Joint Comments of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) on the Prevailing Wage and Apprenticeship Requirements in the Inflation Reduction Act of 2022

RIN 1545-BQ54/REG–100908–23

The International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) submit these comments in response to the Department of the Treasury and the Internal Revenue Service's (collectively referred to as "Treasury" in these comments) NPRM, *Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements.*[1]

SMART represents highly skilled members in diverse occupations. As it pertains to clean energy,[2] our members receive broad-based training and attain journeyperson status in the construction, alteration, and repair of HVAC systems for heating and cooling of energy-efficient residential and commercial buildings and building envelopes. SMACNA is a national employer association representing 3,500 contributing unionized sheet metal contractors with expertise in HVAC systems. SMART and SMACNA jointly sponsor the International Training Institute for the Sheet Metal and Air Conditioning Industry (ITI).[3] ITI works in conjunction with 148 SMART local joint apprenticeship and training committees (JATCs) to provide training 12,636 apprentices and 1,776 pre-apprentices throughout the United States.

---

[1] *Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements*, 88 *Fed.Reg*. 60018 (Aug. 30, 2023) (referred to as "IRA NPRM").

[2] SMART members and signatory contractors work on 179D projects in the private and public sectors (e.g., schools, municipals buildings, courthouses, universities, etc.). Of the 11 tax credits provisions in the IRA, SMART members and signatory contractors will be most affected by section 48C, Qualifying Advanced Energy Project Credit, and section 48, Investment Tax Credit (ITC). 48C tax credits cover "thermal energy storage property," which means property comprising a system that: 1) is directly connected to a heating, ventilation, or air conditioning ("HVAC" system; 2) removes heat from, or adds heat to, a storage medium for subsequent use: and 3) provides energy for heating or cooling of the interior of a residential or commercial building.

[3] The ITI protects the interests of apprentices in JATCs during the term of their apprenticeship and throughout their careers in a variety of ways: by almost 50 years of curriculum development that anticipates the need for training and re-training as technology evolves; journeyperson upgrades for graduates so that their skills do not become obsolete as technology changes; diverse on-the-job training; a nationally-recognized, portable credential; college credit; an opportunity for expedited progression; multi-modal options for related instruction; portable health insurance and pensions, and progressively-increasing wages that are commensurate with skills acquired.

SUMMARY OF COMMENTS

The Inflation Reduction Act's massive investments to fight the climate crisis creates good paying jobs[4] and a "unique framework that incentivizes apprenticeship and skill-building investments through government spending."[5] The greatest percentage of bonus credits on IRA projects – domestic content (10%), low-income communities (10%), and labor standards (30%) – are contingent upon compliance with the Prevailing Wage and Apprenticeship (PWA) requirements. Despite the unprecedented financial rewards for compliance – a five-times-multiplier bonus – Treasury repeatedly express concern that the PWA rules "minimize burdens for taxpayers."[6] Indeed, the benefits to the taxpayers offered under the IRA clearly outweigh any burdens discussed and rejected in NPRM. The NPRM expresses less concern that pervasive violations of PWA requirements will be undetected absent project labor agreement (PLA) or alternative mechanisms designed to achieve compliance for taxpayers who choose not to sign PLAs. The deterrent effect of stringent penalties for PWA violations is illusory if the probability of detection of such violations is miniscule. As recognized by the Biden administration in numerous contexts,[7] PLAs provide a viable means to ensure compliance, enable unions to play a

[4] *See* the U.S. DOL's *The Good Jobs Initiative*: https://www.dol.gov/general/good-jobs

[5] Mike Williams, Marina Zhavoronkova, & David Madland (2022). *The Inflation Reduction Act Provides Pathways to High-Quality Jobs*. Center for American Progress: https://www.americanprogress.org/article/the-inflation-reduction-act-provides-pathways-to-high-quality-jobs/

[6] IRA NPRM, 88 *Fed.Reg*. at 60038. Regarding "burdens," it is highly likely that on 179D projects, taxpayers, contractors, and subcontractors may be subject to DBRA and/or state or local prevailing wage requirements, including submission of weekly certified payroll records, because the owners of the energy efficient buildings that will be constructed or existing buildings that will be retrofitted include federal, state, and local government. Qualified buildings include but are not limited to: K-12 schools, higher education, and libraries; municipal buildings, such as police, fire stations, courthouses, and more; and public offices, parking garages, and airport terminals. *See* page 23 for further discussion of the applicability of DBRA to projects covered under the IRA. Because the owners of these public and non-profit buildings are nontaxable entities, the deductions can then be passed on to the primary designers of the properties.

[7] *See* e.g., *How Unions and Unionized Workplaces Advance the Mission of the Department of Labor*: https://www.dol.gov/sites/dolgov/files/general/labortaskforce/docs/WORK-fs-DOL-Unions-v6.pdf

central role in curbing PWA violations, and provide workers with a vehicle to report violations without fear of retaliation.

SMART and SMACNA recommend that Treasury impose requirements on taxpayers that would promote efficacy, accountability, and transparency in fulfilling their Good Faith Efforts (in the absence of a PLA) to meet the three separate prongs – Labor Hours, Participation, and Ratio – of the Apprenticeship Requirements. Three requirements, which would optimize a taxpayer's ability to achieve each prong, are: 1) development of an apprenticeship utilization plan, which lists as one of many criteria, "all trades/crafts to be used on the project," at least 90 days before the taxpayer, contractor, and/or subcontractor on a project make a request(s) to a registered apprenticeship program(s) (RAPs) for apprentices to work on a covered project and submission of the plan to the DOL within the same time frame; 2) a request(s) for apprentice(s) to applicable RAPs must be made at least 90 days in advance of the date on which the apprentices will begin working on the project; and 3) inclusion of requirements in § 1.45–12(d) that taxpayers collect and audit requests for apprentices to RAPs from contractors and subcontractors to ensure that taxpayers have the ability to detect non-compliance. These three requirements would serve two purposes: 1) they will greatly increase the likelihood that PWA violations will be detected; and 2) they will deter perfunctory requests for apprentices from RAPs at the 11th hour when it is far too late for a RAP to recruit apprentice in response to a surge in demand. As discussed below, in the union sector, apprentices are recruited based on expected demand by signatory contractors, as determined by JATC boards, in consultation with individual contractors and the JATC coordinator.

SMART and SMACNA encourage Treasury to develop a two-track model for monitoring, compliance, and enforcement of the IRA's prevailing wage and apprenticeship requirements: one set of criteria for taxpayers who are signatory to PLAs and another for those who do not. This

approach is warranted because PLAs are effective in detecting and rectifying PWA violations (with union oversight); promoting efficiency; providing a steady supply of highly skilled labor; and preventing labor disputes. Absent a PLA, there is no such oversight. The two-track approach would model the Commerce Department's requirements for funding under the CHIPS and Science Act of 2022.[8] In guidance for applicants, Commerce strongly encourages the use of PLAs in connection with construction projects, while providing an alternative for applicants who are not signatory to PLAs. As stated by Commerce, applicants that "commit to using best-practice project labor agreements will generally be likely to produce a construction workforce plan that meets the criteria" in the Agency's Notice of Funding Opportunity.[9] By contrast, applicants who do not commit to using a PLA are required to submit workforce continuity plans and show that they have taken other measures to reduce the risk of delays in project delivery.[10]

Regarding enhancement of monitoring, compliance, and enforcement of PWA requirements, taxpayers who do not sign PLAs should be required to: 1) confirm that fringe benefit contributions made on behalf of laborers and mechanics by contractors and subcontractors are remitted to a bona fide fringe benefit fund, plan, or program and require submission of proof of payment to the fund, plan, or program; 2) disseminate and/or ensure that contractors and subcontractors disseminate individual written statements, with a notice of entitlement to prevailing

[8] See the Department of Commerce's *Workforce Development Planning, Guide Guidance for CHIPS Incentives Applicants*, CHIPS Program Office (March 27, 2023). https://www.nist.gov/system/files/documents/2023/03/30/CHIPS%20Workforce%20Development%20Planning%20Guide%20%281%29.pdf

[9] Commerce guidance at 36.

[10] In accordance with Commerce's guidance (page 36), the workforce continuity plan must detail the following information: 1) steps taken and to be taken to ensure the project has ready access to a sufficient supply of appropriately skilled and unskilled labor to ensure construction is completed in a competent manner throughout the life of the project; 2) steps taken and to be taken to minimize risks of labor disputes and disruptions that would jeopardize timeliness and cost-effectiveness of the project; 3) steps taken and to be taken to avoid workplace illnesses, injuries, and fatalities; and 4) steps taken and to be taken to ensure that workers on the project receive wages and benefits sufficient to secure an appropriately skilled workforce in the context of the local or regional labor market.

wage rates for the classification of work performed, on every payment of wages to laborers and mechanics;[11] 3) file with DOL a notice of intention to seek tax credits prior to commencing work on the project;[12] 4) ensure that contractors and subcontractors submit weekly certified payroll records (CPRs) to the taxpayer; 5) develop a mechanism to monitor CPRs that is sufficient to reliably detect misclassification of laborers and mechanics and non-payment of prevailing wages, including non-payment of fringe benefits, because taxpayers cannot ensure compliance with Prevailing Wage Requirements on qualified facilities without undertaking a contemporaneous review of CPRs submitted by contractors and subcontractors; and 6) submit requests for supplemental wage determinations to the DOL on behalf of contractors and subcontractors on covered projects and include a provision in all relevant contracts prohibiting contractors and subcontractors from making direct requests for supplemental wage determinations to the DOL.

In circumstances where taxpayers decline to become signatory to PLAs, a weekly CPR requirement would deter fraud, and would, thus, be in furtherance of the sound tax administration of the IRA. SMART and SMACNA agree with Treasury's view that submission of weekly CPRs **to the IRS** "would not assist the IRS with the efficient administration of the increased credit provisions"[13] and recognize that the IRS lacks the expertise and staffing to provide meaningful review of such records. However, weekly submission of CPRs **to taxpayers** would enable them to fulfill their obligations to ensure that contractors and subcontractors comply with PWA requirements. On a related point, SMART and SMACNA support imposition of responsibility on

[11] *See* Comments of the Attorneys General of Massachusetts, Colorado, Delaware, Illinois, Maine, Maryland, Michigan, New Jersey, New York, Oregon, Rhode Island, and the District of Columbia; the California Air Resources Board; and the Ramsey County, Minnesota, Attorney, December 1, 2022

[12] Comments of Attorneys General at 14.

[13] IRA NPRM, 88 *Fed.Reg.* at 60038.

the transferor taxpayer for PWA penalty of cure positions since, the transferors are in the best position to implement a plan for monitoring compliance with PWA requirements and to ensure that subcontractors and contractors comply with their obligations.

COMMENTS

I. PROJECT LABOR AGREEMENTS ARE THE MOST EFFECTIVE MECHANISMS THROUGH WHICH THE IRA's PWA STANDARDS CAN BE IMPLEMENTED, MONITORED FOR COMPLIANCE, AND ENFORCED

Under the proposed rule, the penalty payment to cure a failure to satisfy the Prevailing Wage Requirements shall not apply with respect to a laborer or mechanic employed in the construction, alteration, or repair work of a qualified facility if the work is done pursuant to a "pre-hire collective bargaining agreement with one or more labor organizations" that establish the terms and conditions of employment for a specific construction project (Qualifying Project Labor Agreement) and any correction payment owed.[14]

SMART and SMACNA strongly support a regulatory framework that incentivizes the use of PLAs on qualified facilities and exemption from the penalty payment to cure a failure to satisfy these requirements. PLAs are a reliable means through which the PWA requirements can be administered and enforced. As discussed below, the advantages of using PLAs – efficiency, safety, availability of highly-trained worker – are well-known to the Biden administration and merit

[14] The proposed regulatory language states that a PLA must, among other things, "Contain provisions to pay prevailing wages." § 1.45–7. It is more appropriate to state that a PLA must "contain provisions to pay **not less than** prevailing wages," for two reasons: 1) it tracks the language in the IRA, which uses "not less than" in describing the amount to which laborers and mechanics are entitled; and 2) prevailing wage requirements establish a floor but not a ceiling.

encouragement of the use of PLA for these reasons, which are in addition to enforcement and prevention of fraudulently obtaining and/or transferring bonus credits.[15]

A. Absent a PLA, No Viable Complaint Mechanism is Available under the Regulatory Framework to a Laborer or Mechanic Who is Not Paid Prevailing Rates

In the IRA context, PLAs are the best mechanism for monitoring and ensuring compliance with the payment of PWA requirements. Treasury recognizes that "having a project labor agreement in place may also help ensure compliance with PWA requirements,"[16] but the proposed rules do not contain a viable enforcement mechanism in the absence of a PLA. The NPRM discusses enforcement mechanisms that are available on DBRA jobs (e.g., debarment from future federal contracts), including the roles of the WHD[17] and contracting agencies, but declines to "incorporate the various enforcement processes that are available to the DOL and the contracting agencies to address noncompliance."[18] In fact, the NPRM states that the obligation to make correction payments and pay the penalty "would not become binding until a return is filed claiming the increased credit," and payment of the correction payment or the penalty is not required "until the time the increased credit is claimed."[19] Under this scenario, it appears that a laborer or mechanic may not pursue a prevailing wage violation even when the taxpayer has contractually

---

[15] *Executive Order on Use of Project Labor Agreements For Federal Construction Projects*, Feb. 4, 2022. https://www.whitehouse.gov/briefing-room/presidential-actions/2022/02/04/executive-order-on-use-of-project-labor-agreements-for-federal-construction-projects/

[16] IRA NPRM, 88 *Fed.Reg*. at 60029.

[17] In the DBRA context, the DOL recently upgraded the tools at its disposal to impose meaningful penalties on violators. In proposing these upgrades, such as new anti-retaliation protection and cross-withholding of funds, the DOL recognized that its then current regulations were insufficient to prevent violations of the DBRA. *See* Final Rule, *Updating the Davis-Bacon and Related Acts Regulations*, 88 *Fed.Reg*. 57526 (August 23, 2023).

[18] IRA NPRM, 88 *Fed.Reg*. at 60022.

