



## LEGAL ALERT

December 2022

### 60-Day Period to Begin Construction Following IRS Guidance on Wage and Apprenticeship has Begun

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The IRS released [Notice 2022-61](#), "Prevailing Wage and Apprenticeship Initial Guidance Under Section 45(b)(6)(B)(ii) and Other Substantially Similar Provisions" last week. Under the Inflation Reduction Act of 2022 (the "Act"), one of the ways that certain tax credits for clean energy can be increased, including increasing the Energy Credit from 6% to 30%, is if construction begins on the project within 60 days of the IRS's release of guidance on the prevailing wage and apprenticeship requirements. (See our previous coverage of the Act [here](#).) The IRS has now officially released that guidance.

#### **Prevailing Wage Guidance**

- The taxpayer satisfies the Prevailing Wage Requirements if:
  - The taxpayer satisfies the Prevailing Wage Rate Requirements (as determined by the Secretary of Labor for construction, alteration, or repair of a similar character in the locality in which such facility is located) with respect to any laborer or mechanic employed in the construction, alteration, or repair of a facility, property, project, or equipment by the taxpayer or any contractor or subcontractor of the taxpayer; and
  - The taxpayer maintains and preserves sufficient records, including books of account or records for work performed by contractors or subcontractors of the taxpayer, to establish that such laborers and mechanics were paid wages not less than such prevailing rates, in accordance with the general recordkeeping requirements under the tax code.

#### **Apprenticeship Guidance**

- The taxpayer satisfies the Apprenticeship Requirements if:
  - The taxpayer satisfies the Apprenticeship Labor Hour Requirements (the Applicable Percentage of the total labor hours of the construction, alteration, or repair work (including such work performed by any contractor or subcontractor) with respect to such facility is, performed by qualified apprentices), subject to any applicable Apprenticeship Ratio Requirements (apprentice-to-journeyworker ratios of the Department of Labor or the applicable State Apprenticeship Agency).
    - The Applicable Percentage is:
      - (i) in the case of a qualified facility the construction of which begins before January 1, 2023, 10 percent,
      - (ii) in the case of a qualified facility the construction of which begins after December 31, 2022, and before January 1, 2024, 12.5 percent, and
      - (iii) in the case of a qualified facility the construction of which begins after December 31, 2023, 15 percent.

### ***Apprenticeship Guidance - Continued***

- The taxpayer satisfies the Apprenticeship Requirements if:
  - The taxpayer satisfies the Apprenticeship Participation Requirements (each taxpayer, contractor, or subcontractor who employs 4 or more individuals to perform construction, alteration, or repair work with respect to the construction of a qualified facility must employ 1 or more qualified apprentices to perform such work); and
  - The taxpayer complies with the general recordkeeping requirements under the tax code, including maintaining books of account or records for contractors or subcontractors of the taxpayer, as applicable, in sufficient form to establish that the Apprenticeship Labor Hour and the Apprenticeship Participation Requirements have been satisfied.

### ***Beginning of Construction or Installation Guidance***

- The IRS Notice, relying on prior IRS guidance, describes two methods that a taxpayer may use to establish that construction of a facility begins: (i) by starting physical work of a significant nature (Physical Work Test), and (ii) by paying or incurring five percent or more of the total cost of the facility (Five Percent Safe Harbor)
  - Under the Physical Work Test, construction of a facility begins when physical work of a significant nature begins, provided that the taxpayer maintains a continuous program of construction. (Does not include preliminary activities such as: planning or designing, securing financing, exploring, researching, obtaining permits, licensing, conducting surveys, environmental and engineering studies, or clearing a site.).
  - Under the Five Percent Safe Harbor, construction of a facility will be considered as having begun if: (i) a taxpayer pays or incurs five percent or more of the total cost of the facility, and (ii) thereafter, the taxpayer makes continuous efforts to advance towards completion of the facility.

If you have any questions regarding these IRS guidance matters please contact:

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