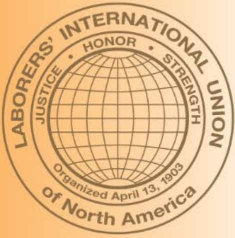

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LiUNA!

November 4, 2022

VIA ELECTRONIC SUBMISSION

Internal Revenue Service
Attn: Office of Associate Chief Counsel- Passthroughs & Special Industries
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: 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)*

Dear Sir or Madam:

The Laborers' International Union of North America (LIUNA) submits the attached comments in response to the 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).*

Your time and attention to the attached are appreciated. Should you have any questions, please contact this office.

With kind regards, I am

Sincerely yours,

TERRY O'SULLIVAN
General President

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Attachment

Feel the Power

COMMENTS OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA 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 Laborers' International Union of North America ("LIUNA") submits these comments in response to Notice 2022-51 ("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").

LIUNA is a diverse union representing nearly half a million members, most of whom work in the construction industry on a vast array of private and publicly funded projects, including renewable energy projects, energy generation and distribution systems, pipelines, water and clean air works, environmental remediation and renovation projects and many other types of projects which involve constructing a clean energy future in the United States. As such, the prevailing wage and apprenticeship requirements in the Inflation Reduction Act of 2022 (IRA)[1] are of vital importance to LIUNA construction members. These labor standards will protect LIUNA members every time they are employed on the projects for which tax credits are explicitly linked to the protections in the Davis-Bacon Act[2] (DBA) and the National Apprenticeship Act.[3]

LIUNA welcomes the new era of development that the IRA portends and we are prepared to cooperate with all stakeholders to quickly and efficiently implement the requirements under the IRA. We welcome clarification from the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) in guidance regarding the provisions of §§ 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E, and 179D of the Internal Revenue Code, as amended or added by the IRA. We believe Treasury may rely upon many current standard practices and tools used by other federal and state agencies in order to facilitate timely, consistent, and efficient implementation of the IRA. LIUNA appreciates the opportunity to provide the following

[1] Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818. 2022.

[2] The prevailing wage requirement states that the taxpayer "shall ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor… 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 facility 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.'' IRA, § 13101(f).

[3] The apprenticeship utilization requirement states that "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…be performed by qualified apprentices…". IRA, §13101(f).

"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." I.R.C., § 3131 (e)(3)(B) (1986).

comments to questions in Notice 2022-51 pertaining to the prevailing wage and apprenticeship requirements applicable to increased or bonus credit (or deduction) amounts under the foregoing provisions of the Code to assist in the development of implementing guidance.

I. Prevailing Wage Requirement

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

Response: The statutory language in the IRA amending § 45(b)(7)[4] (Prevailing wage requirements) of Title 26 sets the framework for the interaction between the Secretary of Labor and the Secretary of Treasury with respect to the application of Davis-Bacon wage determinations to enhanced tax credits defined in the IRA.

The IRA specifies that construction workers "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 qualified facility 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" (known as the "Davis-Bacon Act"). Section 45(b)(7) is incorporated by reference in several other tax credits in the IRA which utilize the same enhanced tax credit framework.[5]

The prevailing wage requirements in the IRA to enhance tax credits preserve the Secretary of Labor's authority to determine prevailing rates under the Davis-Bacon Act. Because the IRA expressly authorizes the Secretary of Labor to determine the prevailing wage in accordance with the DBA, Treasury may therefore rely upon existing Department of Labor (DOL) regulations and guidance as an efficient way to guide taxpayers and avoid administrative redundancies in prevailing wage implementation.[6]

Specifically, the Secretary of Labor's responsibility for determining prevailing wages is regulated by 29 CFR Part 1, which sets forth the criteria for conducting prevailing wage surveys and collecting other relevant wage information. It includes updating wage determinations based on collective bargaining agreements or new surveys. And it includes the authority to issue modifications to add *key* classifications of laborers and mechanics on a project-by-project basis when appropriate.

