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IRS Publishes Registered Apprenticeship Guidance

On November 30, 2022, the Internal Revenue Service (“IRS”) and the Department of the Treasury (“Treasury”) published Notice 2022-61 (the “Notice”) in the *Federal Register*. Among the provisions of the Inflation Reduction Act of 2022 (the “IRA”) were amendments to the Internal Revenue Code of 1986, as amended (the “Code”) to add prevailing wage and registered apprenticeship requirements that taxpayers must meet in order to qualify for the higher amount of certain clean energy tax credits, for construction of qualified facilities, property, projects or equipment (referred to as “facilities” in the Notice and herein). The applicable credits include the alternative fuel refueling property credit, the production tax credit, the credit for carbon oxide sequestration, the credit for production of clean hydrogen, the clean fuel production credit, the investment tax credit, and the advanced energy project credit.

The Notice starts the clock on the 60-day delay period built into the IRA. As a result, the prevailing wage and apprenticeship requirements will be operative for facilities where construction begins on or after January 29, 2023.

The Notice addressed a number of issues including, the prevailing wage requirements, the determination of the beginning of construction for purposes of certain tax credits, and the beginning of installation for purposes of the energy efficient commercial building deduction. This Alert focuses on the apprenticeship requirements of the Notice.

Apprenticeship Requirements

Under the IRA, in addition to a recordkeeping requirement, there are two basic apprenticeship requirements.



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The first requirement is a labor hour requirement; a taxpayer must ensure that a certain number of labor hours of construction, alteration or repair work (including work performed by any contractor or subcontractor), be performed by qualified apprentices, expressed as a percentage of total labor hours of construction, alteration, and repair work, subject to any applicable requirements for the ratio of apprentices to journeyworkers. A qualified apprentice is an individual who is employed by the taxpayer or by any contractor or subcontractor and who is participating in a registered apprenticeship program. The total labor hours, excludes any hours worked by foremen, superintendents, or persons employed in a bona fide executive, administrative, or professional capacity. The applicable percentage is 10% for a qualified facility, the construction of which begins before January 1, 2023; the applicable percentage is 12.5% for a qualified facility, the construction of which begins after December 31, 2022, and prior to January 1, 2024; and the percentage for a qualified facility, the construction of which begins on or after January 1, 2024 is 15%.

The second requirement is a participation requirement. If the taxpayer or any contractors and subcontractors who employ four or more individuals to perform construction, alteration, or repair work, at least one qualified apprentice must be employed to perform such work.

The IRA also provides a “good faith effort” exception. Under this exception, a taxpayer will be deemed to have satisfied the apprenticeship requirement if the taxpayer has requested qualified apprentices from a registered apprenticeship program and either (i) such request has been denied, provided that such denial is not the result of a refusal by the taxpayer or any contractor or subcontractors performing construction, alteration, or repair of the qualified facility to comply with the standards and requirements of the registered apprenticeship program; or (ii) the registered apprenticeship program fails to respond to such request within five business days after the date on which the registered apprenticeship program received such request. A taxpayer can also satisfy the apprenticeship requirements if it pays a penalty of \$50 multiplied by the total labor hours for which the statutory requirements were not satisfied with respect to the construction, alteration, or repair work on any qualified facility. However, if the Secretary determines that any failure is due to the intentional disregard of the Code requirements, the penalty amount is increased from \$50 to \$500.

Taxpayers can expect that the IRS and Treasury will issue further guidance clarifying certain provisions of

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the IRA, including a proposed regulation.



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