Joint Comments of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) on Requirements in the Inflation Reduction Act of 2022

Notice 2022-51

The International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) submit these comments in response to questions raised by the Department of the Treasury and the Internal Revenue Service (IRS) on the prevailing wage and apprenticeship utilization requirements in the Inflation Reduction Act of 2022.[1]

SMART has approximately 203,000 members in diverse occupations, with more than 136,000 members employed in the sheet metal trade. SMACNA is a national employer association representing 3,500 contributing unionized sheet metal contractors. SMART and SMACNA jointly sponsor a national training fund, the International Training Institute for the Sheet Metal and Air Conditioning Industry (ITI),[2] which works in conjunction with 148 SMART local joint apprenticeship and training committees (JATCs) to provide training to apprentices and journeypersons throughout the country. We also jointly fund and manage the National Energy Management Institute Committee (NEMIC),[3] which has as its key mission affording trainees – apprentices and journeypersons – the opportunity to obtain third-party certification of their skills through the International Certification Board/Testing, Adjusting and Balancing Bureau (ICB and TABB). An independent assessment of their skills safeguards the welfare of apprentices and other SMART members by increasing their marketability.

[1] https://www.irs.gov/pub/irs-drop/n-22-51.pdf

[2] The ITI protects the interests of apprentices in JATCs during the term of their apprenticeship and throughout their careers in a variety of ways: by almost 50 years of curriculum development that anticipates the need for training and re-training as technology evolves; journeyperson upgrades for graduates so that their skills do not become obsolete as technology changes; diverse on-the-job training; a nationally-recognized, portable credential; college credit; an opportunity for expedited progression; multi-modal options for related instruction; portable health insurance and pensions, and progressively-increasing wages that are commensurate with skills acquired.

[3] NEMIC was established in 1981 for the purpose of identifying and developing educational opportunities that reflect current needs in the sheet metal industry and to create and expand employment for apprentices and journeypersons employed by SMACNA contractors.

The IRA's massive investments to fight the climate crisis will incentivize expansion of workforce training and creation of career-sustaining, middle class jobs by providing expanded tax credits for taxpayers that satisfy prevailing wage and apprenticeship requirements. This unprecedented level of financial support from the federal government for expansion of registered apprenticeship promises to greatly increase opportunities for the continuity and diversity of employment necessary to provide broad-based training to entry-level workers. Over time, the tax credits will incentivize private investment that will increase the supply of journeypersons as apprentices graduate from registered apprenticeship programs (RAPs). Unions and signatory contractors play a critical role in supplying the Nation with highly skilled construction workers available to work on private and public jobs.

To assist the Treasury Department in preventing fraud, wage theft, and exploitation,[4] these comments focus on specific steps that the Treasury Department, individually or in coordination with the Wage and Hour Division (WHD) and/or Office of Apprenticeship (OA), may take to promote accountability, appropriate oversight, and enforcement and to determine which functions can appropriately be delegated to the taxpayer. In the context of the tax credit enhancements for compliance with prevailing wage and apprenticeship utilization requirements, the taxpayer assumes an analogous role to a "prime contractor," [5] as that term is defined by the DOL in proposed

[4] *See* the White House's FACT SHEET: The Inflation Reduction Act Supports Workers and Families (Aug. 19, 2022), which states that the IRA will "Stop companies from ripping off workers" and "Incentivize prevailing wages." https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/19/fact-sheet-the-inflation-reduction-act-supports-workers-and-families/

[5] Under the proposed rule, the term ''prime contractor'' means:

> [A]ny person or entity that enters into a contract with an agency. For the purposes of the labor standards provisions of any of the laws referenced by § 5.1, the term prime contractor also includes the controlling shareholders or members of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, any contractor (e.g., a general contractor) that has been delegated all or substantially all of the responsibilities for overseeing any construction anticipated by the prime contract, and any other person or entity that has been delegated all or substantially all of the responsibility for overseeing Davis-Bacon labor standards compliance on a prime contract. For the purposes of the cross-

regulations, in terms of responsibility for compliance with such requirements and liability for noncompliance. Under current Davis-Bacon and Related Acts (DBRA) regulations, prime contractors have the responsibility for the compliance of all the subcontractors on a covered prime contract.[6] Additionally, these comments respond to questions raised by the Treasury Department regarding good faith efforts to comply with utilization requirements; documentation or substantiation that should be required to show compliance with the prevailing wage requirements; and other topics on which SMART and SMACNA have expertise.

I. UNION CONTRACTORS MEET IRA LABOR STANDARDS SINCE THEY ARE CONTRACTUALLY OBLIGATED TO PAY PREVAILING RATES OF PAY AND TO FUND JATCs

In implementing the apprenticeship utilization requirements of the IRA, the Treasury Department must ensure that its guidance is consistent with the purpose of the National Apprenticeship Act of 1937 (NAA), 29 U.S.C. § 50, which is to "safeguard the welfare of apprentices"[7] and the Davis-Bacon Act, which is "to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area."[8] The most straightforward means to compliance with the prevailing wage and apprenticeship utilization

withholding provisions in § 5.5, any such related entities holding different prime contracts are considered to be the same prime contractor.

See Notice of Proposed Rulemaking, Updating the Davis-Bacon and Related Acts Regulations, to amend Parts 1, 3, and 5 of these regulations. 87 *Fed.Reg.* 15711, 15706 (Mar. 18, 2022).

[6] 29 C.F.R. § 5.5(a)(6).

[7] The IRA incorporates by reference the definition of "registered apprenticeship program" in Section 3131 (e) (3)(B) of Internal Revenue Code, which states as follows:

> The term "registered apprenticeship program" means an apprenticeship registered under the Act of August 16, 1937 (commonly known as the "National Apprenticeship Act"; 50 Stat. 664, chapter 663; 29 U.S.C. 50 et seq.) that meets the standards of subpart A of part 29 and part 30 of title 29, Code of Federal Regulations.

