

Tax Incentives for Green Energy Projects Come With a Lot of Strings Attached

Labor & Employment Law Update

By Jeffrey Risch on October 24, 2023

On August 29, 2023, the U.S. Department of the Treasury and the Internal Revenue Service (IRS) released more guidance and proposed rules on key provisions in the Inflation Reduction Act (IRA) that requires employers to meet certain labor mandates involving apprenticeship mandates, prevailing wage requirements and possible forced unionization on green energy construction projects. While prevailing wage and apprenticeship requirements are not something new, investors, developers and employers who do not fully understand these requirements will likely face legal liabilities and issues that they did not expect because compliance is difficult. Additionally, the likely insistence that a Project Labor Agreement (aka union only contract) be implemented on such projects certainly adds to potential labor headaches and restrictions. The proposed rules are subject to public commentary and a public hearing later this year and it's anticipated that the final rules will be in effect sometime in 2024.

The IRA's prevailing wage and registered apprenticeship requirements apply to the clean energy tax incentives under the law, including the clean energy investment and production tax credits that help finance utility-scale wind, solar, and battery storage projects as well as for the credits for carbon capture, utilization, and storage and clean hydrogen projects. This includes and covers construction, alteration and repair of these facilities. If the prevailing wage and registered apprenticeship requirements are satisfied, a taxpayer can claim an enhanced credit or deduction equal to up to five times the value of the regular credit or deduction. Of course, non-compliance will result in fines and penalties being assessed by the IRS.

Any entity seeking the IRA's tax incentives must pay prevailing wages to construction workers building clean energy projects in strict accordance with the U.S. Department of Labor's rules under the Davis-Bacon Act. This essentially means that such workers must be paid union-scale based on the geographic area and the type of work to be performed. With respect to the apprenticeship requirements that must be met, those seeking the IRA's tax incentives must also ensure that apprentices --- workers actually registered in a U.S. Department of Labor apprenticeship program --- perform a certain number of labor hours on the project. The labor hours requirement provides that a minimum percentage (12.5% in 2023 and then rising to 15% percent in 2024 forward) of the total labor

hours for such a project must be performed by apprentices. There is also a precise apprenticeship to journey worker ratio requirement, which ensures that there are sufficient experienced workers to oversee apprentices, and a participation requirement which requires contractors and subcontractors to utilize apprentices across the full range of work performed, rather than limiting them to one type of work. Additionally, contractors and subcontractors that employ four or more individuals to perform construction, alteration, or repair work on a facility must employ at least one qualified apprentice. In essence, the work to be performed will be inevitably “sliced and diced” in such a way that the labor costs will be significantly higher than what many will likely anticipate. Moreover, finding available apprentices that are actually registered with a U.S. Department of Labor apprenticeship program will be difficult --- often times, they just don't exist in many geographic areas. Apprenticeship rates are down across many trades and the ongoing labor shortage has made finding apprentices very difficult. While the proposed rules do contemplate a “good faith” exception if available apprentices are not available, employers will certainly face battles with the federal government in meeting the exception --- especially when they are utilizing a non-union workforce.

The proposed rules also provide incentives for the adoption of Project Labor Agreements. A Project Labor Agreement is a type of construction contract that mandates contractors adopt and strictly adhere to area-wide union construction contracts. This will inevitably result in more union-only projects and will further add to inefficiencies created from “slicing and dicing” the work amongst a variety of union trades claiming certain distinct “parts.”

With all of this in mind, developers, owners, general contractors and subcontractors are advised to carefully scrutinize green energy projects and become intimately familiar with all of the strings attached to such projects where public funds are utilized and/or tax incentives are sought.

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