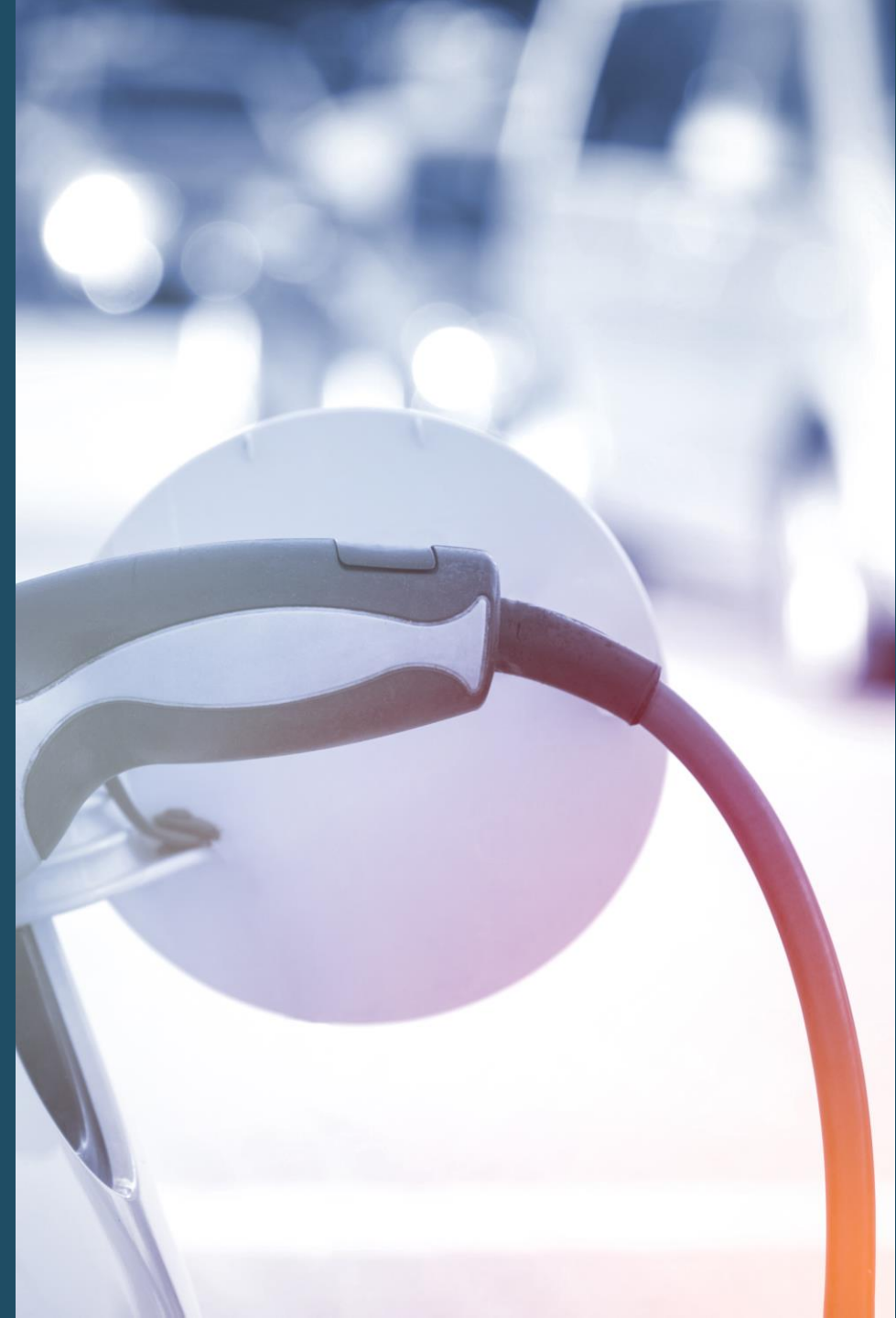


Vinson&Elkins

The Inflation Reduction Act: What Do Wages and Apprentices Have to Do with Taxes?