In the Treasury Guidance or other interagency agreement implementing this Act, it may be advisable to consider allowing the DOL, Wage and Hour Division (WHD), to post missing wage classifications on an annual basis, rather than rely upon time-sensitive project requests. This procedure must not run afoul of other regulatory obligations in determining a local prevailing wage, nor depart from the established procedures for determining "conformed" wage

[4] Pub. L. 117-168, § 13101 (2022).

[5] I.R.C. §§ 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E, and 179D (2022).

[6] 29 C.F.R. pts. 1 and 5.

classifications as described below. However, allowing prepopulated wage determinations in areas that lack all necessary wage rates may avoid delays in construction and uncertainty for taxpayers. This will affect mainly counties that have historically had no large-scale construction activity upon which to base certain wages, but which, due to the nature of some clean energy siting needs, may now attract such work to the area.

We additionally recommend that Treasury Guidance instruct taxpayers on administrative tools and interpretations of the Davis-Bacon Act which may aid taxpayers in carrying out their duty to ensure that all laborers and mechanics employed by the taxpayer (or its contractors and subcontractors) be paid wages no less than the locally prevailing rates, including the following:

1. *SAM.gov*. Taxpayers should be directed to the DOL's online wage determinations site to ascertain applicable prevailing wages.
2. *Benefits*. Taxpayers should be instructed that wage determinations (WDs) "provide for the payment of minimum wages, including fringe benefits" (29 CFR 1.1). Taxpayers should be aware of the requirement that benefits are included in the determination of prevailing wages according to regulation 29 CFR 5.31 (Meeting wage determination obligations).
3. *Modifications to wage determinations*.
   a. *Missing wage determinations*. The setting of minimum, locally prevailing wages for a particular craft is integral to the Secretary of Labor's authority under the IRA. In localities that may currently lack key classifications of laborers and mechanics necessary for the construction of qualified clean energy projects, the WHD of DOL has authority to make additions to the wage schedule. The Department should consider an efficient process to clarify published WDs where those classifications are missing, rather than rely upon a project-by-project "conformance" request. Regardless of the process utilized under the IRA to add missing key craft classifications, any action to "conform" additional wage rates to an existing wage determination must be undertaken by WHD as consistent with its published guidance in *All Agency Memoranda 213* and *233*.[7]
   b. *Classifications for work on clean energy*. If there is no integrity to the "classifications of laborers and mechanics" there can be no determination of a meaningful minimum prevailing wage as the DBA and IRA intend. Treasury Guidance should be clear that taxpayers will use the wages on posted WDs (available at Sam.gov) and that any request for additional classifications should be rare and will follow the established practice under AAMs cited in "Section 3(a)" above. Existing classifications of laborers on wage determinations generally include classifications that perform the necessary "scope of work" of laborers on clean energy projects. Individual tasks are not subject to the establishment of separate wage classifications. For example, neither "solar installer" nor

[7] *See,* AAM No. 213 (Mar. 22, 2013) and AAM No. 233 (Dec. 14, 2020). Application of the Davis-Bacon and Related Acts requirement that wage rates for additional classifications, when "conformed" to an existing wage determination, bear a "reasonable relationship" to the wage rates in that wage determination.

"wind technician" are classifications within the context of prevailing wages. These names refer to the duties of crafts, such as General Laborer or other local labor classifications already included in wage determinations, for which wage determinations are published in the overwhelming majority of localities in the U.S.[8]

4. *Types of Construction*. The Davis-Bacon Act establishes minimum wages for classifications of laborers and mechanics according to "projects of a character similar" in four types of construction. Treasury should clarify that clean energy development will adopt the DBA definitions of construction types according to AAM 130[9] and AAM 131.[10] Treasury may also consider including a summary of these AAMs in its guidance.

   LIUNA expects that clean energy projects under IRA normally will utilize the Heavy wage rate schedules for the appropriate prevailing wage, although there may be certain projects that will properly be based upon other wage determinations (i.e. Building) in whole or in part. Treasury should clarify that the appropriate wage determination – both in regards to the proper locality and the proper "type of construction" (i.e., Heavy, Building, etc.) – shall be determined consistent with current DOL regulatory and administrative practice.

Question 2: 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?

