



# International Union of Operating Engineers

AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

November 4, 2022

JAMES T. CALLAHAN  
GENERAL PRESIDENT

Internal Revenue Service  
CC:PA:LPD:PR (Notice 19 2022-51)  
Room 5203, P.O. Box 7604, Ben Franklin Station,  
Washington, DC 20044.

JAMES M. SWEENEY  
GENERAL SECRETARY-TREASURER

To Whom It May Concern,

Please allow this correspondence to serve as the International Union's Operating Engineers' submission of comments on the below referenced proposed questions regarding implementation of the Inflation Reduction Act.

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## International Union of Operating Engineers Comments on:

Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements under the Act Commonly Known as the Inflation Reduction Act of 2022

### *Notice 2022-51*

The International Union of Operating Engineers ("IUOE") respectfully submits these comments in response to the United States Department of the Treasury ("Treasury") and the Internal Revenue Service's ("IRS") request for comments concerning the application of Prevailing Wage standards for tax credits in the Inflation Reduction Act of 2022. ("IRA")

The IUOE was founded in 1896 and proudly represents over 400,000 working people across the United States and Canada. Members of the IUOE are primarily operating engineers, who work as power equipment and crane operators, pipeliners, mechanics, and surveyors in the construction industry, and stationary engineers, who work in operations and maintenance in building and industrial complexes, as well as several job classifications in the petrochemical industry. While working and advocating on behalf of our members, the IUOE is intimately familiar on all matters surrounding the Davis Bacon Act ("DBA", "The Act", or "Davis Bacon") and energy infrastructure at large.

By and through our 72 Hoisting and Portable Locals throughout the United States and Canada, IUOE members work millions of manhours on energy infrastructure projects through all 50 states, and consequently, it has first-hand knowledge and expertise on how to build America efficiently and equitably. The Davis Bacon Act was passed in 1931 to ensure that the US Government behaved responsibly by not undercutting area wage standards when entering the construction market as a consumer. With the DBA, Congress mandated that when the US Government invests in our Country's vital infrastructure, it also must invest in the local community by ensuring no wage paid will be less than the prevailing wage of the community



where the project is being built. The Act in part revolutionized the country's moral philosophy when dealing with the American worker and laid the groundwork for fundamental labor legislation such as: the National Labor Relations Act, the Fair Labor Standards Act, Walsh-Healey Public Contracts Act and McNamara-Ohara Service Contract Act.

However, in the over 90 years since the Act was passed, the construction industry has changed significantly with the world around it. Modern and complex finance schemes have come to primarily fund construction and while in 1931 the Federal Government built primarily by directly funding, today tax credits are a vital Federal tool used to build infrastructure. Unfortunately, a questionable sense of history and principles in past Administrations has allowed the US Government to fund large amounts of construction projects through this method while circumventing the noble intent of the DBA by not mandating that the prevailing wage of a community be paid on such work.

The IUOE applauds this indication by the IRS and Treasury that they will actively ensure that the DBA is incorporated into Tax Credits being used to fund energy projects through the IRA. The heart of the Davis Bacon Act is ensuring responsible contracting practices on all Federally assisted construction projects, not just Federal projects through a specific funding vehicle. The IUOE believes that by taking these proactive steps the IRS and Treasury will not only benefit American workers and families, but the American public who rightfully depend on the ideal that this country's infrastructure be built by a quality well-trained workforce.

With that background, the IUOE provides the following comments in support of the measures proposed by Treasury and the IRS.

1. Is guidance necessary to clarify how the Davis-Bacon prevailing wage requirements apply for purposes of § 45(b)(7)(A)?

The IUOE believes Treasury should actively provide guidance to taxpayers who may be unfamiliar with DBA compliance. The United States Department of Labor ("USDOL") maintains innumerable resources on how taxpayers can best comply with the DBA. The guidance the USDOL provides runs from as granular as a voluminous Prevailing Wage Resource Book<sup>1</sup> to as broad as few paragraphs overview on how to comply with the Act<sup>2</sup>, with many resources in between. The USDOL makes compliance with the Act relatively simple, and as such, Treasury and the IRS should work with the USDOL to raise awareness about the various documents and publications that are currently available on how to best comply with the DBA and deliver targeted technical assistance to tax filers.