Presented by Mary Alexander and Alex Bluebond



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Today's Speakers



Mary Alexander

Counsel – Tax

Washington

+1.202.639.6536

malexander@velaw.com



Alex Bluebond

Counsel – Labor & Employment

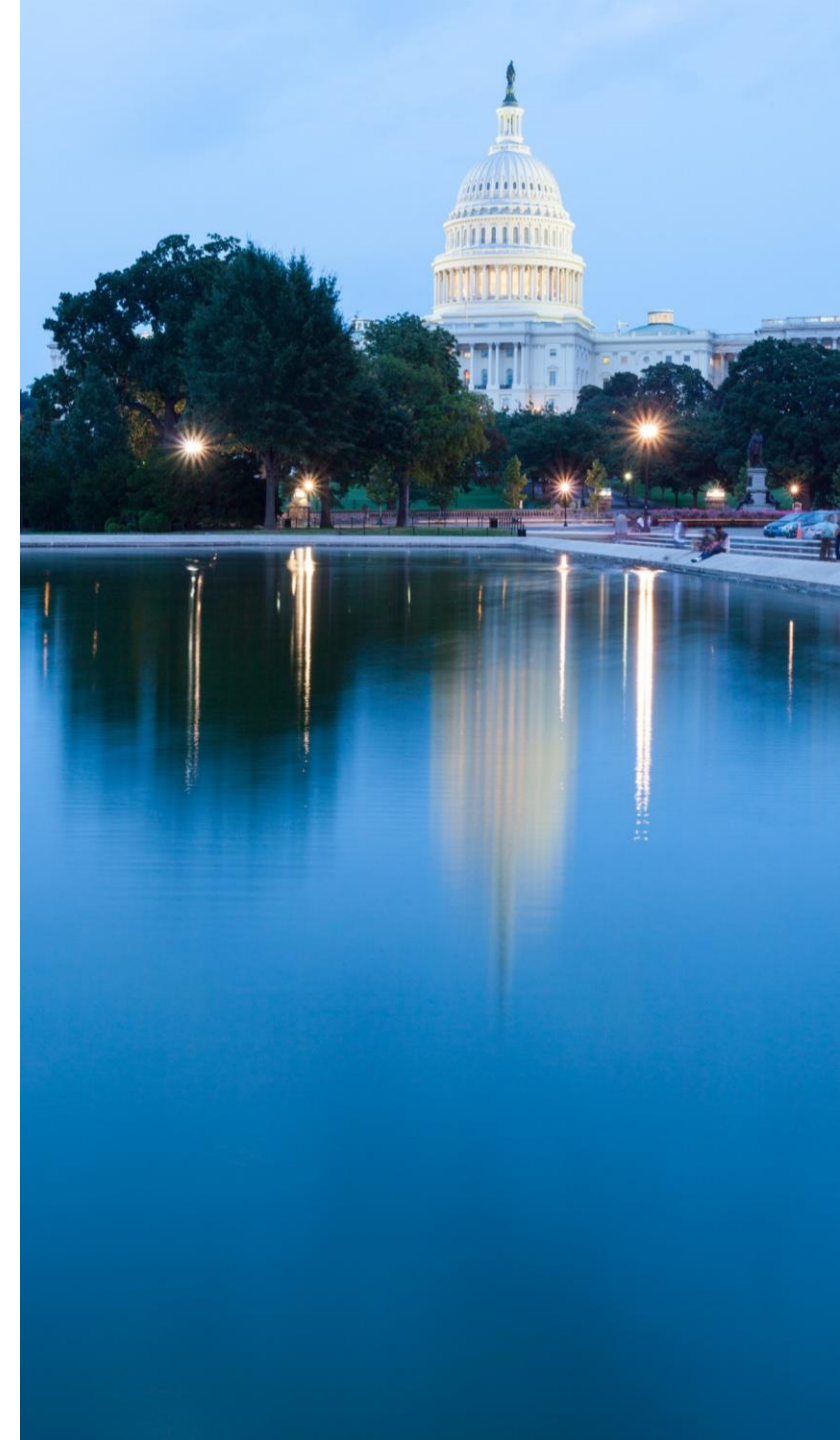
Houston

+1.713.758.2261

abluebond@velaw.com

Inflation Reduction Act – Overview

- Historic investment in climate policy primarily using the tax code
- Extends and expands tax credits for a broad swath of “green” technologies (wind, solar, hydropower, geothermal, hydrokinetic, landfill gas, nuclear, etc...)
- Provides strong subsidies for standalone storage and hydrogen
- Makes carbon capture very attractive and more accessible
- Encourages domestic manufacturing/mining
- Promotes EVs and installation of related EV charging infrastructure
- Extends and expands credits for renewable fuels
- Permits monetization of the credits with “direct pay” and “transferability” eliminating some barriers to capital investment
- Provides a long runway for building facilities and for entitlement to the credits
- 15% minimum book tax (AMT) can be reduced by renewable and clean credits