[8] *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 773 (1981).

requirements would be for taxpayers to voluntarily enter into construction contracts with contractors and subcontractors that are signatory to collective bargaining agreements (CBAs), which mandate payment of prevailing rates and contributions to JATCs by signatory contractors for each hour worked on projects governed by the CBAs. JATCs provide a steady stream of apprentices to work under the guidance of journeypersons. These programs deliver quality skill and safety training, and thereby, increase the Nation's supply of skilled construction workers available to work on private and public projects.[9] Another effective means to compliance would be for taxpayers to voluntarily enter into project labor agreements on covered projects, particularly ones that mandate submission of apprentice utilization plans at or before pre-construction conferences.[10] These two approaches would avert worker misclassification, which is rampant in the construction industry where there are enormous economic incentives to cheat, ranging from the high costs of workers compensation for construction occupations[11] to reduced wages for registered apprentices on federal and state prevailing wage jobs.[12]

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[9] Sally Klingel & David B. Lipsky, "Joint Labor-Management Training Programs for Healthcare Worker Advancement and Retention." Cornell University ILR School, *Research Studies and Reports*, 2010. (Construction JATCs are a joint "response to a seasonal and mobile labor market.")

[10] *See* Port of Seattle Project Labor Agreement, which requires submission of a utilization plan at the pre-job conference:

> The Parties agree to set a minimum State Apprenticeship Council (SAC) Apprenticeship Utilization Goal of fifteen percent (15%) per craft. The goal established for minority apprentice training is twenty-one percent (21 %) of the total apprentice training hours. The goal established for female apprentice training is twelve percent (12%) of the total apprentice training hours. The Prime Contractor will be responsible for all Contractors and Sub-contractors of whatever tier shall submit an Apprenticeship Utilization Plan at their pre-job conference and all Contractors shall submit weekly certified payrolls identifying all SAC registered apprentices.

[11] Michael Kelsay, James I. Sturgeon, & Kelly D. Pinkham (2006). *The Economic Costs of Employee Misclassification in the State of Illinois*. University of Missouri – Kansas City.
https://faircontracting.org/wp-content/uploads/2019/06/Illinois-Employee-Misclassification.pdf

[12] Davis-Bacon regulations, 29 C.F.R. § 5.5(a)(4)(i), permit contractors to pay registered apprentices wage rates that are below the prevailing rates. Unlike employers in other industries, construction contractors save as much as 40% per hour in the wage of workers classified as first-year apprentices on DB jobs.

II. THE TREASURY DEPARTMENT SHOULD TAKE INTO ACCOUNT THE SCOPE OF WORKER ABUSE IN THE CONSTRUCTION INDUSTRY IN DEVELOPING GUIDANCE AND REGULATIONS NEEDED TO ENSURE OVERSIGHT, ACCOUNTABILITY, AND ENFORCEMENT

In the recent proposed rulemaking updating DBRA regulations, the DOL recognized the need for greater protection of workers and proposed changes to "strengthen enforcement"[13] and deter "unscrupulous business practices."[14] These comments provide the Treasury Department with background on the types of unscrupulous practices that deprive "laborers and mechanics,"[15] including apprentices, of the protections afforded by the DBRA and the NAA.

A. DOL Precedent and Academic Studies Amply Demonstrate that Misclassification and Other Fraudulent Acts are Rampant in the Construction Industry

DOL precedent and academic studies amply demonstrate that financial self-interest has long resulted in misclassification of workers as independent contractors;[16] misclassification of journeypersons to lower paying journeyperson classifications with a lower prevailing wage;[17]

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[13] 87 *Fed.Reg*. at 15700. To better protect workers and ensure that they received the wage and fringe benefits to which they are entitled, the DOL has proposed, for the first time ever, to incorporate anti-retaliation provisions in the DB contract clauses to ensure that workers who raise concerns about payment practices or assist contracting agencies or DOL in investigations are protected from termination or other adverse employment actions; expanding cross-withholding to contracts held by different but related legal entities (e.g., entities controlled by the same controlling shareholder or joint venturers or partners); and strengthened the debarment remedy.

[14] *Id*. at 15746.

[15] 29 C.F.R. § 5.2(m).

[16] See, e.g., Lisa Xu and Mark Erlich, *Economic Consequence of Misclassification in the State of Washington*, Harvard Labor and Worklife Program, 2 (2019), https://lwp.law.harvard.edu/files/lwp/ files/wa_study_dec_2019_final.pdf; Karl A. Racine, Issue Brief and Economic Report, *Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry*, 13 (September 2019). These reports are cited in the WHD's NPRM, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 *Fed.Reg*. 62218 (Oct. 13, 2022). https://www.govinfo.gov/content/pkg/FR-2022-10-13/pdf/2022-21454.pdf

[17] *Cosmic Construction Co., Inc*., WAB 79-19, Sept. 2, 1980; *Jordan & Nobles Construction Co*.; *Soule Glas and Glazing Co*., WAB Case No. 78-18 (Feb. 8, 1979); and *Sealtite Corporation*, WAB Case No. 87-6 (October 4, 1988).

misclassification of workers as apprentices even though they are not individually registered in a bona fide RAP with the OA or State Apprenticeship Agency recognized by the OA;[18] using apprentices on covered projects even though the contractor does not have an approved apprenticeship program;[19] failure to pay the proper percentage of the journeyperson wage rate;[20] and/or a failure to honor required ratios of journeypersons to apprentices.[21]

Misclassification of workers through use of the conformance process, which is used to create "conformed" rates when wage rates are "missing" for work called for on a project, takes many forms.[22] Contractors sometimes deliberatively misrepresent the skill sets involved to perform a classification in support of a lower conformed rate;[23] inappropriately seek a conformance request for a "helper,"[24] misclassify highly skilled and highly compensated workers as "common/general laborer";[25] seek conformances for work within the laborer classification at wage rates that are about half of the rates on the wage schedule for laborers;[26] seek conformed

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[18] *Tollefson Plumbing and Heating*, WAB 78-17 (Sept. 24, 1979); *Clevenger Roofing and Sheet Metal Co*., WAB 79-14 (Aug. 20, 1983).

[19] *Jos. J. Brunetti Construction Co. & Dorson Electric & Supply Co., Inc*., WAB Case No. 80-9 (Nov. 18, 1982); *Spartan Mechanical Corp*., WAB Case No. 80-6 (April 16, 1984); *In re North Country Constructors of Watertown*, WAB No. 92-22 (Sept. 30, 1992), aff'd *North Star Industries v. Reich*, 67 F. 3d 307 (9th Cir. 1995).