[19] IRA NPRM, 88 *Fed.Reg*. at 60027.

obligated contractors and subcontractors to pay prevailing rates of pay and/or the taxpayers has requested supplemental rates from the DOL. It is clear, therefore, that absent a PLA, there is no viable mechanism in the NPRM for monitoring, compliance, and enforcement of the Prevailing Wage Requirements.[20]

Treasury includes in the "facts and circumstances" determining intentional disregard, "Whether the taxpayer had in place procedures whereby laborers and mechanics could report suspected failures to pay prevailing wages and/or suspected failures to classify workers in accordance with the wage determination of workers to appropriate personnel departments or managers without retaliation or adverse action." This is not a viable enforcement mechanism for several reasons: 1) there is no requirement that taxpayers provide notice of these procedures to laborers and mechanisms on the IRA project; 2) since the Prevailing Wage Requirements are not ripe until the taxpayer files a claim for tax benefits, it appears that laborers and mechanics would be unable to timely file a complaint; and 3) the complaint procedure is not an affirmative obligation imposed on taxpayers but rather only one of many facts and circumstances that is assessed in determining intentional disregard.

The NPRM contemplates that, under the proposed framework, individual laborers and mechanics may not be paid prevailing rates of pay because violations may not be detected in a timely manner. But, rather than proposing a framework that would improve the likelihood that laborers and mechanics will be paid the amount to which they are entitled, Treasury focuses on how correct payments may be made when a former laborer or mechanic cannot be located," noting that "States have developed specific rules for the payment of wages to former laborers and

[20] By contrast, RCW 49.04.035 requires the Washington State Department of Labor & Industries to verify apprentice utilization compliance on public works projects and report the results to the Washington State Apprenticeship and Training Council (WSATC).

mechanics who cannot be located."[21] While SMART and SMACNA support inclusion of a Wage Theft Enforcement Fund[22] into the proposed rules, the first priority should be to develop a complaint process (in the absence of PLAs) that empowers laborers and mechanics to seek timely redress for the nonpayment of prevailing wages.

B. Without a PLA, the "Probability of Detection" of Violations of PWA Standards Would Be Miniscule, and Taxpayers Would, Thus, Not Have a "Hard Economic Incentive" to Comply

1. The Proposed Regulatory Framework Makes the "Probability of Detection" Very Low

Economists understand what gives a firm a "hard economic incentive" to comply with statutory provisions designed for the protection of workers.[23] A study undertaken by the Peterson Institute for International Economics, states that, "A purely profit-maximizing firm makes a simple calculus: comply if the expected costs of noncompliance outweigh the profits that can be made through noncompliance."[24] There is no question that the statutory penalties for violations of the IRA's PWA requirements are formidable. However, such penalties would be a "meaningful deterrent" only "if the probability of detection firms expect is very high."[25] In the context of FLSA compliance, for example, economists have found that a firm's "incentive" to comply "depends on

---

[21] IRA NPRM, 88 *Fed.Reg*. at 60028.

[22] *See* e.g., 820 ILCS 115, Illinois Wage Payment and Collection Act; and California, Section 1771.3 - State Public Works Enforcement Fund.

[23] Anna Stansbury (2021). *Do US Firms Have an Incentive to Comply with the FLSA and the NLRA*? Peterson Institute for International Economics. https://www.piie.com/sites/default/files/documents/wp21-9.pdf; *see also* Alexia Fernández Campbell and Joe Yerardi (2021). *Ripping off Workers Without Consequences*. Center for Public Integrity. https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/cheated-at-work/ripping-off-workers-with-no-consequences/

[24] *Id*. at 2.

[25] *Id*.

the probability of detection and on the penalty it expects to pay if found non-compliant."[26] According to an economic study, based on "available data on the penalties levied [for FLSA violations], typical firm would need to expect a chance of at least 78–88 percent that its violation would be detected in order to have an incentive to comply with the FLSA."[27]

2. While the IRA's Statutory Penalties Are High, the Deterrent Effect Will Be Low if Treasury Does Not Require the Taxpayer to Undertake Monitoring that Has a High Probability of Detection of Violations

While the monetary proposed penalties are significant, violations of labor standards are likely to go undetected without reliable monitoring of compliance. As the DOL stated in the context of DBRA enforcement, if the "violations never come to light," taxpayers, contractors, and subcontractors "pocket wages that belong to workers."[28] Worker misclassification is rampant in the construction industry. There are enormous economic incentives to cheat, ranging from the high costs of workers compensation for construction occupations[29] to reduced wages for registered apprentices on federal and state prevailing wage jobs.[30] The five-times-multiplier bonus is unprecedented and could undoubtedly have a great influence on compliance decisions depending

[26] *Id*.

[27] *Id.* at 1.

[28] *See* NPRM, *Updating the Davis-Bacon and Related Acts Regulations*, 88 *Fed.Reg*. 15698, 15755 (March 22, 2022). The DOL quoted *Facchiano Constr. Co. v. U.S. Dep't of Labor*, 987 F.2d 206, 214 (3d Cir. 1993), which observed that debarment "may in fact 'be the only realistic means of deterring contractors from engaging in willful [labor] violations based on a cold weighing of the costs and benefits of noncompliance'" (quoting *Janik Paving & Constr.*, 828 F.2d 84, 91 (2d Cir. 1987).

[29] Michael Kelsay, James I. Sturgeon, & Kelly D. Pinkham (2006). *The Economic Costs of Employee Misclassification in the State of Illinois*. University of Missouri – Kansas City.
https://faircontracting.org/wp-content/uploads/2019/06/Illinois-Employee-Misclassification.pdf

[30] Davis-Bacon regulations, 29 C.F.R. § 5.5(a)(4)(i), permit contractors to pay registered apprentices wage rates that are below the prevailing rates. Unlike employers in other industries, construction contractors save as much as 40% per hour in the wage of workers classified as first-year apprentices on DB jobs.

upon the likelihood of detection. If taxpayers perceive a strong risk of detection, the potential loss of the fivefold bonus should deter noncompliance.

DOL precedent and academic studies, including those cited by the DOL in support of recent upgrades to DBRA enforcement,[31] amply demonstrate that financial self-interest has long resulted in misclassification of workers as independent contractors;[32] misclassification of journeypersons to lower paying journeyperson classifications with a lower prevailing wage;[33] misclassification of workers as apprentices even though they are not individually registered in a bona fide RAP with the Office of Apprenticeship or State Apprenticeship Agency recognized by the OA;[34] using apprentices on covered projects even though the contractor does not have an a RAP;[35] failure to

[31] Davis-Bacon Final Rule, 88 *Fed.Reg*. at 57606. citing Nat'l Emp. L. Project, "Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries" (Oct. 2020), https://www.nelp.org/publication/ independent-contractor-misclassification-imposeshuge-costs-workers-federal-state-treasuries-updateoctober-2020; Nathaniel Goodell & Frank Manzo IV, "The Costs of Wage Theft and Payroll Fraud in the Construction Industries of Wisconsin, Minnesota, and Illinois: Impacts on Workers and Taxpayers " (Jan. 2021), https://midwestepi.files.wordpress.com/ 2020/10/mepi-ilepi-costs-of-payroll-fraud-in-wi-mnil-final.pdf; Mandy Locke, et. al., "Taxpayers and Workers Gouged by Labor-Law Dodge," Miami Herald (Sept. 4, 2014), https://www.miamiherald. com/latest-news/article1988206.html; Russell Ormiston et al., supra note 70, at 75–113 (summarizing widespread labor violations in the residential construction industry).

[32] *See, e.g*., Lisa Xu and Mark Erlich, *Economic Consequence of Misclassification in the State of Washington*, Harvard Labor and Worklife Program, 2 (2019), https://lwp.law.harvard.edu/files/lwp/ files/wa_study_dec_2019_final.pdf; Karl A. Racine, Issue Brief and Economic Report, *Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry*, 13 (September 2019). These reports are cited in the WHD's NPRM, *Employee or Independent Contractor Classification Under the Fair Labor Standards Act,* 87 *Fed.Reg*. 62218 (Oct. 13, 2022). https://www.govinfo.gov/content/pkg/FR-2022-10-13/pdf/2022-21454.pdf

[33] *Cosmic Construction Co., Inc*., WAB 79-19, Sept. 2, 1980; *Jordan & Nobles Construction Co*.; *Soule Glas and Glazing Co*., WAB Case No. 78-18 (Feb. 8, 1979); and *Sealtite Corporation*, WAB Case No. 87-6 (October 4, 1988).

[34] *Tollefson Plumbing and Heating*, WAB 78-17 (Sept. 24, 1979); *Clevenger Roofing and Sheet Metal Co*., WAB 79-14 (Aug. 20, 1983).

[35] *Jos. J. Brunetti Construction Co. & Dorson Electric & Supply Co., Inc*., WAB Case No. 80-9 (Nov. 18, 1982); *Spartan Mechanical Corp*., WAB Case No. 80-6 (April 16, 1984); *In re North Country Constructors of Watertown*, WAB No. 92-22 (Sept. 30, 1992), aff'd *North Star Industries v. Reich*, 67 F. 3d 307 (9th Cir. 1995).

pay the proper percentage of the journeyperson wage rate;[36] and/or a failure to honor required ratios of journeypersons to apprentices.[37]

C. PLAs Enable Unions to Play a Central Role in Curbing PWA Violations and Provide Workers with a Vehicle to Report Violations Without Fear of Retaliation

The validity of the two-track model is further supported by the vital role that unions play in discovering, deterring, and rectifying wage theft. As stated by the DOL: [38]

> Unions play a central role in curbing wage theft by negotiating contractual guarantees of workers' wages, together with a process for enforcing these guarantees, by encouraging state and local legislation against wage theft,[39] by helping low-wage workers vulnerable to wage theft understand their statutory rights, and by empowering workers to report violations of their rights.

The DOL cites to a number of studies which establish that having a "unionized workplace" protects workers against the "rampant problem of wage theft, or failure to pay wages required by law."[40] Citing research, from the University of Pennsylvania, Temple University, and the University of Minnesota, the DOL states that "workers with less bargaining power are more likely to have lower wages, more violations of their labor rights, and are less likely to report violations to enforcement

---

[36] *Bay State Wiring Co.*, WAB 76-8 (June 14, 1977).

[37] *Johnson Electric Co*., WAB 80-3 (April 11,1983); *CRC Development Corporation*, WAB Case No. 77-01 (Jan. 23, 1978); *Repp & Mundt, Inc. & Goedde Plumbing & Heating Co., Inc*. WAB 80-11 (Jan. 17, 1984); *Palmer and Sicard, Inc*., WAB 77-12 (Dec. 14, 1977).

[38] *See* How Unions and Unionized Workplaces Advance the Mission of the Department of Labor https://www.dol.gov/sites/dolgov/files/general/labortaskforce/docs/WORK-fs-DOL-Unions-v6.pdf

[39] Doussard, Marc & Ahmad Gamal, The Rise of Wage Theft Laws: Can Community—Labor Coalitions Win Victories in State Houses? 2015*, Urban Affairs Review*, Vol. 52., No. 5, (2016). Available at: https://doi.org/10.1177/1078087415608008.

[40] *Id*. citing, Mangundayao, Ihna, Celine McNicholas, Margaret Poydock, & Ali Sait (2021). More Than $3 Billion in Stolen Wages Recovered for Workers between 2017 and 2020, EPI, at 2, (2021). Economic Policy Institute: https://www.epi.org/publication/wage-theft-2021/ This research notes a study by Cooper and Kroeger (2017) that "investigated just one type of wage theft and found that in the 10 most populous states in the country, 17% of eligible low-wage workers reported being paid less than the minimum wage, amounting to 2.4 million workers losing $8 billion annually. Extrapolating from these 10 states, Cooper and Kroeger estimate that workers throughout the country lose $15 billion annually from minimum wage violations alone."

agencies."[41] The research found that higher average wages, lower labor market concentration, and a higher union coverage rate are all associated with fewer workplace law violations.

Since the regulatory framework proposed by Treasury lacks a viable complaint procedure, workers who are neither represented by a union nor working on a PLA have no clear avenue for pursuing violations of PWA requirements. Furthermore, since the Prevailing Wage Requirements becomes "binding only when a tax return claiming the increased credit is filed,"[42] it would be unknown to the workers on a non-PLA job if they are, in fact, entitled to prevailing wage rates.[43]

D. The Use of PLAs on IRA Projects Will Enhance Efficiency and Safety and Will Provide a Reliable Supply of Highly-Trained Workers

1. *PLAs Achieve Efficiencies on Large-Scale Projects by Harmonizing Work Rules, Schedules, and Other Terms Included in Individual CBAs*

Construction is a highly skilled, labor-intensive industry. The success of any construction project requires significant coordination among the various contractors and their ability to rely on a dependable, qualified workforce. Yet employment in the construction industry is highly fragmented. Any sizable construction project involves a constantly changing stream of contractors and subcontractors responsible for discrete aspects of the job, which must be coordinated if the work is to proceed smoothly and safely. Each of those contractors and subcontractors supplies its own complement of employees who are, for the most part, hired for a particular project. In the unionized sector, each trade has its own local collective bargaining agreement, with different work

[41] *Id*. citing, Marinescu, Ioana, Yue Qiu, & Aaron Sojourner, *Wage Inequality and Labor Rights Violations*, NBER Working Paper No. 28475, (2020). Available at SSRN: https://ssrn.com/abstract=3673495 or http://dx.doi.org/10.2139/ssrn.3673495.

[42] *See* IRA NPRM, 88 *Fed.Reg*. at 60035.

[43] As discussed below, SMART and SMACNA believe that the proposed posting of written notice in a "prominent place at the facility" is deficient in many respects and insufficient to provide actual notice to laborers and mechanics. For this reason, we recommend that Treasury require that taxpayers disseminate and/or ensure that contractors and subcontractors disseminate individual written statements, with a notice of entitlement to prevailing wage rates for the classification of work performed, on every payment of wages to laborers and mechanics.

rules, schedules, holidays, and expiration dates. In the nonunion sector, each contractor similarly comes to the project with its own labor-relations structure, work rules, and hiring needs.