Additionally, as North American Building Trades Unions ("NABTU") previously advocated for, the IUOE recommends that Treasury and the IRS adopt and model provisions into contracts where the tax credits apply:

- a. Federal Acquisition Regulation ("FAR") 52.222-5(a), Construction Wage Rate Requirements – Secondary Site of the Work

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<sup>1</sup> Wage and Hour Division Prevailing Wage Resource Book (May 2015), accessed on Oct. 20, 2022 Available at: <https://www.dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book>

<sup>2</sup> *Federal Contracts-Working Conditions: Prevailing Wages in Construction Contracts*, U.S. Dep't of Lab. Employment Law Guide - Prevailing Wages in Construction Contracts. Available at: [https://webapps.dol.gov/elaws/elg/dbra.htm?\\_ga=2.26543355.734342438.1666618687-1065806743.1610120323](https://webapps.dol.gov/elaws/elg/dbra.htm?_ga=2.26543355.734342438.1666618687-1065806743.1610120323) (Accessed: October 25, 2022). Available at: [https://webapps.dol.gov/elaws/elg/dbra.htm?\\_ga=2.26543355.734342438.1666618687-1065806743.1610120323](https://webapps.dol.gov/elaws/elg/dbra.htm?_ga=2.26543355.734342438.1666618687-1065806743.1610120323)

- b. FAR 52.222-6 (a) &(b), Construction Wage Rate Requirements (the wage determinations referenced in this clause are publicly available at [sam.gov](http://sam.gov))
- c. FAR 52.222-8 (a), (b) & (c), Payrolls and Basic Records
- d. FAR 52.222-9 (a) & (c), Apprentices
- e. FAR 5.2.222-14, Disputes Concerning Labor Standards

For those provisions, the term “taxpayer” shall replace “contracting officer” where it appears in FAR 52.222-8(b)(1) and in the third sentence of FAR 52.222-8(c). The phrase “taxpayer or Secretary of the Treasury” shall replace “Contracting Officer or authorized representative of the Contracting Officer” where it appears in FAR 52.222-8(c). The term “contractor” shall replace “offeror” and the term “taxpayer” shall replace “Government” and the term “U.S. Department of Labor” shall replace “Contracting Officer” in FAR 52.222-5. For all other FAR clauses referenced above (i.e., 52.222-6,-9,-14), the term “taxpayer” shall replace the term “contracting agency” and “contracting officer”; the term “contract or project” shall replace “Federal contract or project”; the phrase “debarment pursuant to Section 9 of notice no. \_\_\_” shall replace “debarment action pursuant to 29 CFR 5.12.”.

2. Section 45(b)(7)(B)(i) generally provides a correction and penalty mechanism for failure to satisfy prevailing wage requirements. What should the Treasury Department and the IRS consider in developing rules for taxpayers to correct a deficiency for failure to satisfy prevailing wage requirements?

The IUOE stresses that Treasury and the IRS must be clear that a taxpayer’s willful failure to pay their workers the contractually and lawfully mandated prevailing wage will not be tolerated. To that end, the IUOE advocates for increased fines of \$10,000 per worker for willful disregard of the DBA provisions.

The IUOE understands that deciphering intent in these types of cases can be difficult, but Treasury and the IRS should complete a full investigation that considers the Taxpayer’s past violation of both USDOL and State Prevailing wage laws (including those owners, officers, directors, partners, managers, and agents, and any firm, corporation, partnership, or association in which an ownership interest exists or existed). Treasury and the IRS should consider holding taxpayer’s and their controlling group both jointly and severally liable for willful disregard of the DBA provisions. Further, the IUOE believes that any taxpayer who is found to have willfully violated the law by underpaying their workers should be debarred and be deemed to no longer qualify and/or be eligible to receive a credit or deduction under any covered tax program.

Lastly, the IUOE believes it vital that the falsification of any of the certifications in Section 4 must subject the taxpayer to civil or criminal prosecution under 26 U.S.C. § 7206.

3. What documentation or substantiation should be required to show compliance with the prevailing wage requirements?

The IUOE advocates that the best form of documentation to show compliance with the prevailing wage requirements remains the Certified Payroll Documents that are submitted periodically to the applicable agencies. The IUOE believes that its important for Treasury and the IRS to establish a procedure whereby taxpayers should be required to submit these documents on a monthly basis during construction of each covered project, and that the respective agencies examine these submissions to ensure compliance.

Further, to streamline and save resources, the relevant agencies should consider signed Collective Bargaining Agreements (CBA) that surpass the wage listed on the Wage Determination as compliance per

se. Existence of a Collective Bargaining Agreement for the work ensures that, at a minimum, the prevailing wage rates are paid, and also, that there is a dispute resolution process available to workers for any failure to pay the appropriate rate contained *within* the CBA.