[20] *Bay State Wiring Co.*, WAB 76-8 (June 14, 1977).

[21] *Johnson Electric Co*., WAB 80-3 (April 11,1983); *CRC Development Corporation*, WAB Case No. 77-01 (Jan. 23, 1978); *Repp & Mundt, Inc. & Goedde Plumbing & Heating Co., Inc*. WAB 80-11 (Jan. 17, 1984); *Palmer and Sicard, Inc*., WAB 77-12 (Dec. 14, 1977).

[22] The WHD issues a "conformed" rate when there is no appropriate classification on the applicable general wage determination for work required to complete a project and specified criteria in 29 C.F.R. part 5 are met. 29 C.F.R. 5.5(a)(1)(ii)(A).

[23] *P&N, Inc./Thermodyn Mechanical Contractors, Inc*., ARB Case No. 96-116 (Oct. 25, 1996).

[24] *Bryan Electrical Construction, Inc*., WAB Case No. 94-16 (Dec. 30, 1994).

[25] *Jordan & Nobles Construction Co*., WAB No. 81-18 (Aug. 19, 1983).

[26] *Rite Landscape Construction Co., Inc*., WAB No. 83-03 (WAB Oct. 18, 1983).

rates for work that is already encompassed within a classification on a wage determination for the purpose of paying less than the prevailing rates;[27] and select conformed rates that fail to bear a reasonable relationship to the rates on the applicable wage determination.[28]

B. Participating Employers in Poor Quality, Underfunded RAPs are Unjustly Benefited on Prevailing Wage Jobs

At present, union contractors account for nearly all expenditures on RAPs. In Indiana, Illinois, and Wisconsin, for example, JATCs are responsible for 94%, 95%, and 99% of expenditures for construction apprentice training, respectively.[29] In Indiana, about $56,873,080 is spent each year on construction industry training by non-profit organizations headquartered in the state; JATCs spend a total of $54,410,780; and the non-union construction industry spends an annual total of $2,462,300 on apprentice training.[30] A 2018 study of expenditures on apprenticeship programs in New York demonstrates the same imbalance between union and non-union expenditures.[31] Additionally, JATCs train the vast majority of apprentices in the construction industry. In Illinois, 97.5% of construction apprentices – 74,458 – were enrolled in

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[27] *Selco Air Conditioning, Inc., ARB Case No. 14-078* (July 27, 2016); *American Building Automation, Inc*., ARB Case No. 00-67, (May 30, 2001); and *Pizzagalli Construction Co*., ARB No. 98-090 (May 28, 1999).

[28] *See Norse, Inc*., Case No. 95-05 (Feb. 29, 1996); *U.S. Fire Protection*, ARB Nos. 99-008 (1999); and *Courtland Constr. Corp*., ARB No. 17–074 (Sept. 30, 2019).

[29] Kevin Duncan (2018). *Implications of Clarifying the Definition of Public Works and Prevailing Wage Coverage in New York: Effects on Construction Costs, Bid Competition, Economic Development, and Apprenticeship Training*. https://faircontracting.org/wp-content/uploads/2019/04/NY-PW-report-Duncan-3-15-18.pdf

[30] *See* the attached *Summary of Apprentice Expenditures for the Indiana Construction Industry* (April 2022), which is based on an analysis of IRS forms.

[31] Duncan (2018) reported that the nonprofit training program affiliated with ABC had three employees, approximately $350,000 in training expenditures, and net assets of about $149,000. By contrast, the 11 JATCs that offer the same trade training as ABC have combined net assets of over $87 million, $18.0 million in expenditures, and 128 employees. Duncan Report at 8.

JATCs between 2000 and 2016.[32] The sponsors of unilateral programs do not invest sufficient resources to develop and sustain quality programs and produce a minor percentage of graduates.

Participating employers in poor quality, underfunded RAPs in the construction industry are unjustly benefited, because they pay apprentices less than the journeyperson rates of pay without spending the needed resources to provide adequate training. The construction industry is the only industry in which employers have a strong financial incentive to establish apprenticeship programs irrespective of an employer's ability to provide quality training since Davis-Bacon regulations, 29 C.F.R. § 5.5(a)(4)(i), permit contractors to pay registered apprentices wage rates that are below the prevailing rates. Unlike employers in other industries, construction contractors save as much as 40% per hour in the wage of workers classified as first-year apprentices on Davis-Bacon jobs. In a legitimate training program, this short-term reduction in wages for a novice with limited skills is a fair trade-off for obtaining the necessary training to develop diverse skill sets in a marketable trade. There is a compelling need to protect apprentices in the construction industry, because a person's status as an apprentice determines the prevailing rates of pay to which he or she is entitled.[33] Duly registered apprentices or trainees are the "only employees covered by the labor standards of the Davis-Bacon and related Acts and regulations applicable thereto who may be paid less than the predetermined wage rate for the work they perform."[34]

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[32] Robert Bruno and Frank Manzo IV (Jan. 6, 2020). *The Apprenticeship Alternative/Enrollment, Completion Rates, and Earnings in Registered Apprenticeship Programs in Illinois*, at 3. https://faircontracting.org/wp-content/uploads/2020/01/ilepi-pmcr-the-apprenticeship-alternative-final.pdf

[33] This special recognition of apprentices registered with federal or state agencies dates back to the first promulgation of DB regulations in 1951. *See Miami Elevator Co*., 2000 WL 562698, citing 16 *Fed.Reg*. 4430 (May 12, 1951).

[34] *Miami Elevator Co*., quoting *Soule Glass and Glazing Co., Portland, MA*, 1979 WL 29169 (DOL WAB). *See also*, *CRC Development Corp.,* 1978 WL 22697 (DOL WAB).