This fragmentation presents formidable challenges on large, long-duration projects. PLAs were developed as a governing mechanism for such projects. They are a management tool that establishes the ground rules binding all contractors and workers who will be engaged on a project for its entire duration. By harmonizing each contractor's individual practices and setting the common rules for the project, a PLA sets the framework for all the contractors, subcontractors, and trades to work together to complete not only their individual tasks, but also the larger project.

2. PLAs Provide a Mechanism for Quickly and Consistently Staffing the Jobs with the Most Highly-Trained, Qualified Employees from all the Trades

PLAs provide a mechanism for quickly and consistently staffing the job with the most highly-trained, qualified employees from all the trades,[44] to ensure on-time and on-budget construction. All employers working on projects with PLAs benefit from having access to the unions' "hiring hall[s] that match employers with needs and jobseekers with specific skills."[45] This includes access to apprentices trained through a network of RAPs. A common feature of PLAs is a standardized system for utilizing apprentices across the trades.[46] Most PLAs allow contractors

[44] The proposed regulatory language states that a PLA must, among other things, "Be a collective bargaining agreement with one or more labor organizations (as defined in 29 U.S.C.152(5)) of which building and construction employees are members, as described in 29 U.S.C. 158(f)." It is more accurate to define a PLA a "collective bargaining agreement with multiple labor organizations," since the Participation prong of the Apprenticeship Requirements would be best effectuated if a taxpayer enters into a PLA with representatives of each of the separate trades involved on the project rather than with a single labor organization. This recommendation is consistent with Treasury's recognition that taxpayers will "likely" use "multiple occupations" in the construction, alteration, or repair of a qualified facility. 88 *Fed.Reg* at 60030.

[45] Maria Figueroa & Jeff Grabelsky (2010). *The Socio-Economic Impacts of Construction Unionization in Massachusetts*, Cornell University School of Industrial and Labor Relations, at 17. https://faircontracting.org/wp-content/uploads/2022/04/the-socio-economic-impacts-of-construction-unionization-the-socio-economic-impacts.pdf

[46] As a practical matter, construction unions represent separate crafts that are trained in separate RAPs under the instruction of journeyperson in an identified trade. As observed by Treasury, a RAP "typically trains apprentices in a single occupation." IRA NPRM, 88 *Fed.Reg*. at 60030. Treasury should, therefore, specify in its definition of PLAs that signatory labor organizations must sponsor a RAP in the construction industry, as determined by the O*Net Code for the "apprenticeable occupation," 29 C.F.R. § 29.4.

to employ a specified ratio of apprentices to trained journeypersons on the project. Over time, the use of PLAs increases the supply of journeypersons in the areas in which covered projects are located as apprentices graduate from RAPs. Programs registered with the U.S. Department of Labor or state apprenticeship programs are the gold standard; as stated by the DOL, a "structured OJL [on-the-job learning] model is a hallmark of a high-quality apprenticeship program."[47]

II. TREASURY SHOULD INCORPORATE "FACTS AND CIRCUMSTANCES" IN THE PROPOSED "INTENTIONAL DISREGARD" RULE, WHICH ARE CALCULATED TO RESULT IN DISCOVERY OF PREVAILING WAGE VIOLATIONS BY TAXPAYERS WHO ARE NOT SIGNATORY TO PLAs

Treasury requests comments on additional criteria that might be used as part of a facts and circumstances analysis of intentional disregard in this context of the Prevailing Wage Requirements.[48] SMART and SMACNA agree with the proposed criteria but submit that they are not sufficient, without more transparent criteria, to result in a high likelihood of detection of violations of Prevailing Wage Requirements by taxpayers, subcontractors, and contractors who are not signatory to a PLA. As noted above, in the context of labor statutes administered by the DOL, it is rare that violations are found to be for willful violations.[49] For the proposed penalties to serve

[47] Final Rule, *Apprenticeship Programs, Labor Standards for Registration*, 87 *Fed.Reg*. 58269, 58275 (Sept. 26, 2022) (In rescinding the Industry-Recognized Apprenticeship Program (IRAP) rule, the DOL stated that the "IRAP model does not adequately ensure high-quality training or apprentice safety and welfare.") *See also*, Notice of Proposed Rulemaking, Apprenticeship Programs, Labor Standards for Registration, 86 *Fed.Reg*. 62966 (Nov. 15, 2021).

[48] IRA NPRM, 88 *Fed.Reg*. at 60028. The NPRM states that to demonstrate that a failure was not due to intentional disregard, taxpayers would "need to maintain and preserve records sufficient to document the failure and the actions they took to prevent, mitigate, or remedy the failure (for example, records demonstrating that the taxpayer regularly reviewed payroll practices, included requirements to pay prevailing wages in contracts with contractors, and posted prevailing wage rates in a prominent place on the job site)."

[49] In the FLSA context, the DOL considers "only 11 percent of detected" violations "repeat and/or willful." Additionally, while the FLSA provides for criminal prosecution in the case of serious violations, it is extremely rare: there were 10 criminal convictions for violation of the FLSA's minimum wage or overtime provisions during 2005–16 (a period during which the DOL identified nearly 3,000 willful violations). Stansbury research at 2.

the intended deterrent effect, it is important that Treasury include facts and circumstances criteria, which are likely to expose violations and increase the risk to taxpayer of an administrative finding that violations are willful.

Several of the recommendations described below are based on joint comments of a dozen Attorney General offices (and other interested parties), which advocate for "robust" documentation to avoid fraud and to facilitate compliance and enforcement of PWA Requirements.[50] If such requirements are not imposed on employers (taxpayers, contractors, and subcontractors), violations will inevitably go undetected in all but a miniscule percentage of cases.

A. SMART AND SMACNA Urge Treasury to Include New Criteria to Supplement the Existing Ones in the "Facts and Circumstances" Regulation

SMART and SMACNA recommend that Treasury modify the facts and circumstances in § 1.45–7, which are considered in determining whether a failure to satisfy the Prevailing Wage Requirements is due to intentional disregard by adding the following requirements:

- Whether the taxpayer failed to file with the U.S. Department of Labor a notice of intention to seek tax credits prior to commencing work on the facility;
- Whether the taxpayer failed to take steps to confirm that fringe benefit contributions are made irrevocably a bona fide fringe benefit fund, plan, or program by, at a minimum, requiring contractors and subcontractors to submit to the taxpayer the following information: the name and address of benefit fund, plan, or program administrator; the U.S. DOL benefit plan filing number/EIN; and the third-party trustee and/or contact person.
- Whether the taxpayer failed to require contractors and subcontractors to submit to the taxpayers weekly certified payroll records on a form supplied by the taxpayer;
- Whether the taxpayer failed to provide individual written statement with every payment of wages to laborers and mechanics of the prevailing rates of pay, as determined by the U.S. Department of Labor, for the classification(s),

[50] In addition to recommending documentation, the Attorneys General urge Treasury to bolster accountability and enforcement with "on-the-ground verification" of compliance, which would pursuit of PWA violations through "not only technological measures" but "also on-the-ground verification for many types of violations that cannot be readily identified through file reviews." Attorneys General Comments at 15.

applicable to the work performed by the individual and the means through which the laborers and mechanics can recoup underpayments; and

- Whether the taxpayer failed to submit requests for supplemental wage determinations on behalf of contractors and subcontractors on covered projects and include a provision in all relevant contracts prohibiting contractors and subcontractors from making direct requests for supplemental wage determinations to the U.S. Department of Labor.

B. SMART and SMACNA Support the Recommendation of the Attorneys General that Would Require Taxpayers to Submit to the DOL a Notice of Intention to Seek a Tax Credit Prior to Commencing Work

The Attorneys General recommend that Treasury require, among other things, that taxpayers submit to the DOL a notice of intention to seek tax credits prior to commencing work.[51] SMART and SMACNA support this recommendation because such a "pre-filing notice," will aid in preventing fraud and enforcement of the PWA requirements.

1. *Advanced Notice of Intention to the DOL of Claim a Tax Credit Based on Compliance with PWA Requirements Will Deter Fraud*

This pre-filing notice recommendation is consistent with Section 6418, which "directs" the Secretary of the Treasury to provide rules to "require information or registration necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6418."[52] The registration requirement in section 6418, which is applicable to transfers, is

[51] *See* Comments of Attorneys General at 14 (footnotes omitted; emphasis in original): "Beyond requiring taxpayers simply to *maintain* records material to compliance, as the Initial Guidance provides, Treasury and the IRS should require all contractors and taxpayers intending to seek prevailing wage and apprenticeship enhancements to *file* with DOL a notice of intention to seek a tax credit prior to commencing work, certified payroll records covering each week of the time period for which they intend to claim enhanced benefits, and a signed statement certifying under the penalty of perjury that the information contained within the certified payroll records is accurate."

[52] NPRM, *Section 6418 Transfer of Certain Credits*, 88 *Fed.Reg*. 40496 (June 21, 2023).

designed to prevent fraud and other misfeasance, but it is impossible to prevent such transfers without an investigation of compliance with the bonus credits.[53]

Since the lion's share of the tax credits (fivefold increase) referenced in section 6418 are based on compliance with the PWA requirements, it follows, therefore, that the statutory mandate to "require information or registration" cannot be fulfilled without a mechanism in place to prevent fraudulent representations concerning the credits that will be transferred.[54] In the rulemaking on transferability, Treasury considered various alternatives in implementing section 6418 and rejected an alternative that would have allowed taxpayers to submit the information required in the proposed rule on pre-filing at the time of filing the relevant tax return. In so doing, Treasury endeavored to "minimize burden while also minimizing the opportunity for duplication, fraud, improper payments, or excessive payments under section 6418." The NPRM further states that Treasury considered whether "such information could be obtained strictly at filing of the relevant return and decided that such an option would increase the opportunity for duplication, fraud, improper payments or excessive payments under section 6418."[55]

[53] The proposed rule on transferability requires, among other things, that the pre-filing registration in the "type of eligible credit(s) for which the eligible taxpayer intends to make a transfer election;" and the "(e)ach eligible credit property that the eligible taxpayer intends to use to determine a specified credit portion for which the eligible taxpayer intends to make a transfer election." § 1.6418–4.

[54] SMART and SMACNA incorporate by reference our comments in response to the NPRM on transferability.

[55] An eligible taxpayer must provide the specific information required to be provided as part of the pre-filing registration process. The provision of such information, which includes information about the taxpayer, about the eligible credits, and about the eligible credit property, will allow the IRS to prevent duplication, fraud, improper payments, or excessive transfers under section 6418. For example, verifying information about the taxpayer will allow the IRS to mitigate the risk of fraud or improper transfers. Information about eligible credit properties, including their address and coordinates (longitude and latitude), supporting documentation, beginning of construction date, and placed in service date will allow the IRS to mitigate the risk of duplication, fraud, and improper transfers for properties that are not eligible credit properties. Transferability NPRM, 88 *Fed.Reg.* at 40507.

2. *Taxpayers Who Make a Good Faith Effort to Comply with the Duties Incumbent Upon Them to Oversee Compliance with PWA Requirements Would Not Find "Burdensome" the Minimal Time Involved in Submitting a Pre-Filing Notice to the DOL*

The time involved in submitting a pre-filing notice to the DOL would be miniscule relative to the time involved in completing the hundreds of other administrative tasks required to manage a large-scale construction project, including those tasks that are unrelated to compliance with IRA labor standards. It is impossible to imagine a scenario in which taxpayers would find it unduly burdensome to submit a pre-filing notice to the DOL if they are diligently fulfilling the duties required in the proposed rule to comply with the Prevailing Wage Requirements, which include but are not limited to: providing written notice to workers in a "prominent place" of their entitlement to prevailing wages; contemporaneously monitoring the payment of prevailing wage during the course of the entire project; determining the appropriate classifications on the wage determinations to which work on the project corresponds; seeking supplemental rates from the DOL when there are rates missing from the applicable wage determination; and including provisions in any contracts entered into with contractors that required the contractors and any subcontractors retained by the contractors to pay laborers and mechanics at or above the prevailing wage rates and maintain records to ensure the taxpayer's compliance with recordkeeping requirements set forth in § 1.45–12.

C. In the Absence of a PLA, Weekly Submission of CPRs to the Taxpayers is Necessary to Ensure Appropriate Monitoring of Compliance with Prevailing Wage Obligations

1. A Certified Payroll Requirement Would Deter Fraud, and Thus, Would be in Furtherance of Sound Tax Administration of the IRA

The proposed rules include as one of the facts and circumstances, "Whether the taxpayer undertook a quarterly, or more frequent, review of wages paid to mechanics and laborers to ensure that wages not less than the applicable prevailing wage rate were paid." Rather than imposing requirements that are likely to reveal fraud and intentional underpayment of workers, the NPRM leaves it to the discretion of individual taxpayers to determine the specific steps needed to ensure the adequacy of the review. Incorporation of a requirement to collect and review CPRs on a weekly basis would likely be effective in this context because the taxpayer has a strong financial incentive to discover violations.

2. Contractors and Subcontractors Should be Required to Submit Weekly CPRs to Taxpayers Rather than to the IRS Since the IRS Lacks the Expertise and Staffing to Review the CPRs

SMART and SMACNA agree that the regulation should adopt DBA guidance when doing so would be in "furtherance of sound tax administration or the aims of the IRA."[56] In circumstances where taxpayers decline to become signatory to PLAs, a weekly CPR requirement would deter fraud, and would, thus, be in furtherance of the sound tax administration of the IRA. SMART and SMACNA agree with Treasury's view that submission of weekly CPRs **to the IRS** "would not

[56] NPRM, 88 *Fed.Reg*. at 60022.

assist the IRS with the efficient administration of the increased credit provisions"[57] and recognize that the IRS lacks the expertise and staffing to provide meaningful review of such records. However, weekly submission of CPRs **to taxpayers** would enable them to fulfill their obligations to ensure that contractors and subcontractors comply with PWA requirements.

