the work" are counted. However, consistent with the proposed PW&A Requirements Treasury Regulations ("Proposed

Regulations") clarify that all foreperson hours are excluded (even if some hours are considered laborer time).

Prevailing Wage Requirements Highlights

11. Execution of Contract Determines Prevailing Wage Rate: The date of execution of a contract for CAR of a facility determines the applicable general wage determination(s) to use in determining the prevailing wage rates. However, if there is no contract or the parties are unable to determine the date of execution of the contract, then the applicable general wage determination is the determination in effect when CAR starts at the facility. Thus, more than one wage determination may apply where the taxpayer enters separate contracts with more than one contractor. The wage determination does not need to be updated if a contractor is simply provided more time to complete the scope of the original work or if new work added to the contract is incidental, but the wage determination utilized must be updated if alteration or repair work is expected to occur over an indefinite period of time or if material scope changes are made.

12. Supplemental Wage Determination Request Timing Aspects: A taxpayer may request a supplemental wage determination up to ninety (90) days prior to when the taxpayer expects to execute a contract with such contractor for CAR of a facility as opposed to the official date that CAR begins. Any supplemental wage determinations must be incorporated into the contract within 180 days of issuance. Any of the taxpayer, contractor or subcontractor may make the request for a supplemental wage determination.

13. No Movement on Clarifying "Laborer or Mechanic" in Wind, Solar or other Relevant Industries: Incorporating the definitions of "laborers and mechanics" from the Proposed Regulations (i.e., such workers are determined based on the specific job duties and relevant facts and circumstances), the Final Regulations fail to provide additional guidance regarding exclusion of certain owners and specialized employees (such as commissioning technicians) from the definitions of "laborer and mechanic."

14. Repair Work Clarified: The Final Regulations provide additional tests for what constitutes "repair" including activities that: (a) improve the facility, either by fixing something that is not functioning properly or by improving upon the facility's existing condition; (b) involve the correction of individual problems or defects as separate and segregable incidents and are not continuous or recurring; or (c) improves the facility's structural strength, stability, safety capacity, efficiency, or usefulness. The distinction between "repair" and "maintenance" will continue to be a facts-and-circumstances determination.

15. Taxpayer Responsible for PW&A Requirements: The Final Regulations reiterate, multiple times, that the sole responsibility for compliance with PW&A Requirements lies with the taxpayer, even where the taxpayer relies on third-party reviewers to demonstrate compliance with the PW&A Requirements or on third parties to retain relevant records.

16. Correction Payments where Worker cannot be Located: The Final

Regulations provide that taxpayers are required to make correction payments even if the taxpayer is unable to locate the laborer and mechanic and the taxpayer may satisfy this obligation through making such correction payments in compliance with the applicable state unclaimed property laws and federal and state withholding requirements.

17. Penalty Relief when Correction Payments made tied to Failure and Not Awareness but More Time Given: To qualify for penalty relief, correction payments must be made by the last day of the first month following the end of the calendar quarter in which the failure occurred, as opposed to when the taxpayer becomes aware of such failure.

Miscellaneous Highlights

18. Alternatives to Recordkeeping: The IRS provided alternative options for recordkeeping, provided that unredacted records must be made available to the IRS upon request:

a. Taxpayers may collect and physically retain redacted records from every relevant contractor and subcontractor;

b. Taxpayers may use a third-party vendor to collect and physically retain records from every relevant contractor and subcontractor on behalf of the taxpayer (whereby personal information may be redacted to comply with any applicable privacy laws); or,

c. Taxpayers, contractors, and subcontractors may physically retain unredacted records for their own employees.

19. Expanded Recordkeeping: In addition to the recordkeeping requirements promulgated in the Proposed Regulations, the Final Regulations indicate the following additional documents *may* be used by the taxpayer to demonstrate compliance with the Prevailing Wage Requirements, which must be maintained and preserved for the relevant tax years as provided under Section 6001 of the Code and Treasury Regulations Section 1.6001 1(e):

a. All contracts for CAR;

b. Accurately completed Department of Labor Form WH-347;

c. Copies of contracts for CAR of the facility with any contractor or subcontractor;

d. Records to document any failures to pay prevailing wages and the actions taken to prevent, mitigate, or remedy the failure; and,

e. Records related to any complaints received by the taxpayer, contractor, or subcontractor that such party was paying wages less than the applicable prevailing wage rate for work performed by laborers and mechanics with respect to the qualified facility.

