

A Cocktail of Labor Policy, Energy Policy & Tax Policy: Prevailing Wage and Apprenticeship Rules

The Inflation Reduction Act (the IRA) awards renewable energy tax credits¹ for creating (or investing in) property that produces or generates renewable energy and clean energy fuels. Those credits are enhanced if the developer/taxpayer complies with Prevailing Wage and Apprenticeship (PWA) requirements. The IRS issued regulations for PWA requirements (the PWA Regulations). Congress incorporated the PWA requirements in changes and additions made by the IRA to renewable energy tax credits. Thus, Congress weaved a labor policy goal – creating well-paying US jobs - into the most ambitious energy transition legislation of our time. Since the PWA Regulations are about labor policy (more specifically, the Davis-Bacon Act), understanding that policy is critical to making sense of the PWA Regulations. Keep that in mind as you read the PWA Regulations' key points.

The PWA Regulations borrow heavily from the Davis-Bacon Act (DBA). The Davis-Bacon Act applies to federal contracting. Like the PWA Regulations, the DBA requires that contractors (as that term is defined in the DBA) pay workers prevailing wages. The term prevailing wage and other terms and rules are determined under the DBA. The PWA Regulations rely on many of those DBA terms and rules. However, the PWA Regulations also differ from the DBA rules. For a deep dive into the DBA, see the DBA Alert written by Cozen Attorneys Lawrence Prosen and Brian Doll.

The PWA Regulations Differ from DBA Rules Where Following DBA Rules Would Interfere with the Energy Goals of the IRA

The DBA normally applies to contractors working under federal contracts. The contractor commits to DBA rules to get the contract award. In contrast, at the time the contract is awarded, clean energy property developers may not know whether they will claim enhanced clean energy tax credits. For this reason, the Internal Revenue Service (IRS) declined to require developers to abide by DBA record-keeping and payroll practice filings until the developer claims the credit on their income tax return. The IRS, however, encourages developers and other taxpayers to review and require contractors to maintain payroll records satisfying DBA's requirements.

Construction – Scope and Timing Determined Under DBA Rules

The Treasury Department uses the definition of construction under DBA rules to determine when construction activities start. This definition includes preliminary activities like demolition and removal of existing structures. PWA requirements only apply to the construction of property or facilities, the cost of which is included in the credit base. Sometimes, this construction happens offsite. In those cases, the offsite work is included in the site of work where PWA requirements apply. Again, these rules borrow heavily from the DBA. PWA requirements also apply to alterations and repairs during the applicable credit compliance period. The DBA definitions and guidance for these activities are incorporated in the PWA Regulations.

Certain Benefits Included in Compensation for PWA Requirements

The PWA Regulations allow taxpayers to meet prevailing wage requirements through cash payments, bona fide fringe benefit providers, or incurred costs for bona fide benefits.

Apprentice to Journey Worker Ratios Apply

The PWA Regulations incorporate DBA apprentice to journey worker ratio requirements. These



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DBA rules and related definitions are incorporated by reference to the DBA. Other related DBA rules and definitions for laborers and mechanics are also included in the PWA Regulations.

Credit Claimants Responsible for PWA Compliance

Taxpayers claiming credits are solely responsible for ensuring compliance with prevailing wage requirements by contractors and subcontractors. The definition of contractor was clarified to account for situations where parties are not in privity of contract. The term subcontractor includes all subcontractors regardless of tier.

One Megawatt Exception Projects

A project with a maximum net output of less than one megawatt is exempted from PWA requirements. The PWA Regulations establish that maximum net output is determined with reference to nameplate capacity measured in alternating current.

A Host of Other Rules

The PWA Regulations also cover many other matters, including rules related to good faith exceptions for failing to comply, penalty payments to correct inadvertent noncompliance, making good faith efforts to seek and hire apprentices, maintaining sufficient records of PWA compliance, compliance risk liability for credit transferees, and special rules applying for work on:

- i. Native American Tribal territories;
- ii. offshore wind projects; and
- iii. nuclear projects.

In sum, there's a lot to the PWA Regulations. Most of it, however, is a matter of following procedures.

Summary

Clean energy credits advance labor, energy, and tax policies. Having advisors with the right expertise is critical. You'll obviously need real estate attorneys, construction attorneys, and utility attorneys for your project. However, for tax credit purposes, you will need labor attorneys to help with PWA Regulations, engineers and energy regulatory counsel to help interpret the technical elements of the IRA, and tax counsel to advise on the technical rules of clean energy tax credits, as well as a range of other tax law related to economic substance, credit at-risk rules, general at-risk and passive activity rules, and (typically) partnership tax rules.

¹ Renewable energy tax credits include tax credits under IRC Sections 45, 48, 45Y, 45Z, and 48E. Projects started in 2025 will qualify for credits under Sections 45Y, 45Z, and 48E. These provisions award credits for clean energy and clean fuel production. In contrast to Sections 45 and 48, these credits are not based on property type. Rather, any property type that produces clean energy or clean fuel meeting certain criteria will qualify for tax credits. The PWA Regulations also apply to Section 45Q (carbon sequestration), 45U (nuclear power), and 45V (qualified clean hydrogen production).