3. Treasury Misunderstands the Great Importance of Submission of Certified Payroll Records for Contemporaneous Review by a Third Party with Knowledge of the Classifications Needed on the Project

Comments are requested on the requirements in the proposed regulations, including specifically, whether there are "less burdensome" alternatives that ensure the IRS has sufficient information to administer the increased credit and deductions.[58] On projects where the taxpayer is not signatory to a PLA, the IRS cannot achieve its goal of "minimize[ing] burdens" by declining to require submission of CPR, while simultaneously "ensuring that laborers and mechanics are paid the applicable wage rates and that the IRS has sufficient information to administer the increased credits and deduction provisions." Records of classifications of work cannot be compiled and monitored retrospectively. Monitoring of compliance must be contemporaneous, since without interviewing workers (who may be difficult, if not impossible, to locate), there is no ability to reconstruct records of the rates that should have been paid to the workers based on the work that they performed.

[57] *Id*. at 60038.

[58] The comments of the Attorneys General state: "It is all too common for employers and contractors to submit certified payroll records that, on their face, appear to comply with prevailing wage requirements while hiding the fact that workers were paid off the books at non-prevailing rates of pay or were required to return to their employers the difference between their regular wages and the prevailing wage." Comments at 13.

4. In Assessing the Magnitude of the "Burden" Placed on Taxpayers, Treasury Should be Mindful that Taxpayers May be Subject to DBRA and/or State or Local Prevailing Wage Requirements

In imposing alternative obligations on taxpayers who are not signatory to PLAs, Treasury should be mindful that, in many circumstances, taxpayers, contractors, and/or subcontractors will be obligated by DBRA or state or local prevailing wage requirements to perform certain functions, such as submission of weekly certified payroll records. On 179D projects, for example, contractors, and subcontractors construct energy efficient buildings, such as schools,[59] or retrofit existing buildings on federal, state, and local government projects. Additionally, federal agencies, such as the Department of Energy, strongly encourage grant and loan applicants to create innovative partnerships with private investment and to leverage federal investment,[60] which may involve compliance with DBRA requirements.

D. SMART and SMACNA Support the Recommendation of the Attorneys General that Taxpayers Provide Individual Written Notice to Laborers and Mechanics

1. The Proposed Notice Requirement is Deficient

The proposed rules include as one of the facts and circumstances posting a notice to laborers and mechanics of the possibility that they may be entitled to prevailing wages. While SMART and SMACNA support a notice requirement, the proposed one is deficient in several

[59] DOE's FOA for Renew America's Schools outlines how applicants are scored on, "Criterion 3: Innovation and Scalability (20%) This criterion involves consideration of the following factors: the extent to which the proposed technology, process, or project is innovative; the extent to which the project is scalable both within the applicants LEA as well as how this could be replicable in other LEAs; and the extent to which the project leverages additional funds." https://www.energy.gov/scep/articles/renew-americas-schools-informational-foa-webinar

[60] *See* DOE's Hydrogen Hub FOA, which states: "Other Federal Support: Federal financing, such as grants or loan guarantees from federal agencies, cannot be leveraged by applicants to provide the required H2Hub cost share or to otherwise support the same scope of the H2Hub. However, other federal support may be used for activities that fall outside of the H2Hub scope/budget. The financial plan should identify whether the H2Hub will benefit directly or indirectly from other forms of federal support, such as grants, loan guarantees, tax credits, having federal agencies or entities as a customer or off taker of the H2Hub's products or services, or other federal contracts, including acquisitions, leases, and other arrangements, that may indirectly support the H2Hub."

respects. First, the information conveyed in the notice is far too confusing to be of value to workers who are not versed in complex tax issues. It is certain that the vast majority of the intended audience – workers who are unfamiliar with tax credits and deductions – will not grasp the meaning of "in order to claim certain tax credits," the taxpayer must ensure that laborers and mechanics are paid wages not less than those determined the DOL. Second, the information in the notice is indefinite and contingent upon whether the taxpayer ultimately decides to claim the tax benefits. In effect, the so-called notice informs the workers that "you may or may not be" entitled to prevailing wages depending upon a decision that the taxpayer will make at a time that may be after you complete your work on the project. Third, the proposed posting of a single notice requirement in a "prominent place" would likely be insufficient to provide actual notice to workers considering the enormous geographic area(s) [61] spanned by covered projects. Fourth, a further barrier to actual notice is that there is no requirement that notice must be in the native language of the workers on the project. Fifth, the proposed notice does not inform individual workers of the "applicable wage rate(s) as determined by the U.S. Department of Labor for all classifications of work" for the actual work functions that they are performing. The workers would, thus, have limited present ability to determine whether they are misclassified.

2. *The Individual Notice to Laborers and Mechanics Should Identify their Classification(s) of Work, Deductions for Bona Fide Fringe Benefits, Gross and Net Pay, and Other Pertinent Information*

SMART and SMACNA agree with the recommendation of the Attorneys General that Treasury require contractors to provide individual notice to workers on a qualifying project of their right to earn prevailing wages at the rate of pay for an identified classification of work. Individual

[61] *See* IRA NPRM, 88 *Fed.Reg*. at 60024: "The Treasury Department and the IRS expect that the construction of some facilities may span two or more adjacent geographic areas, and more than one general wage determination could apply to the facility."

notice should also include the itemization of the amounts of deductions for each bona fide fringe benefits and the name and identification number of the fund, plan, or program; gross and net pay; and other information pertinent to a determination by the individual laborer or mechanics that he or she is being paid the amount to which he or she is entitled. We encourage Treasury to determine the required content of the individual notice to laborers and mechanics based on models in New York, California, and Minnesota. The New York model[62] requires, for example, that upon the request of an employee, the employer shall furnish an explanation in writing of how the individual's wages were computed. Minnesota law requires, among other things, a list of deductions made from the employee's pay, and the net amount of pay after all deductions are made.[63] California law has requirements that are similar to those in New York and Minnesota, but also requires that pay stubs identify the employee by name and include the last four digits of their social security number or an employee identification number other than a social security number.[64]

[62] The New York Wage Theft Prevention Act (WTPA) requires employer to furnish each employee with a statement with every payment of wages the following information: 1) the dates of work covered by that payment of wages, 2) name of employee, 3) name, address, and phone number of the employer, 4) rate or rates of pay and basis thereof (by the hour, shift, day, week, salary, piece, commission, or other, 5) gross wages, 6) deductions, 7) allowances, if any, claimed as part of the minimum wage, and 8) net wages. For non-exempt workers, the statement must include 1) the regular hourly rate or rates of pay, 2) the overtime rate or rates of pay, and 3) the number of regular and overtime hours worked. On prevailing wage projects, employers are also required to identify the "supplements" claimed to satisfy any part of the supplemental portion of the prevailing wage law. New York Labor Law, § 195(3). https://dol.ny.gov/system/files/documents/2021/03/p715.pdf

[63] Under Minnesota law, "Required Statement of Earnings by Employer: Notice to employee," employers are required to provide each employee an "earnings statement" for each pay period. The statement must include the following information: 1) the name of the employee, 2) the rate or rates of pay and basis thereof, including whether the employee is paid by hour, shift, day, week, salary, piece, commission, or other method, 3) allowances, if any, claimed pursuant to permitted meals and lodging, 4) the total number of hours worked by the employee for nonexempt workers, 5) the total amount of gross pay earned by the employee during that period, 5) a list of deductions made from the employee's pay, 7) the net amount of pay after all deductions are made, 8) the date on which the pay period ends, 9) the legal name of the employer and the operating name of the employer if different from the legal name, 10) the physical address of the employer's main office or principal place of business, and a mailing address if different, and 11) the telephone number of the employer. Minn. Stat. § 181.032.77.

[64] California Labor Code § 226(a)(7).

E. SMART and SMACNA Encourage Adoption of Criteria That Impose an Obligation on Taxpayers to Confirm that Fringe Benefit Contributions by Contractors and Subcontractors are Made to "Bona Fide" Entities

The proposed rule adopts the definition of wages in 29 C.F.R. § 5.2, which defines wages as the basic hourly rate of pay and any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program, "which was communicated in writing to the laborers and mechanics affected."[65] In projects covered by a PLA, this information is embedded therein and there is no need for a taxpayer to provide separate documentation to workers to inform them that contributions are made to bona fide entities.[66] This is not the case for non-PLA projects. The proposed rules impose no obligation on the taxpayer to communicate to affected workers of an enforceable commitment to carry out a financially responsible plan or program.

To correct this deficiency, SMART and SMACNA encourage Treasury to require that taxpayers: 1) "communicate in writing" to affected laborers and mechanics to provide notice of an enforceable commitment to provide bona fide fringe benefits; 2) confirm that fringe benefit contributions made on behalf of laborers and mechanics by contractors and subcontractors are made to a bona fide fringe benefit fund, plan, or program; 3) require submission by contractors and subcontractors, along with the weekly CPRs, proof of payment of fringe benefits to the fund,

[65] IRA NPRM, 88 *Fed.Reg*. at 60024, quoting 29 CFR 5.2.

[66] In the NPRM, Treasury incorrectly states that "Whether amounts are wages for purposes of the Prevailing Wage Requirements is not relevant in determining whether amounts are wages or compensation for other Federal tax purposes." 88 *Fed.Reg*. at 60024.

plan, or program; and 4) require a signed affirmation by the contractors and subcontractors that the funds, plans, or programs are "bona fide," as defined in DBA regulations. SMART and SMACNA encourage Treasury to review state requirements for disclosures, proof of payment, and affirmation, and adopt models that best effectuate compliance. Maryland, for example, requires contractors, and all subcontractors to submit "proof of payment" of fringe benefits.[67] Many states, such as Minnesota, [68] New Jersey,[69] and others, require identification of the entities to which fringe benefit contributions are made, including disclosure of the name and address of the fringe benefit fund, plan or program administrator; the benefit account number; and the identity of the third party trustee and/or contact person.[70]

F. SMART and SMACNA Recommend that the Final Rule Require that Contractors and Subcontractor Submit Requests for Supplemental Rates Through the Taxpayer Rather Than Directly to the DOL

Treasury requests comments on the proposed procedures for requesting supplemental wage determinations and prevailing wage rates for additional classifications.[71] The proposed regulations would provide that a taxpayer, contractor, or subcontractor may request a supplemental wage determination or request a prevailing wage rate for an additional classification from the DOL.

---

[67] *See* Maryland's Prevailing Wage Instructions for the Contractor & Subcontractor, which state, in relevant part, that "The fringe benefit packages of the contractor, and all subcontractors working for the contractor, must be submitted on an additional sheet of paper indicating the hourly dollar amount paid, along with proof of payment, on behalf of each employee working on the project."

[68] Minnesota Department of Labor and Industry Certified Payroll Form: https://www.dli.mn.gov/sites/default/files/pdf/pw_certified_payroll_form.pdf; Payroll Certification for Public Works Projects: https://www.nj.gov/labor/wageandhour/assets/PDFs/wagehub/MW-562%20(6-23)%20PayrollCert-PublicWorks.pdf

[69] NJ Department of Labor and Workforce Development. Certification for Public Works https://www.nj.gov/labor/wageandhour/assets/PDFs/wagehub/MW-562%20(6-23)%20PayrollCert-PublicWorks.pdf

[70] *See* Oregon Certified Payroll Report for Labor Contractors, Form WH-142, and Instructions, which requires disclosure of the "name of the benefit party, plan, fund, or program." The instructions state that the "plans must be approved in order to count as part of the required fringe payment." https://www.oregon.gov/boli/employers/Documents/WH-141.pdf

[71] IRA NPRM, 88 *Fed.Reg*. at 60025.

SMART and SMACNA urge the DOL to reconsider this approach and to permit only the taxpayer to make such requests. Under our proposal, taxpayers would fulfill the role of contracting agencies in the DBRA context, which involves hands-on assistance in assessing the need for conformed rates and making a request to the DOL for such rates when the contracting officers deem it appropriate under applicable regulations. The taxpayer would be better able to monitor the legitimacy of supplemental wage determinations if it is the sole entity on covered projects with authority to make such requests. This process would also enhance coordination and avoid duplicative supplemental requests on the same project. SMART and SMACNA's recommendation better effectuates Treasury's view that a "taxpayer satisfies section 45(b)(7)(A) by ensuring that laborers and mechanics are paid wages at rates not less than the rates determined by the DOL pursuant to a request for a supplemental wage determination or pursuant to a request for a prevailing wage rate for an additional classification."[72]

1. Early Detection of the Scope of Supplemental Rates Required on a Project Will Minimize Delays in Their Issuance

The NPRM observes that it is "It is possible that the DOL's response to these requests will not be issued until after laborers and mechanics have started working on the facility. The laborers and mechanics who are the subject of the requests will have already been engaged in the construction, alteration, or repair, and may have already been paid wages below the rates later determined to be prevailing by the DOL."[73] If Treasury adopts a requirement that taxpayers develop a utilization plan, which lists "all trades/crafts to be used on the project,"[74] at least 90 days

[72] *Id.* at 60024.

[73] *Id*. at 60028.

[74] Oakland Apprenticeship Workforce Development Partnership System: https://cao-94612.s3.amazonaws.com/documents/OAKLAND-APPRENTICESHIP-WORKFORCE-DEVELOPMENT-PARTNERSHIP-SYSTEM.pdf

before the taxpayer, contractor, and/or subcontractor on a project make a request(s) to a RAP for apprentices to work on a covered project, the taxpayer would have the information needed to determine whether there are classifications called for on the project that are missing from the applicable wage determination.

2. *As the DOL Has Observed, Contractors and Subcontractors Often Fail to Understand the Complexities of its Conformance Process*

Accurate administration of the conformance process is complicated and requires a thorough understanding of the DOL's "classifications."[75] There is a significant learning curve in gaining a working knowledge of when it is appropriate to seek a conformance (or supplemental rates).[76] As the DOL observed in its recent rulemaking amending Davis-Bacon regulations, contractors often fail to understand the scope of work included in classifications on wage determinations:[77]

> In some instances, including instances where contractors are unaware that their work falls within the scope of work performed by an established classification on the wage determination, WHD receives conformance requests where conformance plainly is not appropriate because the wage determination already contains a classification that performs the work of the proposed classification.

The preamble to the Davis-Bacon Final Rule further observes that "commenters said that such missing classifications can be an impediment for small firms because it is costly and complicated

---

[75] *See* 29 CFR 5.5 for conformance criteria: (1) The work performed by the classification is not performed by a classification in the wage determination for which a prevailing wage rate has been determined; (2) The classification is used in the area by the construction industry; and (3) The wage rate for the classification bears a reasonable relationship to the prevailing wage rates contained in the wage determination.