Response: Procedures for good faith deficiency corrections are common on federal and federally-assisted construction. Conciliations to cure minor discrepancies of prevailing wage requirements occur with some regularity and are facilitated by the responsible agency. Treasury may wish to consult with DOL on developing efficient procedures for communicating prevailing wage deficiencies to taxpayers and their contractors, and in turn facilitate remedying such deficiencies. For more serious complaints, or for disagreements about ascertaining appropriate wages or back wage claims, Treasury should develop guidance under its audit review authority. Again, IRS should look to – and consult with – the Wage and Hour Division for guidance in

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[8] *See also,* WHD's guidance on this issue: "Please note, wanting to pay a lower wage rate rather than the prevailing wage listed is not grounds for a conformance request. Laborers and mechanics are required to be paid the prevailing wage for the labor classification of work actually performed. ...e.g. Broadband: A large infrastructure contract has been funded to promote rural broadband and Davis-Bacon applies due to the funding source. Q: Do you need to seek a conformance? A: No, 'broadband' is not a labor classification. Typically, a broadband infrastructure project will include the labor classifications for power equipment operators, general laborers, and electricians; if the necessary labor classifications are listed on the wage determination, you do not need to seek a conformance." U.S. Dep't of Labor, Wage & Hour Div., Davis-Bacon Wage Determination Conformance Request Guide", Pg. 5, (Sept. 28, 2021).

[9] AAM No. 130 (Mar. 17, 1978). Application of the Standard of Comparison "Projects of a Character Similar" Under the Davis-Bacon and Related Acts.

[10] AAM No. 131. (Jul. 14, 1978). Clarification of All Agency Memorandum No. 130.

resolving such underpayment claims. For instance, the WHD utilizes a form WH-58 (Receipt for Payment of Back Wages) to document the resolution of such wage claims. IRS may wish to adopt or provide equivalent documentation and procedures to give clarity to taxpayers and IRS auditors as they review cases for compliance.[11]

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

Response: Recordkeeping, retention, and transparency are crucial to maintaining labor standards compliance. Existing public works labor standards compliance regimes are instructive and should inform the Treasury Guidance. Treasury should refer in the Guidance to the appropriate sections of the Davis-Bacon regulations at 29 CFR Part 5 (Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction) and the Federal Acquisitions Regulations (FAR) 52.222-8 (Payrolls and Basic Records) setting forth record keeping requirements.[12] Contract provisions and certified payrolls (CPRs) should be the required compliance tools adopted by Treasury as they have a proven record in this context and CPRs allow for inclusion of necessary information required to ascertain taxpayer prevailing wage compliance.

Specific examples of contract provisions and recordkeeping requirements which should guide the Treasury Department include:

1. *<u>Contract provisions</u>.* The Davis-Bacon Act regulations include *contract provisions* at 29 CFR 5.5 (Contract provisions and related matters) and FAR incorporates these clauses.[13] Treasury should provide equivalent contract language for use in the appropriate procurement contracts of taxpayers (for use by taxpayer and/or general/prime contractors) intending to utilize an

[11] *See e.g.,* I.R.S. Publication 957, (Jan. 2013). "Reporting Back Pay and Special Wage Payments to the Social Security Administration."

[12] The FAR provides: "(a) Payrolls and basic records relating thereto shall be maintained by the Contractor during the course of the work and preserved for a period of 3 years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in 40 U.S.C. 3141(2)(B) (Construction Wage Rate Requirement statute)), daily and weekly number of hours worked, deductions made, and actual wages paid. Whenever the Secretary of Labor has found, under paragraph (d) of the clause entitled Construction Wage Rate Requirements, that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in 40 U.S.C. 3141(2)(B), the Contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs." FAR 52.222-8 (2021).

[13] FAR 52.222-5(a); FAR 52.222-6 (a) & (b); FAR 52.222-8 (a), (b) & (c); FAR 52.222-9 (a) & (c); FAR 5.2.222-14.

applicable tax credit program. The aforementioned provisions, which are written for the use of public contracting agencies, can be revised for use by taxpayers and general/prime contractors as appropriate. These provisions should include the prevailing wage requirement and related instructions. The use of such language in contracts may provide added evidence of good faith compliance with prevailing wage obligations under the IRA.