In addition to the recordkeeping requirements promulgated under the Proposed Regulations in connection with the Apprenticeship

Requirements, the Final Regulations added the following documents and factors to the non-exhaustive list that may demonstrate compliance with the Apprenticeship Requirements:

a. Records demonstrating compliance with the Good Faith Effort Exception in Treasury Regulations Section 1.45-8(f)(1);

b. The amount and timing of any penalty payments and documentation reflecting the calculation of penalty payments;

c. Records to document any failures to satisfy the Apprenticeship Requirements and the actions taken to prevent, mitigate, or remedy the failure; and,

d. Records related to any complaints received by the taxpayer, contractor, or subcontractor that such party was not satisfying the Apprenticeship Requirements.

20. Expanded Intentional Disregard Factors: The Final Regulations expand significantly on non-exhaustive factors considered to determine whether a failure to satisfy the PW&A Requirements was due to intentional disregard. The IRS and the Treasury Department view this as the means of encouraging taxpayer behavior. The expanded factors are described below, and subject to a rebuttable presumption of no intentional disregard, as they apply to both the Prevailing Wage Requirements and Apprenticeship Requirements.

Intentional Disregard – Prevailing Wage Requirements:

a) Whether the taxpayer conducted regular (such as quarterly, or more frequent) reviews of the prevailing wage rate;

b) Whether the taxpayer hired an independent third party to aid in the review of payroll information;

c) Whether the taxpayer (or a third party acting on behalf of the taxpayer) regularly reviewed payroll information of contractors and subcontractors or required contractors and subcontractors to regularly provide payroll information to the taxpayer (or third party acting on behalf of the taxpayer);

d) Whether the taxpayer investigated complaints of retaliation or adverse action as a result of suspected failures to pay prevailing wages and/or classify workers in accordance with applicable wage determinations, employment tax violations, or violations of workplace standard laws, and whether the taxpayer took appropriate actions to remedy any such retaliation or adverse action and prevent it from occurring;

e) Whether the taxpayer posted information in a prominent place at the qualified facility or otherwise provided written notice to the laborers and mechanics during CAR on how to report to the taxpayers' appropriate personnel departments or managers suspected failures to pay prevailing wages and/or suspected failures

to classify workers in accordance with applicable wage determinations, employment tax violations, or violations of workplace standard laws;

f) Whether the taxpayer offered laborers and mechanics the opportunity to acknowledge notice provided by the taxpayer, contractor, or subcontractor that in order to be eligible to claim certain tax benefits, taxpayers must ensure compliance with the Prevailing Wage Requirements;

g) Whether the taxpayer provided laborers and mechanics with paystubs or access to other individual payroll records reflecting amounts they were paid per pay period, including the specific hourly rate and all deductions from wages, and whether the laborers and mechanics were provided with a written notice of the rights conferred by the whistleblower provisions of the Taxpayer First Act (26 U.S.C. 7623(d));

h) Whether the taxpayer knowingly contracted with contractors debarred by a municipality, State, or the U.S. Department of Labor for violations related to the underpayment of local, State, or Federal prevailing wages; and

i) Whether the taxpayer failed to maintain and preserve records in accordance with the PW&A Requirements. Records need only contain the last four digits of a social security number, where applicable.