[76] Davis Bacon Final Rule, 88 *Fed.Reg*. at 57540.

[77] Davis-Bacon NPRM, 88 Fed.Reg. at 57592.

to request conformances."[78] Once a potential requester determines that a classification is truly missing from the wage determination, the requester may fail to understand which classifications on the wage determination bear a "reasonable relationship" to the missing classification.

3. In the DBRA Context, Contracting Agencies Have a Key Role in the Conformance Process that Will Not be Present on Qualified Projects

The process contemplated in the NPRM for obtaining supplemental rates differs from the conformance process in the DBRA context. In the latter, contracting agencies[79] have an important role in the conformance process and routinely fill knowledge gaps that contractors and subcontractors lack. DOL regulations contemplate that contracting officers provide guidance to contractors during in utilizing the process.[80]

- The contracting officer must require that any class of laborers or mechanics …which is not listed in the wage determination, and which is to be employed under the contract be classified in conformance with the wage determination.
- In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate …, the contracting officer will, by email to DBAconformance@dol.gov, refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination.
- The Administrator … will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30–day period that additional time is necessary.
- The contracting officer must promptly notify the contractor of the action taken by the Wage and Hour Division … The contractor must furnish a written copy of such determination to each affected worker, or it must be posted as a part of the wage determination. …

[78] *Id*. at 57540.

[79] AAM No. 118 (Sept. 16, 1974), "DOL reminder that Reorganization Plan 14 of 1950 vests primary enforcement responsibility with contracting agencies."

[80] 29 C.F.R. § 5.5 Contract provisions and related matters.

4. DOL Precedent Demonstrates that Contractors and Subcontractors Misuse the Conformance Process to Undercut Prevailing Wage Rates

SMART and SMACNA support Treasury's position that a "request for a prevailing wage rate for additional classification would not be permitted to be used to split, subdivide, or otherwise avoid application of classifications listed in a general wage determination."[81] Misclassification of workers through use of the conformance process, which is used to create "conformed" rates when wage rates are "missing" for work called for on a project, takes many forms.[82] Contractors sometimes deliberatively misrepresent the skill sets involved to perform a classification in support of a lower conformed rate;[83] inappropriately seek a conformance request for a "helper,"[84] misclassify highly skilled and highly compensated workers as "common/general laborer";[85] seek conformances for work within the laborer classification at wage rates that are about half of the rates on the wage schedule for laborers;[86] seek conformed rates for work that is already encompassed within a classification on a wage determination for the purpose of paying less than

[81] IRA NPRM, 88 *Fed.Reg*. at 60024.

[82] The WHD issues a "conformed" rate when there is no appropriate classification on the applicable general wage determination for work required to complete a project and specified criteria in 29 C.F.R. part 5 are met. 29 C.F.R. 5.5(a)(1)(ii)(A).

[83] *P&N, Inc./Thermodyn Mechanical Contractors, Inc*., ARB Case No. 96-116 (Oct. 25, 1996).

[84] *Bryan Electrical Construction, Inc*., WAB Case No. 94-16 (Dec. 30, 1994).

[85] *Jordan & Nobles Construction Co*., WAB No. 81-18 (Aug. 19, 1983).

[86] *Rite Landscape Construction Co., Inc*., WAB No. 83-03 (WAB Oct. 18, 1983).

he prevailing rates;[87] and select conformed rates that fail to bear a reasonable relationship to the rates on the applicable wage determination.[88]

5. Treasury Grossly Underestimates the Likely Volume of Supplemental Requests on IRA Projects Over the Next Several Years

The NPRM states the proposed rule provides "special procedures for the limited circumstances" in which a general wage determination does not provide an applicable wage rate(s) for the work to be performed on the facility. While it is likely that the need for supplemental requests will ultimately be limited, the number of such requests will be initially be significant. In 2022, the DOL estimated that it "typically receives thousands of conformance requests each year (sometimes over 10,000 in a given year)."[89] It admitted that there was an "overuse" of conformances,[90] which is "burdensome" on contracting agencies, contractors, and the DOL.[91] Through the recent rulemaking amending Davis-Bacon regulations, the DOL has undertaken the laudatory goal of trying to "minimize overreliance" on the conformance process to produce conformed rates for classifications that are "missing" from wage determinations. The DOL aptly predicts that the new "procedure will reduce the need for conformances of classifications for which conformances are now often required."[92] However, with the massive federal funding to combat

[87] *Selco Air Conditioning, Inc., ARB Case No. 14-078* (July 27, 2016); *American Building Automation, Inc*., ARB Case No. 00-67, (May 30, 2001); and *Pizzagalli Construction Co*., ARB No. 98-090 (May 28, 1999).

[88] *See Norse, Inc*., Case No. 95-05 (Feb. 29, 1996); *U.S. Fire Protection*, ARB Nos. 99-008 (1999); and *Courtland Constr. Corp*., ARB No. 17–074 (Sept. 30, 2019).

[89] Davis-Bacon NPRM, 87 *Fed.Reg*. at 15723.

[90] Id. at 15699, citing Department of Labor, Office of the Inspector General, Better Strategies Are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates (2019) (OIG Report), at 10, available at: https://www.oversight.gov/sites/default/files/oig-reports/04-19-001-Davis%20Bacon.pdf

[91] Davis-Bacon Final Rule, 88 *Fed.Reg.* at 57529.

[92] *Id.*

carbon emissions, it is likely that the requests for conformances will increase in the short term. Furthermore, a review of the DOL's Davis-Bacon survey plans over a period the five years,[93] which indicates that the DOL has conducted a small number of surveys each year, demonstrates that the DOL's goal of reducing the number of conformance requests will take numerous years to accomplish.[94]

III. SMART AND SMACNA ENOURAGE TREASURY TO IMPOSE DEVELOPMENT OF AN APPRENTICESHIP UTILIZATION PLAN TO SATISFY THE GOOD FAITH EXCEPTION FOR TAXPAYERS WHO ARE NOT SIGNATORY TO PLAs

The proposed Good Faith Effort rules lack mandatory oversight and planning mechanisms that would promote efficacy, accountability, and transparency (in the absence of a PLA) to meet the three separate prongs – Labor Hours, Participation, and Ratio – of the Apprenticeship Requirements. SMART and SMACNA encourage Treasury to issue a clear rule that Good Faith Efforts will not be satisfied if the taxpayer fails to timely develop a utilization plan[95] at least 90

[93] AAM No. 242, Fiscal Year 2023 Davis-Bacon Survey Plan (six surveys); AAM No. 238, Fiscal Year 2022 Davis-Bacon Survey Plan (six surveys); AAM No. 234, Fiscal Year 2020 Davis-Bacon Survey Plan & Proposed Fiscal Year 2021 Survey Plan Under Consideration (10 in 2021 and 11 in 2022). See also, AAM No. 228, Fiscal Year 2019 Davis-Bacon Survey Plan & Proposed Fiscal Year 2020 Survey Plan Under Consideration.

[94] Another means adopted by the DOL in the Final Rule to reduce the number of conformances is to adopt state or local prevailing wage rates as the federal prevailing wage rates. The Final Rule allows WHD to adopt prevailing wage rates set by state or local officials, even if the state or locality's methods or criteria for determining the prevailing wage are not precisely the same as WHD's, provided that specified criteria are met. *See* 29 CFR 1.3(g) and (h). To adopt such rates, WHD must first obtain them and any relevant supporting documentation from the state or local government, and review both the rate and the processes used to derive the rate. The following states do not have state prevailing wage laws: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, New Hampshire, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wisconsin. Other states, such as Missouri, do not meet the federal criteria, which include the State or local government sets wage rates, and collects relevant data, using a survey or other process that is open to full participation by all interested parties." 29 C.F.R. 1.3(h)(1).

[95] *See e.g.*, the apprenticeship utilization language in the Seattle Public Schools Student and Community Workforce Agreement, for example, which requires submission of a utilization plan before the pre-construction conference:

> Section 2. The SPS Workforce Utilization Plan shall be prepared by the Prime Contractor and submitted to SPS prior to the SPS pre-construction conference and approved by SPS prior to start of work. The Workforce Utilization Plan provided by the Prime Contractor shall describe how the Prime Contractor will achieve the goals and requirements for utilization of apprentices and other hiring requirements or expectations. The Plan shall be updated regularly by the Contractor as directed by SPS. The Prime Contractor's Workforce Utilization Plan will be reviewed by the PAC and appropriate efforts shall be taken to ensure the desired utilization.

days before the taxpayer, contractor, and/or subcontractor on a project make a request(s) to a RAP(s) for apprentices to work on a covered project and to submit the plan to the DOL within that same time frame.

Rather than haphazardly requesting apprentices to fulfill the Apprenticeship Requirements, development of an apprentice utilization plan would better enable taxpayers to meet the three separate prongs of the Apprenticeship Requirements.[96] Development of an apprenticeship utilization plan is an important step in making a Good Faith Effort to meet the IRA thresholds because recruitment of a skilled workforce, including apprentices, to undertake the massive construction projects funded by the IRA requires advanced coordination and planning. This recommended requirement is consistent with Treasury's inclusion in the facts and circumstances demonstrating intentional disregard, "Whether the taxpayer failed to take steps to determine the applicable percentage of labor hours required to be performed by qualified apprentices." [97] Except for a PLA, there are no other steps that are as likely to achieve all three prongs of the Apprenticeship Requirements as development of an apprenticeship utilization plan.

A. SMART and SMACNA Recommend that Treasury Require the Criteria in the City of Oakland's Apprenticeship Utilization Plan to Facilitate Compliance with All Three Prongs of the Apprenticeship Requirements

SMART and SMACNA encourage Treasury to mandate that the required apprenticeship utilization plan include the elements listed in City of Oakland, California requirements, which are designed to satisfy the City's 15% apprenticeship utilization goal.[98] The plan, which includes the

---

[96] https://lni.wa.gov/licensing-permits/apprenticeship/_docs/AUR2020.pdf

[97] § 1.45–12(d).

[98] Oakland Apprenticeship Workforce Development Partnership System

elements listed below, must be submitted to the City of Oakland at the "Post Award meeting." We recommend that Treasury require incorporation of the Oakland elements into an apprenticeship utilization plan, along with the requirement that the taxpayer submit the plan to the DOL, at least 90 days before a taxpayer, contractor, or subcontractor makes a request(s) to a RAP(s) for apprentices to work on an IRA project. Development of a utilization plan with the Oakland elements would enable a taxpayer to develop a strategy for satisfying all three prongs of the Apprenticeship Requirements since the Oakland plan requires estimated total hours and total apprenticeship hours by each trade (Labor Hours and Participation) and the percentage of the total hours that will be performed by apprentices for each trade (Ratio).

- a list of all trades/crafts to be used on the project,[99] including an estimate of work hours by each trade/craft and the total hours to be used;
- an estimate of the number of apprentices for each trade/craft to be used on the project;
- an estimate of the number of apprentice work hours and percentage to be used by each trade/craft on the project;[100]
- an estimate of the percentage of apprentice work hours to be used by each trade/craft. The percentage of apprentice work hours must be used on the estimate of total work hours by each trade/craft.
- an estimate of the start date for each trade/craft;
- a description of efforts the contractor intends to make to ensure that the apprentice utilization requirement and goals are met;
- a description of any assistance the taxpayer believes will be necessary from the Office of Apprenticeship to meet the apprentice utilization requirement and goals.

[99] *See also* Apprentice Utilization Plan of the Port of Portland's Office of Small Business Development/Workforce Training & Hiring Program requires the prime and each subcontractor with a subcontract of $200,000 or more to indicating the "number of journey workers and apprentices by trade" and "outline" utilization of apprentices. https://cdn.portofportland.com/pdfs/Apprentice%20Utilization%20Plan%20for%20Prime%20Contractors.pdf

[100] *See* the King County Master Community Workforce Agreement, which states, in relevant part, that "The Contractor and their Subcontractors shall submit a plan for participation of WSATC registered Apprentices to the Owner. The Contractor and each Subcontractor shall estimate the total contract labor hours to be worked on the Project and shall include the anticipated Apprenticeship participation by craft and hours."

B. SMART and SMACNA Agree with Treasury that Requiring Compliance with Each of the Three Separate Prongs – Labor Hours, Participation, and Ratio – Best Effectuates the Goals of the IRA

SMART and SMACNA agree with Treasury that requiring compliance with each of the three separate prongs – Labor Hours, Participation, and Ratio – of the Apprenticeship Requirements would best effectuate the IRA. The proposed regulations "explain that the Participation Requirement would apply in addition to the Labor Hour Requirement and the Ratio Requirement."[101] Treasury explains further that "If a taxpayer satisfies the applicable Labor Hours Requirement but fails the Participation Requirement, then the taxpayer would not be eligible for the increased credit unless the taxpayer complies with the penalty provisions of section 45(b)(8)(D) with respect to the total hours that are not met with respect to the Participation Requirement or meets the Good Faith Effort Exception."[102]

1. Absent a PLA, Development of an Apprenticeship Utilization Plan is the Best Means to Making a Good Faith Effort to Satisfy Each Prong of the Apprenticeship Requirements

In light of the importance of giving effect to each prong, it is imperative that taxpayers who are not signatory to a PLA develop a utilization plan that includes steps calculated to satisfy each one. Without a coordinated effort, a taxpayer may end up satisfying the Labor Hours but fail to provide the necessary oversight for quality training and safety. Likewise, a taxpayer may satisfy the Labor Hours by employing a relatively high percentage of apprentices in one or two trades but fail to employ any apprentices in other trades, and thereby, violate the Participation Requirement. Lack of coordination of requests for apprentices will make it nearly impossible for a taxpayer to

[101] IRA NPRM, 88 *Fed.Reg*. at 60029.