C. The Potential for Widespread Abuse of Apprentices is High if the Federal Government is Not Proactive in Screening Out Sham Programs

SMART and SMACNA encourage the Treasury Department to be proactive in collaborating with the OA in rooting out sham programs. Based on our vast experience in administering programs and in the construction industry in general, we anticipate that without rigorous oversight and enforcement, non-union contractors will engage in the following practices, which are illegal and antithetical to the purpose of the NAA:

- Assigning apprentices who are not registered in an apprenticeship program approved by the OA or a State Apprenticeship Agency to work on covered projects;
- Failing to pay apprentices in accordance with required wage progressions;
- Assigning apprentices to perform discrete, repetitive tasks within a trade rather than providing the broad-based on-the-job training required to achieve proficiency in a trade;
- Assigning an apprentice(s) to perform rudimentary tasks within multiple trades to achieve the required utilization percentages, and thereby, preventing the apprentice(s) from developing marketable skills in a recognized trade; and
- Assigning apprentices to distant job sites to fulfill utilization requirements without regard to their obligation to provide broad-based training within a trade.

III. OVERSIGHT, ACCOUNTABILITY, AND ENFORCEMENT STANDARDS ARE NEEDED TO ENSURE IRA COMPLIANCE

SMART and SMACNA encourage the Treasury Department to take the following actions to foster oversight, accountability, and enforcement of the prevailing wage and apprenticeship utilization requirements: 1) adopt DOL's existing framework for DBRA implementation in order to promote consistency across the federal government and expedite the development and publication of guidance; 2) appoint a labor compliance advisor[35] to consult and coordinate with

[35] *See* Labor Advisors for Defense Agencies and Civilian Contracting Agencies. https://sam.gov/content/wage-determinations/resources/labor-advisors Defense agencies and many civil agencies employ Labor Advisors to oversee administration of labor standards and provide support to contracting officers. In the civilian realm, the Departments of Agriculture, Energy, Homeland Security, Housing and Urban Development, Transportation, and Veterans Affairs, and the General Services Administration, Social Security Administration, and NASA have Labor Advisors. The following defense agencies or departments

the WHD and OA of the DOL and Labor Advisors from other federal agencies to ensure consistent interpretations and application of the prevailing wage and apprenticeship utilization requirements;[36] to address complaints in a timely manner,[37] and to provide expertise in addressing "labor disputes" within the meaning on FAR 5.2.222-14;[38] 3) hire and train sufficient staff with the ability to review certified payroll records and detect noncompliance and/or the need for further investigation, including interviews of workers; recommend conformed rates to the Wage and Hour Administrator when requested by a taxpayer for a classification(s) missing from applicable wage determinations; provide educational outreach to taxpayers on how to comply with requirements; perform periodic audits;[39] and refer matters to the DOL for enforcement, as needed; 4) issue clear guidance to taxpayers on their duties in ensuring that contractors and subcontractors are in compliance with prevailing wage and apprenticeship requirements and their liability for unpaid wages for noncompliance; and 5) encourage the OA to initiate a rulemaking to improve the protections afforded apprentices to prevent exploitation on covered projects.

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have Labor Advisors: Air Force, Army, Navy, Department of Defense, Defense Logistics Agency, Naval Facilities Engineering, and Army Corps of Engineers.

[36] Under the regulatory scheme for implementation of DBRA, when contracting agencies or interested parties have questions about such matters as coverage under the DBRA or the applicability of the appropriate wage determination to a specific contract, they are directed to submit those questions to the WHD for resolution. *See* 29 C.F.R. §5.13. The Administrator provides periodic guidance on this process, as well as other aspects of the DBRA program, to contracting agencies and other interested parties, particularly through All Agency Memoranda (AAMs) and ruling letters.

[37] When a contracting agency's investigation reveals underpayments of wages of the DBA or one of the Related Acts, the Federal agency generally is required to provide a report of its investigation to WHD, and to seek to recover the underpayments from the contractor responsible. If violations identified by the contracting agency or by WHD through its own investigation are not promptly remedied, contracting agencies are required to suspend payment on the contract until sufficient funds are withheld to compensate the workers for the underpayments. 29 C.F.R. § 5.9.

[38] FAR 5.2.222-14, Disputes Concerning Labor Standards

[39] Under DB regulations, contracting agencies have the duty to ensure compliance by engaging in periodic audits or investigations of contracts, including examinations of payroll data and confidential interviews with workers. 29 C.F.R. § 5.6.

IV. CLEAR AND CERTAIN GUIDANCE ON PREVAILING WAGE REQUIREMENTS IS ESSENTIAL

The request for comments states that "Section 45(b)(7)(A) provides that a taxpayer must ensure that any laborers and mechanics employed by the taxpayer, or any contractor or subcontractor, are paid wages at rates not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality in which such facility is located as most recently determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, which is commonly known as the Davis-Bacon Act." The Treasury Department then asks whether "guidance necessary to clarify how the Davis-Bacon prevailing wage requirements apply for purposes of § 45(b)(7)(A)." As a threshold matter in developing guidance, it is important that the Treasury Department understand that contractors and subcontractors will most frequently be the employer of laborers and mechanics on qualified facilities and that the taxpayer will not necessarily be their direct employer. Regardless of whether the taxpayer is acting as the direct employer of laborers and mechanics or contracts with contractor(s) that employ them, the taxpayer remains financially liable for amounts owed to construction workers.[40]

A. The Unique Requirements in the IRA Necessitate Creation of an Administrative Process that Adapts and Delegates DBRA Oversight and Enforcement Functions to Entities with the Capacity to Execute Them

SMART and SMACNA strongly encourage the Treasury Department to issue clear guidance on compliance with the prevailing wage requirements in the IRA. Since the framework contemplated by the IRA is unique, it is necessary that the Treasury Department adopt and then adapt the DOL's regulations implementing the DBRA and the Federal Acquisition Regulations, as

[40] NPRM, 87 *Fed. Reg*. at 15740, where the DOL referenced the *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp*., 456 U.S. 556, 572–73 (1982), in stating that: "Where the nominal prime contractor is a single-purpose entity with few actual workers, and it contracts with a general contractor for all relevant aspects of construction and monitoring of subcontractors, the most reasonable enforcement structure would place liability on both the nominal prime contractor and the general contractor that actually has the staffing, experience, and mandate to assure compliance on the job site."

needed, to ensure that taxpayers know what is required of them to earn tax credits. Furthermore, with the great increase in construction activity that the IRA's investments will initiate, prevailing wage requirements will be vital to ensuring that federal investment does not drive down wages for construction workers as contractors compete for the lowest bids. By requiring the payment of minimum prevailing wages, Congress sought in enacting the DBA in 1931 to ensure that Government construction and federally assisted construction would not be conducted at the expense of depressing local wage standards.