4. Is guidance for purposes of § 45(b)(7)(A) needed to clarify the treatment of a qualified facility that has been placed in service but does not undergo alteration or repair during a year in which the prevailing wage requirements apply?

The IUOE believes guidance clarifying the treatment of qualified facilities not undergoing alteration or repair during a year in which prevailing wage requirements apply is appropriate. Because of the complexity this topic can create, Treasury and the IRS should create examples that clearly layout taxpayer obligations in this scenario.

5. Please provide comments on any other topics relating to the prevailing wage requirements for purposes of § 45(b)(7)(A) that may require guidance.

It is vital that Treasury and the IRS apply all USDOL rulings interpretations of the clauses set forth in Section 1 of this notice and related provisions in 29 CFR parts 1, 5 and 7.

The IUOE believes there must be special focus on adoption of provisions on the Conformance process used to add missing classifications to Wage Determinations. Treasury and the IRS must be aware that some of the equipment needed to build this important infrastructure may not have a wage listed under Wage Determinations applying to that project or facility.

Conformances involve a simple process where the USDOL determines a wage for equipment needed on a project but didn't receive enough wage data during a Survey to list on a Wage Determination. This process makes a Taxpayers' obligation clear on what to pay for pieces of equipment, if for some reason the equipment they are utilizing is not listed on the Wage Determination. For that reason, as the Indiana, Illinois, Iowa Foundation for Fair Contracting ("III FFC") remarked, special attention must be paid that taxpayers properly know when and how to file for a Conformance under the DBA.

The IUOE believes it's also important for Treasury and the IRS to stay aware of the relative ease of compliance with the provisions of the DBA. Some parties may object in some manner to the "burden" this would place on taxpayers, however, in reality any perceived burden is in fact relatively small. For example, the Fair Labor Standards Act ("FLSA") already mandates that all employers, not just those performing work on DBA projects, maintain records concerning hours worked, rate of pay, deductions, payment date, etc. The USDOL estimates it would take approximately 55 minutes for a first-time filer to familiarize themselves with the DBA and comply with data submission.<sup>3</sup> It stands to reasons that this 55 minute time period would only decrease to an even more marginal number as taxpayers become more familiar with the processes at play. Simply put, compliance with the DBA requires little more than what is already required by Federal law of all US employers.

As the III FFC astutely remarks in their comments, the data shows that the burden put on contractors for prevailing wage projects is minimal. As the IIIFFC cites, fifteen peer reviewed studies have demonstrated

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<sup>3</sup> Wage and Hour Division Instructions for Completing Payroll Form, WH-347, accessed on Oct. 25, 2022, available at <https://www.dol.gov/agencies/whd/forms/wh347> ("Public Burden Statement: We estimate that it will take an average of 55 minutes to complete this collection of information, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.").

that compliance with prevailing wage laws has no effect on the cost of projects.<sup>4</sup> Additionally, the IIFFC cites to four more peer reviewed studies that demonstrates that prevailing wage laws has no impact on the number of bidders for those projects, and in fact, that those projects with prevailing wage requirements had increased competition.<sup>5</sup>

Taking this into account, the IUOE believes Treasury and the IRS should carefully analyze a stakeholder's potential claim that fairly paying American workers is an impossible task rather than a minor inconvenience. For example, in an area where Prevailing Wages are Collectively Bargained a taxpayer has multiple options available to them such as signing a Project Labor Agreement that would easily comply with all the labor standards being proposed. However, since dissenting stakeholders are likely to conflate their ideological and political beliefs with an administrative burden, Treasury and the IRS should not be deceived.

Please do not hesitate to contact the IUOE with any questions, as we are happy to assist in any manner required to ensure that these vital labor standards are applied and enforced in an equitable manner to projects funded by Inflation Reduction Act of 2022.

Respectfully Submitted,



JAMES T. CALLAHAN  
GENERAL PRESIDENT

cc: Jeff Soth, Legislative Director  
Terry George, Director of Davis Bacon  
James J Callahan, Assistant Director of Davis Bacon  
Matthew G McGuire, General Counsel

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<sup>4</sup> Lina Stepick & Frank P. Manzo IV, The Impact of Oregon's Prevailing Wage Rate Law: Effects on Costs, Training and Economic Development (2021), <https://illinoisepi.files.wordpress.com/2021/01/uo-ilepi-oregon-prevailing-wage-report-final.pdf>.

<sup>5</sup> Lameck Onsarigo, et al., *The effect of prevailing wages on building costs, bid competition, and bidder behaviour: evidence from Ohio school construction*. 38 *Const. Mgmt. and Econ.* 917, 917-33 (2020).