[102] *Id*.

monitor compliance with all three elements of the Apprenticeship Requirements. Without a plan, the taxpayer would depend upon unsystematic efforts of contractors and subcontractors to meet each requirement. Of the three separate prongs, the most likely prong that can be satisfied without a strategic plan is the "labor hours" requirement, which is defined in Section 45(b)(8)(E)(i) as the ''total number of hours devoted to the performance of construction, alteration, or repair work by any individual employed by the taxpayer or by any contractor or subcontractor …" A taxpayer could, for example, backload the number of hours of apprentice hours, without regard to participation and ratios, to meet the Labor Hour prongs. This tactic would be contrary to the statutory obligation to satisfy each of the three prongs and would also be a violation of the Ratio Requirements in the apprenticeship standards. The proposed Apprentice Cure Provision does not mitigate the safety risks posed by a failure to honor the Ratio Requirement.

2. Use of a Utilization Plan Will Enable Taxpayers Who Are Not Signatory to a PLA to Develop a Strategy to Meet the Participation Requirement

SMART and SMACNA support Treasury's proposal to interpret the Participation Requirement as designed to "prevent taxpayers from satisfying the Labor Hours Requirement by only hiring apprentices to preform one type of work and instead encourages taxpayers to use apprentices across the full range of work performed with respect to the facility."[103] This is consistent with Treasury's understanding that that it is "likely that given the multiple occupations involved in the construction, alteration, or repair of a qualified facility, the taxpayer would need to request apprentices from more than one apprenticeship program in order to satisfy the Labor Hours Requirement and the Participation Requirement with respect to that facility."[104] It is difficult to

[103] IRA NPRM, 88 *Fed.Reg*. at 60030.

[104] *Id*.

envision how each taxpayer, contractor, or subcontractor who employs four or more laborers and mechanics can endeavor to employ one or more qualified apprentices to perform work on the covered project in the absence of a PLA or apprenticeship utilization plan. A utilization plan would enable a taxpayer to develop a strategy to ensure that the goal of the Participation Requirement is satisfied.

3. Ratio Requirements Promote Quality Training and Safety in a Highly Dangerous Industry

Treasury requests comments on the application of the Ratio Requirement for purposes of satisfying the Apprenticeship Requirements.[105] The NPRM states that the Ratio Requirement is "intended to ensure that there are enough journeyworkers to oversee the work of apprentices."[106] This is a correct statement, but it is important to emphasize that adequate oversight is an indispensable element in protecting apprentices from injuries and fatalities. The fundamental purpose of ratios in DOL regulations governing apprenticeship standards is to ensure "proper supervision, training, safety, and continuity of employment." [107] Construction work is highly dangerous: Construction workers comprised approximately 7% of the overall U.S. workforce in 2020, yet recent data show they comprised 21% of private sector workplace fatalities, making the construction fatality rate almost three times that for all U.S. private-sector workers.[108] Experienced workers serve as role models to apprentices for use of PPE at jobsites that prevent falls from

[105] *Id*. at 60030.

[106] *Id*. at 60029.

[107] 29 C.F.R. §29.5(b)(7).

[108] U.S. Bureau of Lab. Stat., Labor Force Statistics from the Current Population Survey, tbl. 18b (2021), available at https://www.bls.gov/cps/tables.htm; U.S. Bureau of Labor Statistics; U.S. Bureau of Lab. Stat., 2020 Census of Fatal Occupational Injuries, tbl. A-1 (2021), available at https://www.bls.gov/iif/fatal-injuries-tables/fatal-occupational-injuries-table-a-1-2020.htm.

scaffolds and ladders, exposure to respiratory contaminants, hearing loss, and other hazards and for safe execution of assigned tasks. The importance of appropriate ratios to worker safety is recognized in academic research. There is a substantial body of research that focuses on reduction of injury rates among apprentices in many different trades.[109] The data from research is clear: "for every 10 percent increase in the percentage of apprentices to journeypersons on the jobsite [in carpentry] there was a 27 percent increase in ladder falls."[110]

IV. IMPOSITION OF A TIME FRAME BY WHICH REQUESTS TO RAPs FOR APPRENTICES MUST BE MADE WILL PREVENT HAPHAZARD, 11th HOUR REQUESTS

SMART and SMACNA recommend that request(s) for apprentice(s) to applicable RAPs be made at least 90 days in advance of the date on which the apprentices will begin working on the project. This requirement would deter perfunctory requests for apprentices from RAPs at the 11th hour when it is far too late for a RAP to recruit apprentices in response to an unanticipated surge in demand. As discussed below, in the union sector, apprentices are recruited based on expected demand by signatory contractors, as determined by JATC boards, in consultation with individual contractors and the JATC coordinator.

---

[109] *See* Laurel D. Kincl, Dan Anton, Jennifer A. Hess, & Douglas L. Week, "Safety Voice for Ergonomics (SAVE) Project: Protocol for a Workplace Cluster Randomized Controlled Trial to Reduce Musculoskeletal Disorders in Masonry Apprentice." *BMC Public Health* (2016),16:362; Hester J. Lipscomb, James Nolan & Dennis Patterson, "Continued Progress in the Prevention of Nail Gun Injuries among Apprentice Carpenters: What will it Take to See Wider Spread Injury Reductions?" *Journal of Safety Research* (2010), 41, 241–245 (Between 2005 and 2008, reduction in injuries occurred as carpenter apprentices had "early instruction in tool use"); Vicki Kaskutas, et al., "Changes in Fall Prevention Training for Apprentice Carpenters Based on a Comprehensive Needs Assessment." (By seeking input from learners, a research team developed a fall prevention curriculum that provides new apprentices with basic information needed to protect themselves from fall from heights "early in their training" and additional training later in their apprenticeship); Marcelo M. Soares, Karen Jacobs, & Bradley Evanoff, "Outcomes of a Revised Apprentice Carpenter Fall Prevention Training Curriculum." *Work* (2012) 41, 3806-3808.

[110] Vicki Kaskutas, Ann Marie Dale, Hester Lipscomb, John Gaal, Mark Fuchs, Bradley Evanoff, Julia Faucette, Marion Gillen, & Elena Deych, "Fall Prevention in Apprentice Carpenters." *Scandinavian Journal of Work, Environment & Health* (2010) 36(3): 258–265.

A. The NPRM is Silent on the Time Frame by Which Taxpayers Must Determine Their Needs for Apprentices on the Project

The NPRM states that the Good Faith Effort would "necessitate that the taxpayer ascertain its workforce needs to determine how many qualified apprentices it needs to employ in order to meet the Apprenticeship Requirements, identify registered apprenticeship programs in the occupations needed by the taxpayer and its contractors and subcontractors, and demonstrate capacity to employ apprentices in the occupations for which apprentices are requested."[111] The NPRM is, however, silent on the time frame by which taxpayers must determine their needs for apprentices. Recruitment of a skilled workforce, including apprentices, to undertake the scope of construction contemplated by the IRA requires advanced coordination and planning. The 90-day time frame proposed by SMART and SMACNA for determining "workforce needs" – and development of a utilization plan – is far shorter than the length of planning that typically occurs on large construction projects.

B. The NPRM is Silent on the Issue of the Time Frame for Making a Request to a RAP for Apprentices

There is no guidance in the NPRM on the timing of the request for apprentice(s) from a RAP in relation to the date that the apprentice(s) will begin working on a covered project. This omission is critical. Indeed, there is, therefore, no explicit prohibition that would deter "last-minute" requests for apprentices from RAPs. The 90-day time frame recommended by SMART and SMACNA would enable RAPs to recruit apprentices to meet demand and provide basic safety training before dispatching them to a construction site.

[111] IRA NPRM, 88 *Fed.Reg*. at 60030.

The Good Faith Effort definition in the IRA includes an exception for circumstances under which the RAP "fails to respond" to a "request within five business days after the date on which such registered apprenticeship program received such request."[112] This should not be interpreted as an endorsement of a process whereby the end users (taxpayers, contractors, or subcontractors) of apprentices routinely wait until five days, for example, before the apprentices are needed on a project to make the request. Such an interpretation would be based on an unrealistic expectation that JATCs maintain a large pool of apprentices who are ready and able for referral to work for a signatory contractor.

V. THE 90-DAY TIME FRAMES PROPOSED ABOVE WOULD FACITIATE COORDINATION WITH THE TYPICAL MODEL FOR RECRUITMENT OF APPRENTICES BY RESPONSIBLE RAPS

Treasury requests comments on how the proposed Good Faith Effort Exception will align with current practices with respect to utilization of apprentices in the construction, alteration, or repair of facilities.[113] In response, SMART and SMACNA share an overview of the current practices of JATCs in determining the demand for apprentices by signatory contractors; recruiting apprentices to fill demand; screening apprentices to ensure that qualified individuals are referred to work; referrals to on-the-job training (and the geographic scope of such referrals); and safety training. It is important that Treasury has a thorough understanding of the typical model for recruiting and requesting apprentices in the union sector because "usual and customary business practices" of RAPs are the benchmark for assessing Good Faith Efforts. As stated in the NPRM, a taxpayer can satisfy the Good Faith Effort Exception if it requests qualified apprentices ''in

[112] Section 45(b)(8)(D)(ii) of the IRA.

[113] IRA NPRM, 88 *Fed.Reg*. at 60031.

accordance with usual and customary business practices for registered apprenticeship programs in a particular industry."[114]

A. The "Usual and Customary" Practices of JATCs Involve Registration of Apprentices for Whom On-the-Job Training Opportunities Are Available

A fundamental point that must be understood is that the recruitment model of JATCs does not involve effectively "stockpiling" a pool of apprentices for whom no work assignments are currently available or anticipated to be available within a reasonable time[115] after orientation and preliminary "related instruction" take place. JATCs recruit apprentices when there is a reasonable expectation that work assignments will be available. Without relevant work assignments during the term of the program, an apprentice would lack the hands-on experience to acquire the skills to become a journeyperson. In a legitimate training program, a short-term reduction in wages for a novice with limited skills is a fair trade-off for obtaining the necessary training to develop broad-based skill sets in a marketable trade.[116]

The typical model for recruitment of apprentices in the union sector involves projection of future demand for apprentices based upon work in the geographic area within the JATC's jurisdiction. RAPs that fail to undertake this analysis fail to honor the commitments to apprentices required under the DOL's apprenticeship standards. In accordance with the requirements in 29

[114] *Id*. at 60030.

[115] From the apprentice's perspective, the length of a "reasonable time" will depend on other educational, training, or job opportunities that the individual may have.

[116] The construction industry is the only industry in which employers have a strong financial incentive to establish apprenticeship programs irrespective of an employer's ability to provide quality training since Davis-Bacon regulation, 29 C.F.R. § 5.5(a)(4)(i), permit contractors to pay apprentices wage rates that are below the prevailing rates. Unlike employers in other industries, construction contractors save as much as 40% per hour in the wage of workers classified as first-year apprentices on Davis-Bacon jobs.

C.F.R. § 29.7, [117] JATCs and apprentices enter into a written agreement setting forth the responsibilities and obligations of all parties. JATCs are responsible for determining the quality and quantity of experience on the job necessary to become a journeyperson and have an obligation to make every effort toward obtaining work opportunities that will enable apprentices to develop broad-based skills in the apprenticeable occupation. Therefore, without advanced notice that work opportunities in the occupation for which the apprentices are being trained will be available, expanded recruitment and registration of apprentices cannot occur. In the union sector, signatory contractors co-sponsor JATCs and collaborate with unions in determining the scope of recruitment needed to satisfy the demand for apprentices.[118]

B. Recruitment of Apprentices Based on Projected Future Needs is the "Usual and Customary Business Practice" of JATCs in the Sheet Metal Industry

In the construction industry, responsible sponsors do not register apprentices unless they have a reasonable expectation, based on past experience, that employers participating in the JATC have sufficient work "on the books" to provide high quality on-the-job learning to apprentices. This practice is consistent with the statutory purpose of the NAA, which is "safeguard the welfare of apprentices."[119] Sheet metal JATCs do not enroll apprentices until they have conducted a sufficient analysis of available work to develop a good faith belief that apprentices will have the

[117] 29 C.F.R. § 29.7(e) Apprenticeship agreement. "(e) A statement showing: (1) The number of hours to be spent by the apprentice in work on the job in a time-based program; or a description of the skill sets to be attained by completion of a competency-based program, including the on-the-job learning component; or the minimum number of hours to be spent by the apprentice and a description of the skill sets to be attained by completion of hybrid program; and (2) The number of hours to be spent in related instruction in technical subject s related to the occupation, which is recommended to be not less than 144 hours per year.

[118] There are, at times, extenuating circumstances, such as natural disasters, the Great Recession and other economic downturns, and/or the cancellation of construction plans of a major employer in a state or geographic, which may interfere with the sponsor's ability to more accurately project work opportunities.

[119] 29 U.S.C. 50.

work opportunities necessary to complete the program. Relevant information includes journeyperson and apprentice hours in the recent past for each participating employer; the number and types of projects and projected hours anticipated on each project that the participating employers already have "on the books," along with bid documents; the same information on projects on which participating employers plan to submit bids; and the "need of journeyworkers in the community and reasonable assurance of employment in the occupation establishment upon completion of training."[120]

An important function of boards of trustees, which are comprised of an equal number of management and labor trustees, and staffs of JATCs is determining the future demand for apprentices for the entire duration of the 4 or 5-year program. JATCs typically determine the number of apprentices to accept into the RAP based on projected employment opportunities, i.e., the RAP's capacity to provide on-the-job learning. Coordinators communicate directly with signatory contractors about demand informally or formally (e.g., sending questionnaires using a Google document form regarding expected capacity for apprentices). In some geographic areas, a SMACNA representative attends the monthly JATC meetings and then follows up with outreach to contractors who have not yet responded to a JATC's request for information about demand. Some JATCs factor in the average number of retirements each year in projecting the demand for apprentices. The larger contractors on JATC boards know what their own needs are; they also know the needs of other contractors in same geographic area. At monthly JATC meetings, employer demand for additional apprentices and how many new classes to schedule are on the

[120] *See* "Number of Apprentices to be Trained in the Program," Minimum Standards for Apprenticeship, which states that "The number of apprentices to be trained in the program shall be determined by the need of journeyworkers in the community and reasonable assurance of employment in the occupation establishment upon completion of training."
https://townhall.virginia.gov/L/GetFile.cfm?File=GuidanceDocs%5C181%5CGDoc_DOLI_5841_v7.pdf

agenda. These projections concerning demand are supplemented by obtaining data from benefit funds or plans, which track hours worked.