B. Guidance Should Clarify that Taxpayers Are Responsible for "Documentation or Substantiation of Compliance with Prevailing Wage Requirements"

The request for comments seeks information on the documentation or substantiation that should be required to show compliance with the prevailing wage requirements. During the administration of a DBRA covered contract, contractors and subcontractors are required to provide certified payrolls to the contracting agency to demonstrate their compliance with the incorporated wage determinations on a weekly basis.[41] This function is one of many that the Treasury Department should require the taxpayer to perform. The guidance should state that the taxpayer is responsible for ensuring that contractors and subcontractors submit weekly certified payroll records to the taxpayer[42] and that the taxpayer must timely submit them to the Treasury Department. The guidance should also state that the taxpayer is responsible for auditing the certified payroll records to ensure that contractors and subcontractors pay laborers and mechanics the amounts required in the applicable wage determinations.

[41] *See* generally 29 C.F.R. part 3.

[42] FAR 52.222-8 (a), (b) & (c), Payrolls and Basic Records

Record retention is another important function that should be delegated to the taxpayer regardless of whether the entity is the direct employer of laborers and mechanics. The guidance should state that the taxpayer is required to retain records for certified payroll reports and preserve any written or electronic records that used by contractors and subcontractors to document workers' days and hours worked, rate and method of payment, compensation, contact information, and other similar information, which provide the basis for the contractor's subsequent submission of certified payroll, as well as the last known worker telephone numbers and email addresses, for a period of 3 years after all the work on the covered contract is complete.

C. The Guidance Should Delineate the Taxpayer's Oversight Responsibilities and Liability for Contractor and Subcontractor Violations of Prevailing Wage Requirements

In addition to responsibility for documentation and substantiation of compliance, the taxpayer should also be required to perform, at a minimum, the functions listed below. Since union contractors are required, pursuant to CBAs, to pay prevailing rates of pay, the taxpayer's oversight functions will be straightforward when it enters into a PLA and/or construction contract with union contractors.[43]

- Including in bid solicitations contract clauses pertaining to prevailing wage requirements and the applicable wage determination(s);
- Requiring that contractors and subcontractors certify in writing that they will comply with the prevailing wage and apprenticeship utilization requirements in the IRA;
- Initiating the process of obtaining conformed rates from the Treasury Department on behalf of contractors and subcontractors, informing contractors

[43] *See e.g.*, King County Master Community Workforce Agreement, which states, in relevant part, as follows:

> The Contractor and their Subcontractors shall submit a plan for participation of WSATC registered Apprentices to the Owner. The Contractor and each Subcontractor shall estimate the total contract labor hours to be worked on the Project and shall include the anticipated Apprenticeship participation by craft and hours. Diversity goals for the use of Apprentices are identified in Section 12.2 (c) of this Article. The Contractor must report on meeting the requirements of Article 12 in King County's Diversity Compliance Management System (DCMS) as written in section 00 22 00 of the executed Construction Contract.

and subcontractors of the conformed rates once approved by the WHD, and reviewing certified payroll records to monitor payment of the conformed rates to laborers and mechanics;

- Committing through a contractual obligation that the taxpayer will cover any unpaid wages or other liability for contractor or subcontractor violations of contract clauses governing prevailing wages;
- Entering into a contractual relationship with contractors and subcontractors that authorizes the taxpayer to withhold or cause to be withheld from contract(s) for construction of a qualified facility or any other contract(s) the taxpayer may have with the same contractor or subcontractor, amounts owed to laborers and mechanics for wages and fringe benefits paid at rates lower than the prevailing rates based on the taxpayer's review of weekly certified payroll records;
- Recording the names of all apprentices employed on projects of the taxpayer, the apprenticeable occupation for which each apprentice is registered with the OA; and the trades in which they are utilized on covered projects. The taxpayer is responsible for detection of efforts by contractors and subcontractors to utilize an apprentice on work that is not encompassed within the RAP; and
- Notifying contractors and subcontractors of increases in prevailing rates during the term of the contract and ensuring that certified payroll records reflect such increases. This clarification would ensure that the taxpayer understands the statutory obligation to pay "wages at rates not less than the prevailing rates for construction, alteration, or repair of a similar character in the locality in which such facility is located **as most recently determined** by the Secretary of Labor."[44]

Certain other functions, such as issuance of conformed rates when a classification required to perform covered work is missing from the applicable wage determination, are clearly beyond the ken of taxpayers who lack a high level of expertise in the nuances of DBRA regulations and subregulatory guidance and would reach inconsistent interpretations.

[44] With respect to DBRA requirements, the IRA provides as follows:

> [T]he taxpayer shall ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in . . . the construction of [a covered project] . . . shall be paid wages at rates not less than the prevailing rates for construction, alteration, or repair of a similar character in the locality in which such project is located as **most recently determined by the Secretary of Labor**, in accordance with subchapter IV of chapter 31 of title 40, United States Code." Pub. L. No. 117-169, Title I, Subtitle D, Sec. 13101(f) (emphasis added)

D. Guidance on Obtaining "Conformed" Rates for "Missing" Classifications that are Necessary to Complete a Covered Project is Essential

Since the WHD typically receives more than 10,000 "conformances" annually, it is expected that taxpayers will need a mechanism through which they can obtain conformed rates when classifications called for on covered projects are missing from applicable wage determinations.[45] DOL and FAR regulations provide a mechanism through which contractors may obtain conformed rates. FAR 52.222-6 (c)(1) states, in pertinent part, that the "Contracting Officer shall require that any class of laborers or mechanics, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination." An analogous process is needed to ensure that taxpayers have designated personnel at the Treasury Department who can facilitate the process of obtaining conformed rates.