Prevailing Wage & Apprenticeship Requirements

Fivefold increase in the base ITC/PTC credit for satisfying

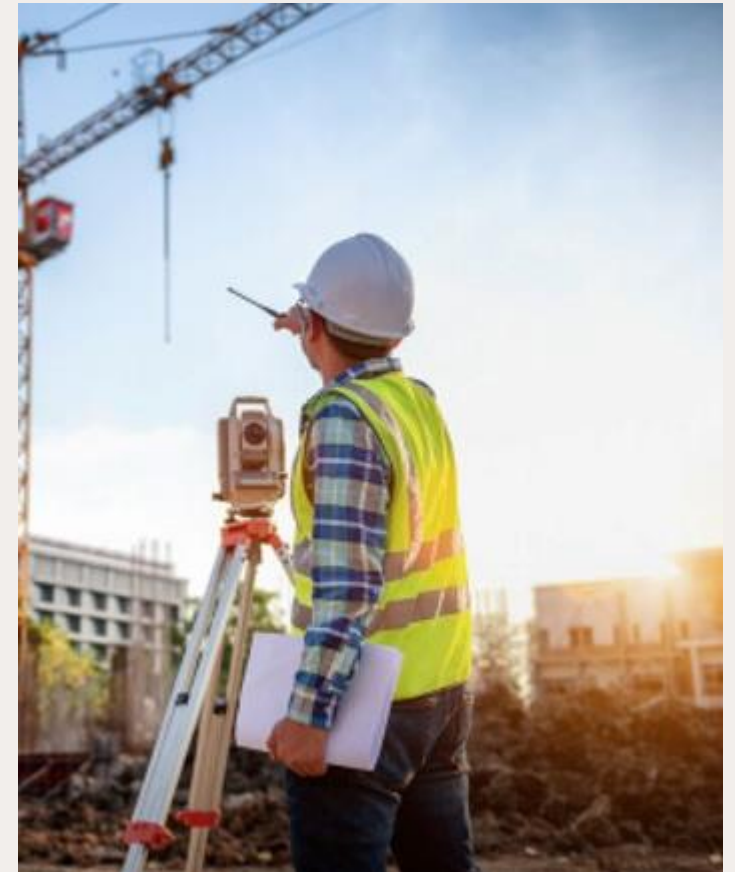
- **Prevailing Wage Requirements**

- Laborers and mechanics are paid Davis-Bacon prevailing wages
 - during the construction of a project; and
 - during the relevant credit period, for the alteration and repair of such project.

- **Apprenticeship Requirements**

- A taxpayer must ensure that qualified apprentices perform no less than the applicable percentage of total labor hours of the project.
 - 10% for projects for which construction begins in 2022;
 - 12.5% for projects for which construction begins in 2023;
 - 15% thereafter.

Requirements apply to projects that begin construction after the date that is 60 days **after** the IRS publishes guidance with respect to the prevailing wage and apprentice labor requirements.



Prevailing Wage Requirements – What are “Prevailing Wages”?

- Davis-Bacon prevailing wages are the wages set by the Department of Labor (DOL) for federally funded construction projects.
- “Prevailing Wages” include:
 - Regular Hourly Rate
 - Fringe Benefits
 - Fringe benefits include Life insurance, Health insurance, Pension, 401(k) contributions, Vacation, Holidays, Sick leave and other “bona fide” fringe benefits.



Prevailing Wage Requirements – Covered Work

- Prevailing Wages must be paid to labor that is:
 - Construction of a project; and
 - Alteration and repair of the project during the relevant credit period.
- Maintenance of a facility or fixtures is not DBA-covered work, but it's not always easy to tell the difference between DBA-covered repairs and maintenance.



Prevailing Wage Requirements – Repair vs. Maintenance

DBA Repair Work

- Non-routine or one-off fixes to facilities or fixtures.
 - Replacement of fixed components.
- DOL Examples: *structural repairs, paving repairs, roof shingling.*

Maintenance

- Routine upkeep to keep something in a state of continuous use
- Scheduled, regular and recurring activities
- Replacement of consumable components.
- DOL Examples: *Light Bulb and HVAC filter replacement; Mowing Grass, Janitorial Work, Replacing worn out carpeting.*

Traditionally, government contracting officers have resolved gray areas between repair and maintenance on a project-by project basis.

It remains to be seen if the implementing regulations of the IRA will provide a means to get a determination on what work is covered in advance.