JATCs undertake a variety of recruitment methods. JATCs may endeavor to maintain an up-to-date list of qualified (pre-screened) individuals whom they can contact to check on their continuing interest and availability (often they have accepted other work or training opportunities) in the event that a signatory contractor makes a request. JATCs in areas with a high demand for apprentices may recruit apprentices "continually." In those areas, when the list of qualified candidates gets low, the application process begins again. If the demand for apprentices in a geographic area is greater than anticipated, a JATC may schedule additional testing and interviewing. Some JATCs recruit apprentices from a pool of graduates of a pre-apprenticeship program. Demand is driven by contractor requests based on an assessment of their needs. If an IRA project is constructed in a geographic area, which historically has had a relatively low demand for apprentices, the local JATC may need a greater time frame to develop a recruitment plan.

To recruit apprentices, JATCs typically administer third-party objective tests, such as the GAN Aptitude Battery, Armed Services Vocational Aptitude Battery (ASVAB), and the Bennett Mechanical Aptitude Test, which examine reading comprehension, math, spatial relations, and mechanical ability.[121] Applicants who earn a score above a cutoff are invited to continue the application process. The percentage of applicants selected depends upon the quality of the applicant pool and the current demand for apprentices in the sheet metal industry. Advanced notice by a requester on an IRA project is needed so that a JATC can schedule these tests.

[121] Some JATCs administer tests developed or used by local colleges (St. Paul Technical College in Minnesota); others have third-party proctors (e.g., Local 12 in Pittsburgh has the National Guard proctor the ASVAB at its training center). Another JATC accepts test results (the Accuplacer test and the Work Key test) administered through Oregon Work Source. SMART Local 20's JATC in Indiana screens applicants with the assistance of Work One, which administers testing in applied technology, graphic literacy, math, and locating information.

C. SMART and SMACNA Request that Treasury Clarify that the "Additional Request" for Apprentices Be Made to the Original RAP

Under the proposed rule, a RAP's denial of a request by a taxpayer, contractor, or subcontractor for an apprentice does not automatically qualify the taxpayer for the Good Faith Effort Exception. The proposed regulations require the taxpayer, contractor, or subcontractor to submit an "additional request" within 120 days of a "previously denied request."[122] Clarification that the additional request must be made "to the same registered apprenticeship program" would provide the original RAP with greater certainty in undertaking a recruitment effort.[123] Without this assurance, the original RAP may enter into an apprenticeship agreement with a new recruit based on the original request but be unable to provide the individual with the expected on-the-job training.

D. When Demand for Apprentices Increases, the Usual and Customary Practices of JATCs are to Actively Recruit and Hire Additional Journeypersons to Work as Instructors and Mentors

Training a greater than anticipated number of apprentices may necessitate hiring additional instructors so that small class sizes can be maintained. With advanced notice and the support of the ITI, JATCs are able to recruit and train journeypersons to become instructors as the demand for apprentices increases. The ITI devotes substantial resources to professional development of apprentice instructors in its JATC programs and offers classes covering technical skills[124] and adult

---

[123] Addition of the following language to § 1.45–8(e)(2) would achieve this goal: "The taxpayer will not be deemed to have exercised a Good Faith Effort beyond 120 days of a previously denied request unless the taxpayer submits an additional request **to the same registered apprenticeship program.**" Emphasis added.

[124] *See* ITI's Course Catalog for courses on development of technical skills. https://www.sheetmetal-iti.org/course-catalog

teaching techniques in accordance with the regulatory requirements.[125] Courses on teaching techniques cover all the skills needed to successfully teach adult learners.[126]

E. Sheet Metal JATCs Need Advanced Notice of an Increased Demand for Apprentices to Schedule Basic Safety Training as Early as Possible

In determining the appropriate length of time between making the original request for apprentices and the date on which apprentices will commence work on a covered project, Treasury should be aware of the importance of conducting safety training as early as possible in the program. Scheduling of safety training often takes time because it is conducted in person in a small class to better engage the attention of apprentices since hazard awareness is a critically important topic. In-person classes provide a forum for instructors[127] to engage the attention of apprentices by using interactive exercises, modelling correct use of PPEs, using hands-on techniques/demonstrations, and sharing their own experiences on worksites and/or inviting other journeypersons or more experienced apprentices to speak at the safety training.

SMART JATCs provide safety training as early as possible. The precise time frame for training may vary but no sheet metal JATC dispatches apprentices to a job site without safety training. SMART Local 2 JATC in Kansas City, Missouri, for example, provides OSHA-30 training to apprentices during orientation. The St. Louis JATC and the JATC serving Maryland,

[125] 29 C.F.R. § 29.5(b)(4) (ii) requires that instructors "Have training in teaching techniques and adult learning styles, which may occur before or after the apprenticeship instructor has started to provide the related technical instruction."

[126] Those classes include: Instructional Management (8 hours); Presentation Skills (4 hours); Using ITI Curriculum (4 hours); Learners and Learning (4 hours); Testing & Evaluation (8 hours); Classroom Management (4 hours); Program Planning (8 hours); Problem Solving (4 hours); Practice Teaching (4 hours); Cooperative Learning (8 hours); Educational Psychology (4 hours); and Teachers and Teaching (4 hours).

[127] These instructors understand that the method of delivery of training – passive or active techniques – impacts its effectiveness. Research shows that the "most engaging" methods of safety and health training "emphasize principles of behavioral modeling," which involves "observation of a role model, modeling or practice, and feedback. These methods also include hands-on demonstrations." Michael J. Burke, Sue Ann Sarpy, Kristin Smith-Crowe, Suzanne Chan-Serafin, et al., "Relative Effectiveness of Worker Safety and Health Training." *American Journal of Public Health* (2006), 96(2):315-324.

Virginia, and the District of Columbia include OSHA-30 in the first class taken by apprentices following orientation.[128] OSHA-30 affords apprentices a greater depth and variety of training than OSHA-10.

F. The Usual and Customary Practices of JATCs in Recruiting Apprentices Require Time to Undertake the Steps Needed to Comply with Diversity Obligations in 29 C.F.R. Part 30

JATCs that make a good faith effort to comply with diversity obligations in 29 C.F.R. Part 30 need advanced notice of unexpected employment opportunities so that they can undertake outreach to persons – women and minorities – who have historically been underrepresented in the construction industry. Part 30 implements the NAA by requiring sponsors of RAPs to provide equal opportunity for participation in their programs, and by protecting apprentices and applicants for apprenticeship from discrimination on certain protected bases. In addition, part 30 requires that sponsors of RAPs take affirmative action to provide equal employment opportunity in such programs.

SMART JATCs recruit apprentices by partnering or coordinating with entities that have access to diverse populations, such as vocational high schools and technical colleges, Helmets to Hardhats, The Women Veteran, National Association of Women in Construction (NAWIC), United Committee Inc., HUD Veteran Affinity Group, work-release programs, Women in the Trades, Urban Corps, Job Corps, Youthbuild U.S.A., SkillsUSA, and Indian Reservations.[129] SMART

[128] SMART Local 2's collective bargaining agreement requires that all members receive OSHA-30 training: "Sheet metal workers shall complete OSHA 30 training, as well as any refresher course, as a condition of employment in the in the sheet metal industry."

[129] SMART Local 66 JATC in Washington State recruits members of the tribes of Skokomish, Mukelshoot, Puyallup, and Tulalip at their tribal centers at least one or twice annually at each center, and separately hosts each tribe at the training center at similar intervals. Another example of outreach to Native American is demonstrated by recruitment in Minnesota. In coordination with the Tribes and Trades Readiness Program, SMART Local 10 JATC, and the Association of Coordinators in Minnesota interview applicants and select 50 individuals for a six-week program involving hands-on activities at the training centers of each of the participating trades. Local 10 JATC hosts them for five days during which they are exposed to different aspects of the sheet metal trade.

Heroes provides sheet metal industry training, free of charge, to enlisted men and women of the military prior to discharge. This training is full-time for seven weeks for a total of 224 hours.[130] When the SMART Heroes program is completed and the veteran is discharged, the veteran can select any one of the 148 SMART apprenticeship programs in the United States and be provided direct entry as a second-year apprentice. Many JATCs recruit apprentices by offering free OSHA-10 classes to women and minorities.[131]

VI. SMART AND SMACNA RECOMMEND CLARIFICATION OF THE PROPOSED RULES TO BETTER CONFORM TO THE USUAL AND CUSTOMARY PRACTICES OF RAPs

SMART and SMACNA recommend additional clarifications to the proposed rules to ensure better conformance to the usual and customary practices of JATCs concerning the geographic scope of referrals of apprentices and post-referral communications between a JATC and an apprentice's employer.

A. SMART and SMACNA Recommend that the Proposed Rule Require that the "Content of Request" Identify the Contact Information of the Entity that Will Employ the Apprentices

The proposed "content of request" states that the requester must include the "name and contact information of the taxpayer, contractor, or subcontractor **requesting employment** of apprentices from the registered apprenticeship program."[132] While the contact information of the entity requesting employment is important, a RAP would greatly benefit from knowing the name

[130] https://www.sheetmetal-iti.org/smart-heroes

[131] In coordination with the Workforce Development team of the District of Columbia's Department of Employment Services, Local 100 JATC provides OSHA-10 classes to women and minorities and exposes them to the sheet metal trade at its training center in Suitland, Maryland.

[132] § 1.45–8(e)(1); emphasis added.

and contact information of the entity that will employ the apprentice. In some cases, the entities may not be the same. It is a customary practice of JATCs for staff (coordinators, instructors, etc.) to remain in contact with the employing contractor to track the progress of the apprentices and to avert any potential work-related problems. To facilitate these communications, SMART and SMACNA recommend modification of the proposed language as follows:

> (1) Content of request. The request of the taxpayer, contractor, or subcontractor must include the proposed dates of employment, occupation of apprentices needed, location of the work to be performed, number of apprentices needed, the expected number of labor hours to be performed by the apprentices, the name and contact information of the taxpayer, contractor, or subcontractor requesting employment of apprentices from the registered apprenticeship program, **and the name and contact information of the prospective employer…**

B. SMART and SMACNA Request that Treasury Modify the Mandatory Geographic Scope of Requests for Apprentices to Ensure that Taxpayers, Contractors, and Subcontractors Do Not Unreasonably Circumscribe the Geographic Scope of the Requests

Regarding the geographic scope of requests, SMART and SMACNA urge Treasury to clarify that the Good Faith Effort requirement is not satisfied unless: 1) outreach to locate a RAP for each occupation is at least statewide when no applicable RAP is located in the geographic area of the IRA project; 2) the taxpayer, contractor, or subcontractor offers employment to apprentices referred from a sister JATC in one or more adjacent state(s) when the JATC closest to the IRA project has no available apprentices and a sister JATC is able to supply apprentices; 3) the taxpayer, contractor, or subcontractor offers employment to apprentices referred from a sister JATC in another geographic area in the same state when the JATC closest to the IRA project has no available apprentices and a sister JATC is able to supply apprentices; and 4) if the research conducted by a taxpayer, contractor, or subcontractor fails to locate a RAP in the applicable geographic area of the IRA project or "that can reasonably be expected to provide apprentices to the location of the

facility," the taxpayer must seek assistance from the Office of Apprenticeship or State apprenticeship agency.[133] In modifying the proposed rules in response to comments, it is important that Treasury understand the usual and customary practices of JATCs in referring apprentices to job sites, which may involve coordination among sister Local Unions and JATCs (in the same state or in adjacent states) in referring apprentices, particularly when the demand for apprentices is high.

In more sparsely populated states (e.g., Montana), a JATC may have statewide jurisdiction, and thus, would refer apprentices to projects throughout the state or possibly in an adjacent state(s) depending upon proximity. In some situations, an IRA project may be closer to a JATC in an adjacent state than to a JATC in the same state, and it would, thus, be in the best interests of the apprentices to cross a state border to obtain work. In more densely populated states, such as New York, California, Pennsylvania,[134] Illinois, Ohio, etc., there are two or more SMART Local Unions with a defined geographic jurisdiction. Each Local Unions co-sponsor a JATC. The usual and customary practice of SMART JATCs is to refer apprentices to outside geographic jurisdiction of the sponsoring Local Union if there is a demand for apprentices on a project that will promote development of skills. In some cases, the apprentice registered with one JATC may reside closer to a project in the geographic jurisdiction of a sister JATC than to large projects in the jurisdiction of his or her own home Local Union.

---

[133] In Washington State, the Department of Labor and Industries (L&I) and MRSC must provide training, information, and ongoing technical assistance to local governments in order to help them comply with apprenticeship utilization requirements. Training must include reporting requirements, sample contract language, and best practices on adopting apprenticeship guidelines — including ensuring compliance related to a contractor that seeks a Good Faith waiver. https://mrsc.org/stay-informed/mrsc-insight/june-2023/2023-legislation-procurement-contracting-part-1

[134] In western Pennsylvania, for example, Local 12 JATC refers apprentices in the following counties: Allegheny, Armstrong, Beaver, Butler, Cambria, Cameron, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Somerset, Venango, Warren, Washington, and Westmoreland. In easter Pennsylvania, Local 19 has jurisdiction in the following counties: Adams, Bedford, Berks, Blair, Bucks, Centre, Chester, Cumberland, Dauphin, Delaware, Franklin, Fulton, Huntingdon, Juniata, Lancaster, Lebanon, Lehigh, Mifflin, Montgomery, Northampton, Perry, Philadelphia, and York. Local 19 also jurisdiction in four counties in New Jersey and in the entire state of Delaware. A third, Local Union – Local 44 – has jurisdiction in the following counties in Pennsylvania: Bradford, Carbon, Clinton, Columbia, Lackawanna, Luzerne, Lycoming, Monroe, Montour, Northumberland, Pike, Potter, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, and Wyoming.