In the recent NPRM amending DBRA regulations, the DOL observed that when rates are missing from the general wage determination, contractors are uncertain of the wage rates to which workers are entitled and "such uncertainty causes contractors to underbid on construction projects and subsequently to pay subminimum wages to workers, missing classifications on wage determinations can result in the underpayment of wages to workers." [46] To level the playing field for contractors in the bidding process and to ensure that workers are not paid subminimum wages, SMART and SMACNA recommend that Treasury Department guidance address how a taxpayer shall obtain the required minimum wage rate if the applicable wage determination does not include a wage rate for work to be performed by a contractor or subcontractor. SMART and SMACNA further recommend that the Secretary of the Treasury, in consultation with the Secretary of Labor,

[45] 87 *Fed.Reg*. at 15723.

[46] *Id*.

establish a procedure whereby the taxpayer may seek a conformed rate and/or information on whether issuance of a conformed rate is appropriate under the circumstances presented.

V. SMART AND SMACNA ENCOURAGE THE TREASURY DEPARTMENT TO READ THE GOOD FAITH EXCEPTION NARROWLY TO EFFECTUATE THE PURPOSE OF THE UTLIZATION REQUIREMENTS

The request for comments seeks the information on "what, if any, clarification is needed regarding the good faith effort exception" and "what factors should be considered in administering and promoting compliance with this good faith effort exception." SMART and SMACNA encourage the IRS to issue clear guidance that good faith efforts will not be satisfied if: 1) the taxpayer fails to recruit apprentices from a RAP for each trade without regard to the location of the program in the state in which a covered project(s) is located;[47] and/or 2) the taxpayer fails to timely develop a utilization plan.[48] The Washington DOT's "Apprentice Utilization Plan" form provides a model that would be useful to taxpayers in developing a viable plan to meet utilization requirements.[49]

[47] This approach is consistent with the statutory requirement that the Treasury Department adopt wage determinations issued by the WHD since wage determinations are based on key trade classifications, such as sheet metal worker, laborer, plumber, and electrician, which have long been recognized as apprenticeable occupations.

[48] *See e.g.*, the apprenticeship utilization language in the Seattle Public Schools Student and Community Workforce Agreement, for example, which requires submission of a utilization plan before the pre-construction conference:

> Section 2. The SPS Workforce Utilization Plan shall be prepared by the Prime Contractor and submitted to SPS prior to the SPS pre-construction conference and approved by SPS prior to start of work. The Workforce Utilization Plan provided by the Prime Contractor shall describe how the Prime Contractor will achieve the goals and requirements for utilization of apprentices and other hiring requirements or expectations. The Plan shall be updated regularly by the Contractor as directed by SPS. The Prime Contractor's Workforce Utilization Plan will be reviewed by the PAC and appropriate efforts shall be taken to ensure the desired utilization.

[49] DOT Form 424-004: https://wsdot.wa.gov/publications/fulltext/forms/424-004.PDF

A. The Statutory Language Requires a Narrow Reading of Good Faith

In a section titled, "Good Faith," the IRA states that a "taxpayer shall be deemed to have satisfied" the apprenticeship utilization requirements with respect to a "qualified facility if such taxpayer has requested qualified apprentices from a registered apprenticeship program" and the following circumstances occur:[50]

1) Such request "has been denied, provided that such denial is not the result of a refusal by the taxpayer or any contractors or subcontractors engaged in the performance of construction, alteration, or repair work with respect to such qualified facility to comply with the established standards and requirements of the registered apprenticeship program, or

2) The "registered apprenticeship program fails to respond to such request within 5 business days after the date on which such registered apprenticeship program received such request."

The statutory language clearly demonstrates that Congress expects that taxpayers, contractors, and subcontractors will engage in outreach and recruitment efforts that are designed to achieve required usage and that they will comply with utilization requirements unless the RAPs are unable to supply registered apprentices. Based upon rules of statutory interpretation, the good faith exception must be read in the context of the purpose of the apprenticeship utilization provisions in the IRA, as gleaned from an examination of the text, as a whole.[51] The Treasury Department should narrowly

[50] 26 U.S.C. § 45(b)(8)(D)(ii)(I) and (II).

[51] *See,* Congressional Research Service (Aug.18, 2020). *Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations,* at 46, citing *Dolan v. U.S. Postal Serv*., 546 U.S. 481, 492 (2006)(The breadth of an interpretation of an exception should be informed by the interplay between the exception and the general rule and read narrowly to "preserve the primary operation" of the "general statement of policy.") https://crsreports.congress.gov/product/pdf/R/R46484/2

construe the exceptions to avoid "swallowing" the general rule,[52] and thereby, "contravene" the "design" of the apprenticeship utilization requirement.[53]

The King County Master Community Workforce Agreement is an excellent example of a narrow reading of the good faith exception. It states that "good faith efforts or best efforts means the strongest possible efforts that the contractor and its subcontractors can reasonably make to meet the established apprentice requirement and hiring goals." A useful model that the Treasury Department could adopt to assist taxpayers in engaging in a good faith effort to recruit apprentices is California Division of Apprenticeship Standards' Request for Dispatch of an Apprentice form.[54] The form states that it can be "used to request dispatch of an apprentice from the Apprenticeship Committee in the craft or trade in the area of the public work." The form includes a link to a database for programs in the area by trade[55] and informs the contractor that it may "also consult your local Division Apprenticeship Standards (DAS) office whose telephone number may be found in your local directory under California, State of, Industrial Relations, Division of Apprenticeship Standards." Mandatory use of a similar form developed by the Treasury Department would facilitate monitoring of good faith efforts because it would provide documentary evidence of outreach.

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[52] *Id.*

[53] *Id.*

[54] Request for Dispatch of an Apprentice – DAS 142 Form: https://www.dir.ca.gov/das/dasform142.pdf

[55] http://www.dir.ca.gov/databases/das/pwaddrstart.asp for information

B. Federal Models for Good Faith Efforts Set a High Bar

Various federal regulators, including the Office of Federal Contract Compliance Programs,[56] the OA,[57] and the Disadvantaged Business Enterprise (DBE) program[58] of the Department of Transportation have decades of experience in evaluating "good faith efforts." SMART and SMACNA encourage the Treasury Department to review these models for recruitment of minorities, women, and others and adapt them to required outreach to satisfy the good faith efforts standard.