Prevailing Wage Requirements

- Prevailing Wages are published in “Wage Determinations.”
 - WDs contain wages for each job classification for particular type of construction (e.g., building, heavy, highway, or residential) and each locality or area.
 - For example, a crane operator on residential construction project in Houston will likely be paid a different amount than a crane operator on a building construction project in New York.
 - Some Job Classifications are broad and likely to be used on many types of projects.
 - Electrician
 - Carpenter
 - Roofer
 - Other Job Classifications are for very specific tasks.
 - Modular Furniture Installer
 - Acoustical Ceiling Installer
 - Tunnel Mole Boring Machine Operator

Conformance – New Wage Determinations

- What happens if you cannot find any classification that matches the duties being performed by the worker?
 - Renewable energy-specific construction jobs are often not listed in WDs.
- “Conformance”
 - An employer/taxpayer may be able to request a WD from the DOL for the new job classification.
 - Unclear how this process will work for IRA projects.



Prevailing Wage Requirements



- New WDs are published every year based on wage surveys, but surveys are not necessarily conducted on an annual basis.
 - Currently, if a majority (i.e., more than 50%) of wage survey respondents report the same rate, the DOL uses that rate as the prevailing wage.
 - In March 2022, Biden administration proposed a rule change that would set prevailing wages if at least 30% of survey respondents reported using the same rate.
- On IRA projects, employers will likely have to pay the most recent prevailing wage regardless of when the project started.

Where to Find Prevailing Wages

The screenshot displays the SAM.GOV Wage Determinations search interface. On the left, the 'Select Domain' section is set to 'Wage Determinations'. Under 'By Wage Determination ID', 'Construction (DBA)' is selected. The 'Filter By' section shows 'Location' with 'State' set to 'Texas' and 'County/Independent City' set to 'Harris'. Under 'DBA Construction Type', 'Building' is selected. The search results show 'Showing 1 - 1 of 1 results' for 'Davis-Bacon Act WD #: TX20220253'. A blue arrow points to this result. The 'Sort by' dropdown is set to 'Published Date'. The 'DBA Wage Determination' details show 'Modification Number 8', 'Construction Types Building', and 'Published Date Sep 15, 2022'. The 'Results per page' dropdown is set to 25.

Prevailing Wage Requirements – Location Matters

Wage Rates vary greatly by location.

State: Texas

Construction Type: Building

County: Midland County in Texas.

BUILDING CONSTRUCTION PROJECTS (does not include single family homes or apartments up to and including 4 stories).

ELECTRICIAN.....	\$ 23.18	6.31
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State: Texas

Construction Type: Building

County: Harris County in Texas.

BUILDING CONSTRUCTION PROJECTS (does not include single family homes or apartments up to and including 4 stories).

	Rates	Fringes
ELECTRICIAN (Excludes Low Voltage Wiring and Installation of Alarms).....	\$ 33.20	10.37

State: New York

Construction Types: Building, Heavy, Highway and Residential

Counties: Bronx, Kings, New York, Queens and Richmond Counties in New York.

BUILDING & RESIDENTIAL CONSTRUCTION PROJECTS (includes single family homes and apartments up to and including 4 stories),
HEAVY AND HIGHWAY CONSTRUCTION PROJECTS

	Rates	Fringes
ELECTRICIAN		
Electricians.....	\$ 56.00	76.725%+16.25
Jobbing, and maintenance and repair work.....	\$ 28.50	51.243%+7.50+a

Prevailing Wage Requirements

- **Cure Options**

- **Unintentional Violation:**

- To the Employee: the sum of
 - (i) the difference between the amount that should have been paid to each worker and the amount actually paid; and
 - (ii) the interest on the difference (interest is at the underpayment rate of 6% + federal short term rate for the period of underpayment).
- To the IRS: a penalty in the amount of \$5,000 per underpaid worker.

- **Intentional Violation:**

- To the Employee: the sum of
 - **Three times** (i) the difference between the amount required to have been paid to each worker and the amount actually paid; and
 - (ii) the interest on the difference (Interest rate remains at 6% + federal short term rate for period of underpayment).
- To the IRS: a penalty in the amount of \$10,000 per underpaid worker.

Apprenticeship Requirements



- An apprenticeship is an industry-driven training program where participants get paid work experience, classroom instruction, mentorship, and a portable credential.
- A “qualified apprentice” means an individual who is an employee of the contractor or subcontractor and who is participating in a registered apprenticeship program.
 - Qualified apprentices must come from apprenticeship programs that have been validated by the DOL or a State Apprenticeship Agency.