Construction projects in the Augusta, Georgia "Workforce Hub,"[135] which borders South Carolina, will necessitate multistate coordination of recruitment of journeypersons and apprentices to man projects given the great scope of construction projects anticipated in Augusta and the surrounding region. SMART Local 85 and SMART Local 399 cover the states of Georgia and South Carolina, respectively. The sister Local Unions and JATCs are coordinating their efforts to recruit journeypersons and apprentices to meet labor demands, since the Augusta area is on the "forefront of the Administration's sustainable domestic production agenda, with $1.4 billion in recently announced private-sector investments, including in batteries."[136] Depending upon manpower needs, recruitment can expand beyond adjacent states.

As written, the proposed rule states that, for each occupation, the requester would be required to make a request to at least one RAP, "which has a geographic area of operation that includes the location of the facility, or to a registered apprenticeship program that can reasonably be expected to provide apprentices to the location of the facility."[137] It appears that Treasury's intent is to prevent unreasonable requests for apprentices by circumscribing the geographic scope of the request. SMART and SMACNA agree that, in most circumstances, it is far more reasonable to request apprentices needed for a project from the most proximate JATC for a particular occupation (as opposed to a JATC for the same occupation located in a distant part of the state). However, a requester should not be able to satisfy its Good Faith Effort by declining to request apprentices from the only JATC in the state for a particular occupation simply because the JATC

[135] White House, FACT SHEET: Biden-Harris Administration Announces Strategies to Train and Connect American Workers to Jobs Created by the President's Investing in America Agenda (May 16, 2023): https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/16/fact-sheet-biden-harris-administration-announces-strategies-to-train-and-connect-american-workers-to-jobs-created-by-the-presidents-investing-in-america-agenda/

[136] *Id.*

[137] § 1.45–8(f)(4).

is located hundreds of miles from the project and/or in another "geographic area," which is defined as "the county, independent city, or other civil subdivision of State in which the facility or secondary site is located…" Likewise, a requester should not be able to satisfy its Good Faith Effort if it rejects apprentices referred by a sister JATC regardless of the location of the referring JATC.

C. Requesters Should be Required to Seek Assistance from the Office of Apprenticeship or a State Apprenticeship Agency When They are Unable to Locate a RAP Based on Their Own Research

The preamble states that the DOL's Office of Apprenticeship and State apprenticeship agencies "routinely provide technical expertise on registered apprenticeship program matters, including identifying registered apprenticeship programs, and assisting employers seeking to register their own programs."[138] Treasury requests comments on whether and how the proposed Good Faith Effort Exception might take into account a situation where a taxpayer contacts these agencies regarding their apprenticeship request, in addition to contacting a specific RAP(s).[139] Since the explicit language in the IRA states that, to satisfy the Good Faith requirement, taxpayers must request "qualified apprentices from a registered apprenticeship program," the rules should make clear that a requester cannot satisfy its Good Faith Effort by contacting an administrative agency instead of one RAP for each occupation. As noted above, if however, the research conducted by a taxpayer, contractor, or subcontractor fails to locate a RAP in the applicable geographic area of the IRA project, the implementing rules should require that the requester must seek assistance from the OA or State apprenticeship agency to satisfy the Good Faith Effort.

[138] NPRM, 88 *Fed.Reg.* at 60031.

[139] *Id.*

VII. SMART AND SMACNA RECOMMEND THE ADDITION OF CRITERIA TO THE FACTS AND CIRCUMSTANCES USED TO DETERMINE AN INTENTIONAL VIOLATION OF THE APPRENTICESHIP REQUIREMENTS

SMART and SMACNA recommend that Treasury add criteria to the facts and circumstances that are "considered in determining whether a failure to satisfy the Apprenticeship Requirements is due to intentional disregard,"[140] which require the taxpayer to audit compliance with the apprenticeship utilization plan. If Treasury declines to require a utilization plan for taxpayers who do not become signatory to a PLA, contemporaneous audits would be more urgently needed to ensure compliance. Addition of the following criteria as "facts and circumstances" in § 1.45–8 would deter non-compliance by greatly increasing the likelihood that taxpayers will timely discover violations of Apprenticeship Requirements:

- Whether the taxpayer failed to require contractors and subcontractors to forward to the taxpayer all requests to RAPs for apprentices within 5 business days of when the requests were made;
- Whether the taxpayer failed to audit requests to RAPs for apprentices to ensure compliance with the Labor Hours, Participation, and Ratio obligations in the Apprenticeship Requirements.

The addition of these proposed criteria to the facts and circumstances indicating an intentional violation of the Apprenticeship Requirements is consistent with the proposed Recordkeeping and Reporting rule, which state that "Records sufficient to demonstrate compliance with the applicable apprenticeship requirements in § 1.45–8 may require," among other things, retention of "Any written requests for the employment of apprentices from registered apprenticeship programs…"[141] Since Treasury deems retention of these requests important to ensure compliance with

[140] § 1.45–8

[141] 1.45–12 Recordkeeping and reporting.

Apprenticeship Requirements, it follows that taxpayers should have the obligation to require contractors and subcontractors to forward the requests to the taxpayer so that it can contemporaneously undertake audits for compliance.

VIII. IMPOSITION OF RESPONSIBILITY ON THE TRANSFEROR TAXPAYER FOR THE PWA PENALTY AND CURE PROVISIONS IS APPROPRIATE SINCE IT IS "SOLELY RESPONSIBLE" FOR COMPLIANCE

Treasury requests comments on the application of the PWA penalty and cure provisions, including to transferees and eligible taxpayers, in the context of transferred credits.[142] SMART and SMACNA support imposition of responsibility on the transferor taxpayer, which is "solely responsible" for compliance,[143] for PWA penalty and cure provisions for four reasons. First, section 45(b)(7)(A) states that the taxpayer shall ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor are paid prevailing wages. The IRA clearly places responsibility on the transferor taxpayer for monitoring and enforcing compliance with Prevailing Wage Requirements. The only taxpayer with the ability or authority to fulfill this duty is the taxpayer who has authority to impose contractual obligations on the contractors and subcontractors that will ensure compliance. If a taxpayer fails to include provisions in contracts with contractors and subcontractors that provide it with the authority to demand accountability in whatever form is most likely to prevent prevailing wage violations, the taxpayer should bear responsibility for PWA penalty and cure provisions.

Second, the taxpayer is the entity that will have control over the decision to sign a PLA. If it chooses not to do so, and thus, knowingly foregoes relief from the penalty payment to cure a

[142] NPRM, 88 *Fed.Reg*. at 60023.

[143] *Id*. at 60022.

failure to satisfy PWA requirements, the taxpayer should bear the burden of making penalty payments.

Third, taxpayers can avoid violations of the Apprenticeship Requirements by choosing to collaborate with contractors and subcontractors in developing an apprenticeship utilization plan. Furthermore, taxpayers also have the option to: 1) include in contracts with contractors and subcontractors requirements that contractors and subcontractors to submit to the taxpayer all requests to RAPs for apprentices within 5 business days of when the requests were made; and 2) conduct audits of requests to RAPs for apprentices to ensure compliance with the Labor Hours, Participation, and Ratio obligations in the Apprenticeship Requirements.

Fourth, as discussed in SMART and SMACNA's comments in response to Treasury's NPRM, *Section 6418 Transfer of Certain Credits*,[144] without proper oversight by taxpayers, there is a strong potential for both unknowing and intentional transfer of such credits in circumstances in which the transferor is not entitled to them. The proposed "transfer election statement" and "minimum required documentation" impose no obligation on transferor to disclose the scope of investigative efforts undertaken (if any) to substantiate its entitlement to bonus credits based on compliance with labor standards.

IX. TREASURY IS STATUTORILY REQUIRED TO LIMIT "TYPE OF CONSTRUCTION" TO THOSE TYPES THAT ARE SPECIFICALLY DESIGNATED BY THE DOL

SMART and SMACNA request that Treasury amend the definition of "type of construction" to clarify that the task of designating types of construction remains with the DOL for IRA purposes and that the only types of construction that will be permitted on IRA projects are

[144] *Section 6418 Transfer of Certain Credits*, 88 *Fed.Reg*. 40496 (June 21, 2023).

those designated by the DOL.[145] The NPRM states that Treasury contemplates that the "construction, alteration, or repair of most facilities eligible for the increased credit under section 45(b)(6) would be either building or heavy construction."[146] The NPRM does not make clear whether Treasury reached this conclusion in consultation with the DOL or has undertaken an independent assessment of the nature of the work based on DOL guidance. That conclusion is nonetheless consistent with DOL guidance, which has determined that construction of a "solar farm facility"[147] and "wind energy project"[148] the work falls under heavy construction.

A. The IRA Requires Payment of Prevailing Wages Based on DOL Types

In the context of applicable prevailing wage rates, the IRA mandates that the "types" of construction are those designated by the DOL. The IRA requires the payment of prevailing wage rates issued by the DOL in accordance with the requirements of the DBA, which compares wage rate for work of a "similar character":[149]

> [A laborer or mechanic] shall be paid wages at rates not less than the prevailing rates for construction, alteration, or repair of a similar character in the locality in which such facility is located as most recently determined by the Secretary of

[145] The proposed regulations define "type of construction" as follows:

> Type of construction. The type of construction is the general category of construction as established by the U.S. Department of Labor for the publication of general wage determinations. Specific types of construction may include, but are not limited to, building, residential, heavy, and highway.

[146] NPRM, 88 *Fed.Reg*. at 60025.

[147] *See* Prevailing Wage and the Inflation Reduction Act: "If a taxpayer is constructing a solar farm facility and wishes to comply with the prevailing wage provisions of the Inflation Reduction Act, the taxpayer should identify the heavy construction wage determination for the area in which the facility is being constructed." https://www.dol.gov/agencies/whd/IRA

[148] *See also* (*id.*): If a taxpayer is constructing a wind energy project and wishes to comply with the labor standards provisions of the Inflation Reduction Act, the taxpayer should identify the heavy construction wage determination for the area in which the facility is being constructed.

[149] 40 U.S.C. 3142: 'The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there.'

> Labor, in accordance with subchapter IV of chapter 31 of title 40, United States Code.

The "similar character" language refers to the type of construction. As explained in All Agency Memorandum Nos. 130 and 131, construction is encompassed within the four types of construction, with heavy as a "catch-all" for construction that does not fall within residential, building, or highway. In categorizing construction in AAMs 130 and 131, the Wage and Hour Division relied on decades of precedent of the Wage Appeals Board in delineating between types.[150] As stated in AAM No. 130, in fulfilling this task, in addition to considering wages it is "also necessary to look at other characteristics of the project, including the construction techniques, the material and equipment being used on the project, the type of skills called for on the project work and other similar factors which would indicate the proper category of construction."[151] Congress recognized the DOL's expertise in this area in vesting it with the duty to determine prevailing rates based on construction types.

G. The Practical Consequences of Using Types that are Not Designated by the DOL is that There Would be No Corresponding Prevailing Rates

The practical consequences of creating additional types of construction by Treasury at the request of taxpayers is that there would be no corresponding rates of pay on wage determinations. The DOL's practice has always been to issue wage determinations for residential, building, highway, and heavy after conducting surveys of these types of work.

[150] AAM No. 130 cites to seven WAB decisions, which were issued in the 1970's, and major bridges contain elements of both heavy and highway construction. See WAB Case No. 772 (October 21, 1977)

[151] AAM No. 130, quoting WAB Case No. 77-23, dated December 30, 1977.

X. TREASURY LACK THE REGULATORY AUTHORITY TO EXEMPT FROM COVERAGE ENTITIES OR FACILITIES THAT ARE NOT STATUTORILY EXEMPTED

The NPRM states that the statutory language of the IRA does not reflect any intent to include exceptions from the PWA requirements, other than the OneMegawatt Exception and the BOC Exception. Consequently, Treasury has not proposed a rule exempting Tribal governments or the Tennessee Valley Authority (TVA) from the PWA requirements in section 45.[152] Despite the lack of authority under the statute to expand upon those exemption, Treasury requests comments on the need for any exceptions, including for Tribal governments or the TVA, from the PWA requirements in addition to those expressly described in the statute. SMART and SMACNA oppose any expansion of exemption from coverage that is not statutorily mandated.

XI. WORKING FOREPERSONS ARE COMMONLY USED ON DBRA JOBS AND ARE PAID THE PREVAILING RATES FOR THE RELEVANT CLASSIFICATION, PLUS A PREMIUM FOR FOREPERSON DUTIES

Treasury requests comments on the treatment of working forepersons performing the duties of laborers and mechanics under certain circumstances, and other executive or administrative personnel who also perform duties of a manual or physical nature, in the construction, alteration, or repair of a qualified facility. Payment of working forepersons at least the prevailing wage for time spent performing work of the trade is consistent with the definition of laborer or mechanic in 29 C.F.R. 5.2, which provides, in pertinent part, that "Forepersons who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent."[153] As a practical matter, in

[152] 88 *Fed.Reg.* at 60022.

[153] See Field Operations Handbook, 15e15:

the union sector, working forepersons are paid a premium – an amount above the rate of the classification for journeyperson in the applicable trade – for foreperson duties. Regarding other executive or administrative personnel, it is not usual or customary for these workers to perform the work of skilled trades. Unlike working forepersons, executive and administrative personnel are not journeypersons.

CONCLUSION

Based on the foregoing, SMART and SMACNA encourage Treasury to develop a regulatory framework that provides the necessary oversight to detect noncompliance with PWA requirements. As proposed, absent a PLA, the likelihood of detection is so remote that taxpayers, contractors, and subcontractors would not be deterred from engaging in rampant violations despite the stringent penalties. PLAs are the gold standard for ensuring compliance. Absent a PLA, greater accountability is needed to prevent tax fraud.

Date submitted: October 30, 2023

A supervisory employee who is not exempt under 29 CFR Part 541 and who spends more than a substantial amount of time (20 percent) in a given workweek as a laborer or mechanic must be paid the applicable DBRA prevailing wage rate for the classification of work performed for all hours engaged in such work as a laborer or mechanic. For example, if a nonexempt working foreman spends 60 percent or 24 hours of a 40 hour workweek performing administrative functions such as preparing time cards, supervising the project work, and arranging for deliveries and the remaining 40 percent (16 hours) of the time performing the duties of an electrician, the individual must be paid the electrician's prevailing wage rate for the 16 hours. See 29 CFR 5.2(m).