C. Washington State Model for Good Faith Efforts List Unacceptable Reasons for Failing to Meet Utilization Requirements

SMART and SMACNA encourage the Treasury Department to review guidance issued by the Washington DOT, titled *Apprenticeship Usage Reporting*, which provides answers to questions that the Treasury Department will need to address in issuing guidance and regulations implementing the IRA.[59] Under the "common questions" section, the Washington DOT responds to 23 questions, including the following:

- How will the good faith effort be evaluated?
- What situation(s) meet the intent of the contract in terms of the good faith effort?
- What situation(s) DO NOT meet the intent of the contract in terms of the good faith effort?

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[56] *See* OFCCP's manual, *2G04 Evaluation of Good Faith Efforts*: https://www.dol.gov/agencies/ofccp/manual/fccm/2g-executive-order-11246-aap-requirements/2g04-evaluation-good-faith

[57] 29 C.F.R. part 30; See OA guidance: https://www.apprenticeship.gov/help/apprenticeship-programs-must-conduct-utilization-analyses-race-ethnicity-and-sex-are

[58] *See* 49 CFR § 26.53 - What are the good faith efforts procedures recipients follow in situations where there are contract goals? *See also* powerpoint presentation of the Office of the Secretary (OST), Departmental Office of Civil Rights (DOCR), DBE Division on the DBE program. https://www.transportation.gov/sites/dot.gov/files/docs/mission/civil-rights/civil-rights-learning-center/281956/session-12gfe-crsymposium-2017-final.pdf

[59] Apprenticeship Usage Reporting: https://wsdot.wa.gov/business-wsdot/how-do-business-us/public-works-contracts/payments-reporting/apprenticeship-usage-reporting

- What if I don't want to put an apprentice on certain parts of the job due to the dangerous nature or work, or their skill level?
- I'm an out-of-state contractor and I'm having trouble finding apprenticeship programs. What should I do?
- I'm a non-union contractor and there aren't as many non-union programs as there are union programs. Does that mean I can't meet the requirement?

D. SMART and SMACNA's Recommendations Concerning Implementation of Good Faith Efforts Requirement

1. Unacceptable Reasons for Failure to Meet Utilization Requirements

SMART and SMACNA recommend that the guidance for implementing the apprenticeship utilization requirements include an illustrative list of reasons (non-exhaustive) that do not satisfy the good faith effort requirement, such as:

- Not replacing an apprentice who quit or was fired;
- Firing an apprentice without cause;
- No apprentices are available in the county in which the project is located or in counties adjacent thereto (see below for recommendations regarding statewide outreach);
- The only apprentices available are from JATCs;
- A contractor with whom the taxpayer has a contractual relationship has a pending application for registration of an apprenticeship program with the OA or state apprenticeship agency;
- The available apprentices lack of the necessary skill to perform the work (see below for a narrow exception); and/or
- The work is too hazardous to be safely performed by an apprentice (see below for a narrow exception).

We further recommend that the guidance adopt the Washington DOT's guidance for these skill and safety criteria. Its guidance lists the following reason (among others) that do not constitute good faith: "Not using enough apprentices because certain work is too dangerous or the apprentices do not have the appropriate skills."[60] Based on that model, SMART and SMACNA recommend

[60] *See Apprenticeship Usage Reporting*: https://wsdot.wa.gov/business-wsdot/how-do-business-us/public-works-contracts/payments-reporting/apprenticeship-usage-reporting

that the guidance state that if safety or skill of apprentices is asserted as a "good faith" reason(s) for failing to meet the utilization requirement, documentation must include photos and a description of the location of the work and equipment involved and a signed statement from the RAP with which the apprentice is registered that the training director agrees with the determination that the apprentice has not received adequate skill or safety training on the work in question.

2. To Meet the Good Faith Effort Standard, the Taxpayers Must Engage in Statewide Outreach

SMART and SMACNA recommend that the guidance make clear that the good faith effort requirement is not satisfied unless outreach for a trade is statewide. In some parts of the country, the geographic jurisdiction of a JATC covers an entire state. This is most likely to be the case in sparsely populated states, such as Montana. In these circumstances, registered apprentices travel to the training center periodically during the year and may travel over six hours one way to attend training classes. Furthermore, when large-scale projects call for a great number of workers, apprentices are often dispatched to locations that are remote from the training center, including to job sites that are in another state. In circumstances where apprentices are dispatched to an out-of-state location, coordination between sister JATCs and/or the national office with which the local JATCs are affiliated is needed to ensure the best utilization of apprentices. By contacting a JATC in the state in which a project is located, the taxpayer effectively initiates a multi-state search for apprentices.[61]

A statewide outreach requirement is consistent with the apprenticeship and DB regulations, which recognize that apprentices may work in areas that are outside the geographic scope of the

[61] See Apprenticeship Reciprocal Agreement between Washington, Oregon, and Montana: https://lni.wa.gov/licensing-permits/apprenticeship/_docs/reciprocalagreement.pdf

JATC with which they are registered. Apprenticeship regulations, 29 C.F.R. § 29.13(b)(7), state that "Program sponsors seeking reciprocal approval must meet the wage and hour provisions and apprentice ratio standards of the reciprocal State." In the NPRM amending DB regulations, the DOL proposed to revise the "subsection of § 5.5(a)(4)(i) regarding reciprocity to better align with the purpose of the DBA and the Department's Employment and Training Administration (ETA) regulation at 29 C.F.R. § 29.13(b)(7) regarding the applicable apprenticeship ratios and wage rates when work is performed by apprentices in a different State than the State in which the apprenticeship program was originally registered."[62]

VI. COMPLIANCE WITH UTILIZATION REQUIREMENTS SHOULD BE ASSESSED BASED ON "TOTAL LABOR HOURS" DURING THE "TAXABLE YEAR" OR LENGTH OF THE PROJECT WHEN SHORTER THAN THE TAXABLE YEAR

In seeking comments, the Treasury Department states that "Section 45(b)(8)(C) provides that each taxpayer, contractor, or subcontractor who employs four or more individuals to perform construction, alteration, or repair work with respect to a qualified facility must employ one or more qualified apprentices from a registered apprenticeship program to perform that work." It then asks, "What factors should the Treasury Department and the IRS consider regarding the appropriate duration of employment of individuals for construction, alteration, or repair work for purposes of this requirement?" A related question raised in the comments is "Are there existing methods to facilitate reporting requirements, for example, through current Davis-Bacon reporting forms, current performance reporting requirements for contracts or grants, and/or through DOL's Registered Apprenticeship Partners Information Management Data System (RAPIDS) database or

[62] Notice of Proposed Rulemaking, Updating the Davis-Bacon and Related Acts Regulations, to amend Parts 1, 3, and 5 of these regulations. 87 *Fed.Reg*. 15711, 15737 (Mar. 18, 2022).

a State Apprenticeship Agency's database?" SMART and SMACNA address both questions below.