2. *Payroll records.* Payroll records requirements are incorporated into the fabric of public works procurement under the FARs, and the regulatory guidance for the content, reporting, and retention are all well developed and have been successfully applied for decades.[14] The proven documentation used in public works prevailing wage compliance is the Certified Payroll (CPR) as reported on Form WH-347.[15] These documents are often maintained in an electronic form ("electronic CPR") through a web-based program for eventual submission electronically to an agency. Treasury should adopt such submission procedures as already in use by federal contracting agencies such as GSA and USACE.[16]

3. *Submission and Review of Payroll Records*. Certified Payrolls should be required to be submitted to Treasury for the duration of construction on any project for which the taxpayer intends to claim a credit under an applicable program in the IRA. These documents would constitute part of the taxpayer's required documentation for claiming an applicable tax credit on its tax return, and would be reviewed as part of any audit by the IRS.

Question 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.

Response: We urge the Treasury Department to look to and adapt procedures already established within the federal government which coordinate the roles of the federal contracting agencies and the Department of Labor to meet their responsibilities to ensure that the Davis-Bacon and Related Acts are enforced.

We urge Treasury to enter into a Memorandum of Understanding (MOU) with the Department of Labor to establish the respective responsibilities of the Departments in implementing and

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[14] 29 CFR 5.5(a)(3) (Payrolls and basic records).

[15] "Form WH-347 has been made available for the convenience of contractors and subcontractors required by their Federal or Federally-aided construction-type contracts and subcontracts to submit weekly payrolls. Properly filled out, this form will satisfy the requirements of Regulations, Parts 3 and 5 (29 C.F.R., Subtitle A), as to payrolls submitted in connection with contracts subject to the Davis-Bacon and related Acts." U.S. Dep't of Labor, Wage & Hour Div., Instructions for Completing Payroll From, WH-347.

[16] Title 48 CFR 22.407 (Solicitation provision and contract clauses) and 48 CFR 52.222-8 (Payrolls and Basic Records).

enforcing the labor standards provisions. Historically, DOL has used MOUs to coordinate its enforcement responsibilities with other federal agencies, including with the Treasury.[17]

In addition, all major federal contracting agencies have Labor Advisors to coordinate the enforcement and compliance of labor standards laws within their agencies and with the DOL. While it is beyond the scope of this Guidance, we recommend that Treasury ultimately establish an Office of Labor Advisors dedicated to compliance and enforcement of the labor standards requirements in IRA.[18]

II. Apprenticeship Requirement

Question 1: 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?

Response: The IRA requires that each contractor or subcontractor "who employs 4 or more individuals to perform construction…shall employ 1 or more qualified apprentices to perform such work." IRA § 13101(f).[19] We recommend that Treasury clarify that such requirement applies to 4 or more workers employed by a contractor *on any single day* on the project.[20] Treasury should also clarify that under the IRA the incentive to hire apprentices does not require each contractor to in turn meet the applicable apprenticeship utilization requirement

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[17] U.S. Dep't of Labor, Memorandum of Understanding Between The Internal Revenue Service and The U.S. Department of Labor, (September 19, 2011). Available at https://www.dol.gov/agencies/whd/about/federal-coordination.

[18] A listing of all civilian agency and Department of Defense agencies' Labor Advisors is found on the SAM.gov website. The role of Labor Advisors is to "provide expertise on the … Davis-Bacon Acts, and related laws, policies, and executive orders to … contracting and acquisition organizations…Provide daily responses to field requests for help on contract labor issues impacting contracts, including the federal wage laws (SCA, DBA, others), contract administration issues, contractor labor relations …Develop policy, regulations, instructions, and guides …Develop curriculum and provide training seminars for contracting personnel on contract labor standards and labor relations, assist in responding to inquiries from unions, DOL, and other parties….[and] Liaison with the Department of Labor and other agency labor advisors." U.S. Dep't of Defense, Dep't. of the Air Force, Labor Advisor Mission Statement.