Apprenticeship Requirements

- Taxpayers must ensure that qualified apprentices perform no less than the “**applicable percentage**” of **total labor hours** of the project.
 - **Applicable percentage** means:
 - If facility began construction prior to 1/1/23, 10%
 - If facility began construction after 12/31/22 and before 1/1/24, 12.5%
 - If facility began construction after 12/31/23, 15%
 - **Total Labor Hours** includes all hours worked by individuals employed by the taxpayer, contractors, or subcontractors
 - *other than hours worked by foreman, superintendents, owners, or persons employed in an executive, administrative, or professions capacity.*



Apprenticeship Programs

- Combine paid on-the-job training with classroom instruction to prepare workers for careers.
- Have requirements for wages that are lower than DBA prevailing wages.
- Require specified ratios of apprentices to journeyman (regular laborers).

- Apprenticeship programs can be run by employers, unions, educational institutions, industry associations, and community groups.
 - Unions are the most common in the construction industry.
 - Satisfying apprenticeship requirements may necessitate a unionized workforce.
 - Employers may establish their own apprenticeship programs by having them approved by the DOL.

Apprenticeship Requirements

- **Exception for good faith efforts:** If a taxpayer requested qualified apprentices from registered apprenticeship program and was denied.
 - Exception also applies the apprenticeship program fails to respond within 5 business days.
 - Does not apply if employer refused to comply with the standards and requirements of the registered apprenticeship program.

- Implementation of the Good Faith Effort exception is unclear.
 - Does the taxpayer only have to ask one apprenticeship program?
 - Do they only have to look in the geographic area of the project? How far do they have to look?
 - Can a taxpayer receive a good faith determination from the DOL prior to beginning construction?
- We expect the IRS to provide more guidance on these issues..

Apprenticeship Requirements

- **Cure Options**

- **Unintentional Violation:**

- Taxpayer pays to IRS: \$50 per labor hours for which the requirement is not satisfied.

- **Intentional Violation:**

- Taxpayer pays to IRS: **\$500** per labor hours for which the requirement is not satisfied.

Subcontractor Compliance

The IRA prevailing wage and apprenticeship requirements apply to all “laborers and mechanics employed by the taxpayer or any **contractor or subcontractor**.”



- Taxpayers will need to consider how to monitor these “flowdown” requirements.
 - Include the prevailing wage and apprenticeship requirements in all contracts and subcontracts.
 - Require contractors to flow down the requirements to any subcontractors they hire.
 - Have audit rights in contractors with contractors and subcontractors.
 - Consider requiring payroll and apprenticeship reporting by contractors and subcontractors.
 - Provide specific Davis-Bacon Wage Determinations to all contractors and subcontractors working on the project.

Subcontractor Compliance

The IRA prevailing wage and apprenticeship requirements apply to all “laborers and mechanics employed by the taxpayer or any **contractor or subcontractor.**”

- Contractors will need to: Require contractors to flow down the requirements to any subcontractors they hire.
 - Be aware of any IRA-related requirements in their agreements.
 - Consider whether they are willing to be responsible for knowing how to comply.
 - Consider what liability they have to a taxpayer if they don't comply.
 - Consider whether they want a price adjustment if wages change.
 - Consider if they have adequate timekeeping and recordkeeping procedures in place.



Treasury and IRS Seeking Input

- The Department of the Treasury and IRS have issued a request for comments on the labor requirements of the IRA to inform the guidance to be issued.*
 - 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?
 - What documentation or substantiation should be required to show compliance with the prevailing wage requirements?
 - What, if any, clarification is needed regarding the good faith effort exception?
 - What documentation or substantiation do taxpayers maintain or could they create to demonstrate compliance with the apprenticeship requirements or the good faith effort exception?
- **All comments that were submitted prior to Nov. 4 will be considered, but the Notice states that comments submitted after that date will be considered if it does not delay issuance of guidance.*

THANK YOU



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@VinsonandElkins



@VinsonElkins

Austin
T +1.512.542.8400

Dallas
T +1.214.220.7700

Dubai
T +971.4.330.1800

Houston
T +1.713.758.2222

London
T +44.20.7065.6000

Los Angeles
T +1.213.527.6400

New York
T +1.212.237.0000

Richmond
T +1.804.327.6300

Riyadh
T +966.11.250.0800

San Francisco
T +1.415.979.6900

Tokyo
T +81.3.3282.0450

Washington
T +1.202.639.6500