A. Use of "Total Labor Hours" Rather Individual Assignments on Projects as the Benchmark Effectuates the Statutory Language in the IRA

SMART and SMACNA encourage the Treasury Department to state in its guidance that taxpayers must meet the utilization requirement for total labor hours during the "taxable year" or the length of the project when the latter is a shorter duration than the taxable year. This benchmark effectuates the clear language of the IRA, which states in a provision, titled "Percentage of Total Labor Hours," that:[63]

> Taxpayers shall ensure that, with respect to the construction of any qualified facility, not less than 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** shall, subject to subparagraph (B), be performed by qualified apprentices.

This benchmark would afford the taxpayer the ability to meet the utilization requirements on the covered project even if, despite good faith efforts, it is unable to meet the requirements on short assignments on the project. The taxpayer would have the ability to offset days with lower utilization by having higher utilization, consistent with "apprentice-to-journeyworker ratios of the Department of Labor or the applicable State apprenticeship agency," on other days.

The Washington State DOT guidance cited above describes the flexibility afforded by this approach in responding to two questions regarding its 15% utilization requirement: "Who does the requirement apply to? Does it apply to the prime contractor, the subcontractors or both?" The guidance demonstrates that the key to compliance is for the prime contractor on Washington State projects, or in this context, the "taxpayer" on the projects covered under the IRA, to contract with

[63] Emphasis added.

companies that "plan" to perform work using apprentices to a "assist" the prime contractor or taxpayer in meeting the utilization requirements:

> The contract requires that 15% of the total labor hours on the project be performed by apprentices. The prime contractor can choose how this will be achieved. We do not require that each contractor achieve 15% apprentice utilization, however in order to meet the requirement, the prime contractor should contract with companies that plan to perform apprentice hours to assist them in meeting the requirement. Otherwise, the prime contractor may not be able to meet the requirement. The requirement is that 15% of the total labor hours performed by all contractors on the job be performed by apprentices.

B. The "4 or More Individuals" Standard Should Apply to the Entire Project

Consistent with the statutory language that the utilization requirements apply to "total labor hours" on covered projects, the Treasury Department should issue guidance stating that the utilization requirements are triggered when a taxpayer, contractor, or subcontractor "employs 4 or more individuals to perform construction, alteration, or repair work with respect to the construction of a qualified facility" in any craft at a work site at the same time during the project.

This approach is consistent with the Nevada Labor Commissioner's guidance interpreting the Nevada's Apprenticeship Utilization Act,[64] which also uses, as a benchmark for triggering coverage, a designated number of workers. Like the IRA, the Nevada statute does "not specify or clarify if the more than 3 is for the entire public works project, or more than 3 for a specific day(s), week(s), and/or another period."[65] The Labor Commissioner guidance states, in relevant part, that "the legislative history and intent to mean that there must be more than 3 employees/workers employed on the public works project/work site at any one time and/or the same time."[66] The

[64] Nevada Revised Statutes (NRS), § 338.01165.

[65] Unlike the IRA, the Nevada statute is craft-specific and becomes applicable when there are more than 3 workers employed for **each apprenticed craft or type of work** to be performed on the public works project. The threshold in the IRA becomes applicable if "4 or more individuals" of any craft are employed to perform construction, alteration, or repair work on a covered project.

[66] Supplemental Guidance Apprenticeship Utilization Act, *What Does More Than 3 workers employed for Each Apprenticed Craft or Type of Work Performed Mean*? (March 5, 2021).

guidance further states, that in " other words, there must be a "crew" of "more than 3 employees/workers" for the utilization requirements to apply.

C. Weekly Certified Payroll Records Would Facilitate Recordkeeping and Reporting Requirements

A requirement that all employers – taxpayers, contractors, and subcontractors – complete and submit to the taxpayer or the Treasury Department (depending upon whether the taxpayer is the direct employer or acts in an oversight role) would facilitate recordkeeping and reporting requirements. The DOL's certified payroll form is a useful model. It includes spaces for reporting the number of workers employed by a contractor or subcontractor in each classification in a work week, including those employed as apprentices; the number of hours worked on each day of the week; rates of pay; contributions for fringe benefits; and information that identifies individual workers.[67] By requiring contractors and subcontractors to complete these forms on a weekly basis, the taxpayer would have the ability to determine whether the "4 or more individuals" standard is met, to maintain a tally of the total labor hours on the project, and to determine whether the utilization percentages are satisfied.

https://labor.nv.gov/uploadedFiles/labornvgov/content/Apprenticeship_Utilization_Act/AO%20AUA%20Supplemental%20Guidance%203%205%202021.pdf

[67] https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh347.pdf

CONCLUSION

In conclusion, SMART and SMACNA appreciate the efforts of the Treasury Department and the IRS to prioritize prevailing wage and apprenticeship requirements, because labor protections in the IRA do not become operative until 60 days after the Treasury Department issues guidance.[68] Clear and certain guidance will promote compliance and provide taxpayers with the opportunity to adapt internal recordkeeping systems and enter into contractual relationships with contractors and subcontractors that are committed to compliance. As stated above, the most straightforward means to compliance with the prevailing wage and apprenticeship utilization requirements is for taxpayers to enter into construction contracts with contractors and subcontractors that are signatory to collective bargaining agreements that mandate payment of prevailing rates and facilitate use of registered apprentices on private and public jobs. Another effective means to compliance is for taxpayers to enter into project labor agreements on covered projects.

Submitted on November 4, 2022

[68] *See, e.g*. 26 U.S.C. §§45(b)(6)(B)(ii), 48(a)(9)(B)(ii).