[19] The 'qualified apprentice' is "an individual participating in a registered apprenticeship program, as defined in section 3131(e)(3)(B)." IRA at 93. Section 3131(e)(3)(B) defines a "registered apprenticeship program" as "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.) which is interpreted by subpart A of part 29 and part 30 of title 29, Code of Federal Regulations". 26 USC 3131(e)(3)(B).

[20] *See,* Nevada regulations: "The Office of the Labor Commissioner/Labor Commissioner (OLC/LC) has interpreted the plain language of NRS section 338.01165 in connection with 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 for each apprenticed craft or type of work performed to trigger the requirements of NRS section 338.01165. In other words, there must be a "crew" of more than 3 employees/workers for each apprenticed craft or type of work performed on the public works project/work site at the same time for the requirements of NRS section 338.01165 to apply. This could include a crew of more than 3 employee/workers of an apprenticed craft or type of work performed present at the same time on the project/work site for only 1 full day of work. The OLC/LC would also look to the potential rotation of crews to avoid the requirements of NRS section 338.01165." State of Nev., Office of Labor Comm'r., Supplemental Guidance Apprenticeship Utilization Act (March 5, 2021).

[10%,12.5%,15%] and that the registered apprentice utilization goal will apply to total "labor hours" (as defined by IRA) assessed project wide.

Question 2: Section 45(b)(8)(D)(ii) provides for a good faith effort exception to the apprenticeship requirement.

a. What, if any, clarification is needed regarding the good faith effort exception?
b. What factors should be considered in administering and promoting compliance with this good faith effort exception?

Response: The good faith exception should be read strictly in order to achieve the purpose of the IRA to encourage the utilization of apprentices on projects receiving tax credit enhancements. There are several federal[21] and state laws that have a "good faith" standard as part of their compliance framework. These are instructive and can serve as models for the Treasury Department in establishing its Guidance. For example, there are state apprenticeship utilization laws that address good faith requirements.[22] Treasury itself has a version of good faith evaluation in its own code as well in 26 USC 1.6662-3 (Negligence or disregard of rules or regulations). These inform our response below.

There are two considerations which should guide Treasury. First, what information demonstrates good faith in applying for an apprenticeship utilization waiver request before commencement of construction?[23] Second, what considerations should IRS undertake when a taxpayer did not request a waiver for a project *and* did not meet the apprenticeship utilization requirements?[24]

In publishing guidance and future regulations on this issue, Treasury should operate from the principle that documented circumstances in a good faith effort must demonstrate that a taxpayer took steps to meet the intent of contract requirements and the intent and purpose of IRA. If there is a shortfall in apprentice participation, it should be demonstrated that such shortfall is attributable solely to the situations presented in the taxpayer's documented good faith effort.

Any good faith effort waiver for compliance should be evaluated based on the taxpayer's attempts to utilize apprentice labor:

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[21] *See also*, the good faith effort procedures under the Disadvantaged Business Enterprise Program of the Department of Transportation. U.S. Dep't of Trans., "DBE Program Good Faith Efforts - § 26.53 of 49 C.F.R. 26".

[22] Nevada, NRS § 338.01165; Washington State, RCW 39.04.320.

[23] *See*, Nevada Apprenticeship Utilization Act Waiver Request: "A Public Body, upon the request of a contractor or subcontractor, may submit a request for a modification or waiver of the percentage of hours of labor of one or more apprentices prior to (1) the bid advertisement; (2) the bid opening; or (3) the award of the contract if, "Good Cause" exists." State of Nev., Dep't of Biz. & Indus., Office of Labor Comm'r., Apprenticeship Utilization Act. (March 5, 2021).

[24] *See*, Washington State guidance "How will the good faith effort be evaluated?" State of Wash., Dep't of Trans., Apprenticeship Usage Report (2020).

