

Staying ahead of the prevailing wage curve

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Many entities representing a wide variety of industries, sizes and customer bases are increasingly seeking guidance on the interpretation and application of prevailing wage and apprenticeship requirements, such as those within the Davis-Bacon Act. The increasing demand for prevailing wage compliance is directly attributable to the market opportunities and funding available pursuant to the Infrastructure Investment and Jobs Act (IIJA), CHIPS and Science Act (CHIPS) and Inflation Reduction Act (IRA). This article highlights how the prevailing wage and apprenticeship requirements are applied pursuant to the IIJA, CHIPS and IRA and what entities should be considering to demonstrate compliance.

The United States Government's initiatives related to the advancement of infrastructure, expansion of domestic manufacturing and promotion of clean energy have resulted in an increased reliance and demand across all sectors for engineering, and construction capabilities and capacity. These initiatives have been enacted through legislation such as the IIJA, CHIPS and IRA.

The passage of these acts have coincided with an increased focus by the current Administration on Americans being paid fair and reasonable wages. Accordingly, programs funded through these acts have expanded the applicability of prevailing wage requirements, such as those within the Davis-Bacon Act, to organizations previously not subject to such requirements.

- ▶ **IIJA** - Effective November 2021, the IIJA includes approximately \$1.2 trillion in spending to enhance American transportation systems, water infrastructure, and internet access nationally. IIJA provisions include the Davis-Bacon Act's prevailing wage requirements (named Davis-Bacon Related Act or DBRA) to most of its federally funded projects involving construction.
- ▶ **CHIPS** - Effective August 2022, the CHIPS Act includes approximately \$280 billion in spending and tax incentives to enhance American semiconductor research, development and manufacturing. CHIPS-funded projects involving construction activity include Davis-Bacon Act's prevailing wage requirement provisions.
- ▶ **IRA** - Effective August 2022, the IRA includes approximately \$360 billion in clean energy tax incentives and credits for qualifying projects. More importantly, taxpayers seeking the qualifying clean energy projects can achieve a five-times multiplier if certain prevailing wage and apprenticeship requirements are met. The IRS will hold the responsibility to guide and enforce compliance.¹

The prioritization of the Davis-Bacon Act and the DBRA was recently highlighted by August 2023 Department of Labor (DOL) final rule² that includes a provision to apply the requirements to a covered agreement even if the applicable clause or wage determination was inadvertently excluded by the awarding agency.

¹ "Prevailing Wage and Apprenticeship Initial Guidance Under Section 45(b)(6)(B)(ii) and Other Substantially Similar Provisions," Federal Register, <https://www.federalregister.gov/documents/2022/11/30/2022-26108/prevailing-wage-and-apprenticeship-initial-guidance-under-section-45b6bii-and-other-substantially>

² "Updating the Davis-Bacon and Related Acts Regulations," Department of Labor, https://www.dol.gov/sites/dolgov/files/WHD/davis-bacon/Final-Rule_Updating-the-Davis-Bacon-Related-Acts.pdf

Comparative summary

While the IIJA, CHIPS and IRA contain certain prevailing wage and apprenticeship requirements that are generally aligned, companies will need to be aware of and account for certain regulatory nuances when performing projects funded or incentivized under each of the acts.

The following table provides a comparative summary of prevailing wage requirements for IIJA and CHIPS versus IRA activities:

Consideration	IIJA and CHIPS ³	IRA
Regulatory oversight body	DOL	IRS
Triggering event	Government contract, grant, cooperative agreement, other transaction funded by the act	Qualifying clean energy project
Timing of obligation to comply	Compliance obligation becomes binding as a condition of an award.	Compliance obligation becomes binding only when the tax return is filed to claim the increased credit.
Exemptions	Award less than or equal to \$2,000	Beginning of construction occurs before January 29, 2023 or certain facilities with a maximum net output of less than one megawatt
Covered population	Non-exempt laborers and mechanics	Non-exempt laborers and mechanics
Prevailing wage definition	Basic hourly rate plus fringe benefits	Basic hourly rate plus fringe benefits
Prevailing wage obligation	Payment at or above the wage determination(s) selected by the Contracting/Awarding Officer (Government)	Payment at or above the wage determination(s) selected by the entity (taxpayer)
Overtime premium pay	Full-time employee payment of 1½ times the basic hourly rate for contracts/awards above \$100K	No specific requirement to pay overtime premiums
Wage determination source	System for Award Management (SAM.Gov)	SAM.Gov
Apprenticeship	Apprenticeship is not required but permitted for use.	Apprenticeship is required to include labor hour, ratio and participation requirements. Exceptions granted based on payment or good faith effort criteria met.
Penalties	<ul style="list-style-type: none"> Correction payments, including interest, to account for any prevailing wage shortfalls Termination of work Restitution, criminal action Debarment proceedings 	<ul style="list-style-type: none"> Non-intentional failure - Correction payments, including interest, to account for any prevailing wage shortfalls and one-time \$5,000 penalty fee for each covered employee Intentional failure - Correction payments, including interest, at three times the amount of the prevailing wage shortfall delta and one-time \$10,000 penalty fee for each covered employee
Penalty waivers	Not applicable	IRS holds authority to exercise penalty waivers based on the facts and circumstances.
Recordkeeping	<p>Three-year retention requirement of weekly certified payroll reports supplemented with applicable bona fide fringe benefit plans and apprenticeship records (if used).</p> <p>The three-year requirement does not exempt contractors from any longer retention requirements, as prescribed by FAR 4.705 <i>Specific retention periods</i>.</p>	<p>Over the course of the entire project, taxpayers are obligated to retain payroll records to reflect hours worked and wages paid (and as applicable, correction payments) for all covered employees at a frequency consistent with their regular payroll practices and apprenticeship records to include copies of written requests for apprentices as well as apprenticeship registration and agreement documentation and records to evidence compliance with the daily ratio requirements.</p> <p>Taxpayers can avoid the appearance of intentional disregard by adopting reasonable diligence practices such as quarterly prevailing wage monitoring.</p>
Reporting	Statutory requirement to submit weekly certified payroll reports is binding at the time of the project award.	No weekly certified payroll reports. Taxpayers' compliance obligation to report becomes binding at the time a tax return claiming the increased credit is filed.

Key takeaways

It is critical for companies entering into projects funded by IIJA and CHIPS and/or claiming IRA clean energy tax credits to comply with the prevailing wage requirements specific to each act. This includes ensuring that any contractors or subcontractors subject to the requirements are made aware of their obligations and ensuring that they also comply with the requirements. As outlined in the table above, failure to comply can lead to substantial financial penalties, potential termination of award and even debarment.

³ Although not directly mentioned in the provisions as a DBRA, current notices of funding opportunities (NOFOs) are including traditional Davis-Bacon Act references. One example is the [National Institute of Standards and Technology's NOFO for the CHIPS Incentives Program – Commercial Fabrication Facilities](#)

Critical activities

To avoid these penalties, companies performing programs involving construction activities under IIJA or CHIPS or seeking tax incentives under IRA for qualifying projects should take action to ensure compliance with prevailing wage and apprenticeship requirements. These actions include:

Conducting compliance program assessments

- ▶ Assess existing capabilities to comply with IIJA, CHIPS and IRA prevailing wage and apprenticeship requirements, as applicable.
- ▶ Implement processes and controls to ensure compliance. This includes establishing clear roles and responsibilities related to the identification, administration, documentation and reporting of compliance requirements.

Subcontract management

- ▶ Flow down relevant prevailing wage provisions, including audit rights, to contractors and subcontractors performing construction projects under IIJA-, CHIPS- and IRA-related programs.
- ▶ Conduct ongoing monitoring of contractors and subcontractors for compliance with the provisions, including periodic assessment of labor records provided.

Compliance monitoring

- ▶ Establish monitoring activities to evaluate the completeness and accuracy of prevailing wage compliance activities and supporting documentation. This should include the identification of requirements, identification of covered resources, mapping of programs and resources to appropriate wage-determinations and job classifications, ensuring prevailing wage and apprentice requirements are met, and meeting reporting and certification requirements.

What recipients and taxpayers can do

Now	Next	Beyond
<p>Understand the prevailing and apprenticeship requirements inherent in IIJA, CHIPS and IRA.</p> <p>Identify whether you are or will be subject to such requirements in any existing or future awards.</p> <p>Evaluate the processes, functions, systems, tools and controls needed for prevailing wage and apprenticeship compliance.</p> <p>Determine if investment is needed to automate processes to ensure compliance with applicable prevailing wage and apprenticeship requirements.</p> <p>Ensure costs for implementing required processes and controls are incorporated into your program budgets to allow for recovery of the cost of compliance.</p>	<p>Implement processes, controls, procedures and reporting capabilities to address applicable IIJA, CHIPS and IRA prevailing wage and apprenticeship requirements.</p> <p>Critical components of implementation include awareness and training for those involved in ensuring compliance.</p>	<p>Assess prevailing wage compliance during the life of covered programs and update processes and controls as-needed, including consideration for subcontractor and contractor requirements.</p> <p>Ensure retention of appropriate documentation for future DOL or IRS audit and other government oversight.</p>

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