Intentional Disregard – Apprenticeship Requirements:

a) Whether the taxpayer regularly conducted reviews of the contractors' and subcontractors' use of qualified apprentices;

b) Whether the taxpayer, contractor, or subcontractor contacted the Department of Labor's Office of Apprenticeship or relevant State apprenticeship agency for assistance in locating a registered apprenticeship program;

c) Whether the taxpayer regularly followed up with a registered apprenticeship program regarding a request for qualified apprentices;

d) Whether the taxpayer developed and used an apprenticeship utilization plan;

e) Whether the taxpayer required contractors and subcontractors to forward to the taxpayer requests to registered apprenticeship programs within five (5) business days of when requests are made; provided that a taxpayer is not automatically deemed to have acted with intentional disregard for ignoring solicitations from labor unions or representatives of registered apprenticeship programs;

f) Whether the taxpayer investigated complaints of retaliation or adverse action concerning failures to comply with the Apprenticeship

Requirements, and whether the taxpayer took appropriate actions to remedy any such retaliation or adverse action and prevent it from occurring;

g) Whether the taxpayer refused to employ available qualified apprentices (note that this factor appears in the Preamble to the Final Regulations only);

h) Whether the taxpayer failed to maintain and preserve records in accordance with the PW&A Requirements. Records need only contain the last four digits of a social security number, where applicable; and,

i) Whether the taxpayer had in place procedures whereby individuals could report suspected failures to comply with the Apprenticeship Requirements, without retaliation or adverse action, whether the taxpayer investigated such reports by individuals, and whether the taxpayer had internal controls to prevent the failures to comply with the Apprenticeship Requirements.

Additional Apprenticeship Highlights

21. Additional Apprenticeship Program Requirement and Request Details:

a. Taxpayers are permitted to create their own registered apprenticeship program and taxpayers are not required to use apprentices from a program located in the same geographic areas as the project to satisfy the "labor hours" requirement. However, taxpayers are required to request qualified apprentices from at least one apprenticeship program with a geographic area of operation that includes the geographic location of the facility for purposes of the Good Faith Effort Exception.

b. Furthermore, requests for apprentices must include (i) "reasonable" estimates and (ii) a statement of intent to employ qualified apprentices consistent with the hours and date of employment included in the request, and the taxpayer needs to keep records reflecting that the estimates included in such request were reasonable.

c. The Final Regulations have also been updated to include a new example to address the situation where a taxpayer initially qualifies for the Good Faith Effort Exception and later obtains qualified apprentices in response to an additional request for qualified apprentices that is subsequently made.

22. Substantive Responses Required for Requests for Qualified Apprentices: The Final Regulations provide that a response must be considered substantive to satisfy the Good Faith Effort Exception (i.e., an automated or other non-substantive response or acknowledgement is not sufficient), and that the taxpayer, contractor or subcontractor has no obligation to follow up with the registered apprenticeship program after an

initial request is made or after receipt of a non-substantive response. However, note the additional "intentional disregard" factor that will encourage following up (see *Intentional Disregard – Apprenticeship Requirements*). In the event a taxpayer receives a partial denial to a request, it may still create a valid basis for satisfying the Good Faith Effort Exception with respect to the portion of the request denied (but the taxpayer must hire the qualified apprentices that are available). Furthermore, the Final Regulations indicate that a denial that (a) follows an initial acceptance and (b) is received prior to the start of the requested work may still serve as a valid basis for the Good Faith Effort Exception.

23. No Pre-filing Requirements: The Final Regulations provide that the Treasury Department and the IRS will not impose pre-filing requirements, including submission of pre-filing certified payroll records or other sworn reports, the pre-filing review of submitted payroll records, job site visits by the IRS, and interviews of workers regarding the accuracy of submitted information, as such requirements are not prescribed in the Code and the obligation to comply with the PW&A Requirements only arises *after* a taxpayer has filed a tax return claiming the increased credit amount.

24. Indian Tribal Government Employees Exempt: The Final Regulations provide limited relief from the PW&A Requirements for Indian Tribal Governments. Namely, an Indian Tribal government (including any subdivision, agency, or instrumentality thereof) is excepted from the Prevailing Wage Requirements with respect to employee laborers and mechanics and such Indian Tribal government actors may choose the general wage determination to use for work on a qualified facility where the CAR of such facility occurs on Indian land that encompasses or overlaps with more than one geographic area with respect to which the US Department of Labor has issued a general wage determination.

25. Certain Credits Do Not Require Prevailing Wage After Placement in Service: Prevailing Wage Requirements do not apply to periods after placement in service with respect to the following credits: Section 30C and 45L.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should

seek the advice of your legal counsel.