1. Good faith effort will generally take the form of documentation demonstrating that the taxpayer took steps to communicate workforce needs with appropriate Registered Apprenticeship Program(s) in a statewide area[25], or, demonstrate that contractor(s) hired by the taxpayer for a covered project participates in Registered Apprenticeship Program(s), but that no apprentices were available or not enough apprentices were available during the project.
2. If apprentices are not available for dispatch at the beginning of a long-duration job, it is expected the taxpayer or responsible contractor check back with the program periodically to see if apprentices are available. In addition, the intent of the apprenticeship utilization requirement is not for contractors to lay off their apprentice workers as soon as they complete a program and become a full journeyworker.
3. The availability of apprentices for one or more crafts should not absolve a taxpayer of good faith efforts to secure apprentice hiring for other crafts/contractors where adequate apprentices are available.

Question 3: 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 a State Apprenticeship Agency's database?

Response: The existing Certified Payroll requirements and forms under the Davis-Bacon Act and the FAR provide an appropriate framework for IRA compliance, albeit with certain modifications to add individual listing of the wages and benefits of apprentices.[26] As described above, the DOL form WH-347 is used on public works for compliance. Treasury should clarify that as a tax document such forms carry the same obligations for truthful reporting, and penalties for false statements, as a tax return.[27]

Further, CPRs allow for certifications regarding whether apprentices are in registered apprenticeship programs. The FAR 52.222-8 (Payrolls and Basic Records) requires that "[c]ontractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs…, the registration of the apprentices…, and the ratios and wage rates prescribed in the applicable programs."

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[25] Some states are served by only one registered apprenticeship program for certain crafts. It is common practice in the construction industry for both journey and apprentice workers to travel long distances from their home area to work on construction projects. Statewide outreach may not be necessary in more densely populated states where multiple registered apprenticeship programs are available in closer proximity.

[26] U.S. Dep't of Labor, Wage & Hour Div., Payroll From, WH-347 (2008).

[27] 26 U.S. Code 7206 (Fraud and false statements).

Some of the specific records which the Guidance should require are:

1. Taxpayers (and their contractors) should be instructed to provide evidence of the registered apprenticeship program and verified individual registration of individuals.
2. Copies of current apprentice certifications from the USDOL or state apprenticeship agency, and evidence of the approved program ratio as well as a wage schedule. It is not uncommon for employers to retain copies of the apprentice status letters received from the apprenticeship program.
3. Documentation showing that the contractor or subcontractor participates in USDOL/State-Approved programs may include:
    - Letters or email correspondence from apprenticeship programs,
    - Printouts showing the availability or lack of USDOL/State-Approved Apprenticeship Programs,
    - Agreements, contacts or subcontracts,
    - Logs of phone calls with names, dates and outcomes.

We recommend that Treasury review and adapt reporting forms from states such as Washington State and California which have robust apprenticeship requirements on public works projects. For example, California uses a form for contractors to utilize in contacting apprenticeship committees to request apprentices for each craft or trade on the project. *See* DAS 142 form (Request for dispatch of an apprentice – DAS 142 Form).[28] Washington State has forms as well which manage, track, and report apprenticeship utilization. They "provide final utilization rates once the project is completed and all affidavits are filed. … Each report compares utilization rates based on certified payroll reports and affidavits that have been filed for the project."[29] Treasury may want to consult these in developing future regulations on the IRA.

Question 4: What documentation or substantiation do taxpayers maintain or could they create to demonstrate compliance with the apprenticeship requirements in § 45(b)(8)(A), (B), and (C), or the good faith effort exception?

Response: Treasury can be informed by previously published compliance guidance under the American Rescue Plan Act's "Coronavirus State and Local Fiscal Recovery Funds."[30] Treasury guidance for those programs described several compliance measures that would establish good faith in meeting workforce goals for construction under the State Fiscal Recovery Funds,

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[28] Cal. Dep't. of Industrial Relations, Apprenticeship Requirements.(Oct. 2016).

[29] State of Wash., Dep't. of Labor & Indus., Prevailing Wage Intent & Affidavit System (Jan. 2020).

[30] Dep't of Treasury, Coronavirus State and Local Fiscal Recovery Funds Guidance on Recipient Compliance and Reporting Responsibilities, Pg. 31, (2022).

including an option of providing certification based upon the project having a project labor agreement.[31] Using a similar framework in implementing the IRA tax credit labor standards, Treasury can be guided by the following compliance documentation:

1. Taxpayer submits CPRs that include apprenticeship information as outlined in FAR 52.222-8 (Payrolls and Basic Records) as described above; *or,*
2. If such a certification is not provided, taxpayers must demonstrate that taxpayer or taxpayer's responsible agent:
   - No less than six months prior to the anticipated start of construction, provided information on the project and an anticipated labor demand schedule to the responsible representatives of registered apprenticeship programs for all crafts: 1.) required to build the project and 2.) that serve the project area; *and*
   - Demonstrated the participation of contractors on the bid list who currently participate in registered apprenticeship program(s) for each of the construction trades they employ; *and*
   - Demonstrate that contract clauses used by the taxpayer on an eligible project included appropriate requirements for contractors or subcontractors employing four or more workers on the project to participate in the appropriate registered apprenticeship program(s) for which registered apprentices were available in the project area; *or*
   - Provide documentation of non-responsiveness of the RAP in a timely period; or written evidence (such as letters or email correspondence) of a refusal by the RAP to provide apprentices to an employer who has otherwise agreed to the terms and conditions of employing such apprentices.

We note that the strongest assurance that a taxpayer is in compliance with labor standards is the use of a collective bargaining agreement and/or a project labor agreement, meaning a pre-hire collective bargaining agreement consistent with section 8(f) of the National Labor Relations Act (29 U.S.C. 158(f)), as a means of demonstrating good faith compliance on apprenticeship goals found in the IRA tax credit programs.

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[31] *Id*. at 31. *See also*, "In this Supplementary Information for the final rule, Treasury encourages recipients to ensure that capital expenditures to respond to the public health and negative economic impacts of the pandemic and water, sewer, and broadband projects use strong labor standards, including, for example, project labor agreements and community benefits agreements that offer wages at or above the prevailing rate and include local hire provisions. Treasury believes that its encouragement of labor standards carries benefits because it will ensure that workers have access to strong employment opportunities associated with infrastructure projects, which will in turn aid the economic recovery. Treasury believes that infrastructure projects may also benefit from stronger labor standards due to the potential of these standards to ensure a stronger skilled labor supply and minimize labor disputes and workplace injuries, which can result in costly disruptions to projects." Coronavirus State and Local Fiscal Recovery Funds, Dep't of Treasury, 87 Fed. Reg. 18, 4444 (Thursday, January 27, 2022).

Question 5: Please provide comments on any other topics relating to the apprenticeship requirements in § 45(b)(8)(B) that may require guidance.

Response: Several aspects of the Registered Apprenticeship System may be unfamiliar to certain contractors in the clean energy sector. Treasury should provide guidance and establish compliance training in conjunction with DOL to educate contractors on their apprenticeship obligations under IRA.

1. *Wage.* Treasury should clarify that consistent with the Davis-Bacon Act regulations at 29 CFR 5.5(a)(4) (Apprentices and trainees), registered apprentices are permitted to be paid a wage pursuant to their apprenticeship agreement (generally a percentage of the journeyworker rate) rather than the minimum wage specified for their trade on a wage determination.[32]
2. *Ratios*. Apprenticeship utilization ratios are common practice in the industry and are established either by registered apprenticeship (RA) programs (as approved by DOL or State Apprenticeship Offices), or as in California, established by state law.[33] These ratios are intended to provide meaningful mentorship and ensure worksite safety by limiting the number of lesser experienced craft workers. Local unions or RA programs are generally responsible for monitoring apprentice job assignments. However, contractors and, in turn, the taxpayers who contract with them, are responsible for adherence to RA program standards and local practice. It should be made clear that the deliberate overuse of apprentices to lower average hourly labor costs would not only violate the terms of the RA program(s), but would constitute a deliberate attempt to evade the prevailing wage requirements of the IRA, § 13101(f).

Prevailing wage standards and registered apprentice utilization remain central tools for ensuring construction investments deliver good jobs and the next generation of construction workers to build America's clean energy infrastructure. We look forward to working with Treasury, developers, and employers to efficiently and effectively implement this legislation.

[32] *See*, "Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Office…." 29 CFR 5.5(a)(4).

[33] Cal. Lab. Code § 1777.5(g).