



VIA ELECTRONIC SUBMISSION

October 30, 2023

Douglas W. O'Donnell
Deputy Commissioner for Services and Enforcement
U.S. Department of the Treasury
Internal Revenue Service
1111 Constitution Ave. NW
Washington, DC 20224

Re: Comments of Associated Builders and Contractors to the Treasury Department and Internal Revenue Service on Reg-100908-23, Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements

Dear Mr. O'Donnell:

Associated Builders and Contractors submits the following comments to the U.S. Treasury Department and Internal Revenue Service in response to Reg-100908-23, Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements, published in the Federal Register on Aug. 30, 2023.¹

The IRS/Treasury notice of proposed rulemaking requests public comments on proposed regulations affecting an estimated \$270 billion worth of increased tax credit or deduction amounts available for taxpayers constructing clean energy projects conditioned on satisfying prevailing wage and registered apprenticeship (collectively, PWA) requirements established by the Inflation Reduction Act of 2022.

ABC appreciates the opportunity to provide feedback on this proposed rule, hereinafter referred to as the PWA NPRM.

About ABC

ABC is a national construction industry trade association representing more than 22,000 member companies. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC and its members believe construction work procured by both private and public stakeholders should be performed on the basis of merit—through fair and open competition—regardless of contractors' or their employees' labor affiliation and willingness to sign agreements with unions. More than 88% of the U.S. construction industry workforce have freely chosen not to belong to a union and are employed by contractors who are not signatory to any union agreements.²

¹ <https://www.federalregister.gov/documents/2023/08/30/2023-18514/increased-credit-or-deduction-amounts-for-satisfying-certain-prevailing-wage-and-registered>

² See U.S. Bureau of Labor Statistics Table 3, Union affiliation of employed wage and salary workers by occupation and industry, Industry and Construction, accessed Oct. 3, available at: <https://www.bls.gov/news.release/union2.t03.htm>.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private sector customers.³

Historically, many ABC members have successfully built all aspects of “clean” and renewable energy projects of the types under the pre-IRA tax code—which generally provided for tax incentives of 30% of investments in qualifying projects—such as solar, wind, geothermal, carbon sequestration, electric vehicle charging stations and other types of clean energy construction. However, the IRA dramatically altered clean energy project tax incentives by reducing credit/deduction incentives to a baseline of 6% in sections 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E and 179D of the updated Internal Revenue Code. Under the IRA, clean energy developers are now eligible to receive the full 30% tax incentive—five times the value of prior baseline tax incentives—but only if they meet the onerous and unclear PWA requirements discussed in the NPRM and in ABC's comments.

The vast majority of ABC's contractor members are also small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration's Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)⁴ and industry workforce employment (nearly 81% of the construction industry is employed by small businesses).⁵ In fact, construction companies that employ fewer than 100 construction professionals comprise 99% of construction firms in the United States and account for 69% of all construction industry employment.⁶ In addition, the vast majority of small businesses are not unionized in the construction industry.⁷

In addition to small business member contractors that build private and public works projects, ABC also has large member general contractors and subcontractors that perform construction services for private, federal, state and local government customers procuring construction contracts subject to respective private and government acquisition policies and regulations. For example, ABC members won 55% of the \$147 billion in direct prime construction contracts exceeding \$25 million awarded by federal agencies during fiscal years 2009-2022.⁸ Successful ABC member general contractors provided subcontracting opportunities to large and small

³ For example, see ABC's 33rd Excellence in Construction Awards® program from 2023: <https://www.abc.org/Portals/1/2023/EIC/33rd%20Annual%20Excellence%20in%20Construction%20Program.pdf?ver=gsV6cu81Y5la-XT6lgP4Vg%3d%3d> available at <https://www.abc.org/Membership/Awards-and-Recognition/EIC-Winners>

⁴ U.S. Census Bureau 2021 County Business Patterns: <https://data.census.gov/table?q=CBP2021.CB2100CBP&tid=CBP2021.CB2100CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.html>.

⁵ 2022 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2022), at page 4, <https://advocacy.sba.gov/wp-content/uploads/2022/08/Small-Business-Economic-Profile-US.pdf>.

⁶ U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States and Selected Geographies: 2021, available at <https://data.census.gov/table/CBP2021.CB2100CBP?q=CBP2021.CB2100CBP&hidePreview=true>.

⁷ Unlike many other industries, there are few barriers to a worker joining a union in the construction industry. A worker seeking union membership simply applies for membership at the appropriate local union hiring hall. If membership is accepted and financial obligations are met initially and thereafter in good standing, the worker is dispatched to contractors signatory to a specific union collective bargaining agreement and may be assigned to many different union signatory contractors throughout their career. Despite this, unionization in the construction industry has dropped dramatically from 80% during WWII to a record-low 11.7% in 2022 since the government began tracking this data.

⁸ See data and graphics available in [“April 2023 Update: ABC's Fight Against Government-Mandated Project Labor Agreements Intensifies,”](#) TheTruthAboutPLAs.com, April 20, 2023.

contractors in the specialty trades and delivered taxpayer-funded construction projects safely, on time and on budget for their federal government customers. Likewise, ABC members are prominent builders of private construction projects in all market segments and geographies across America and also deliver state and local government construction projects rebuilding their communities.

Since almost all federally funded projects are governed by the Davis-Bacon Act, ABC members who perform such work are familiar with the burdensome and inflationary requirements of DBA “prevailing wage” laws and regulations. But many ABC member contractors and other contractors, particularly smaller construction firms, avoid bidding on prevailing wage projects, in part because the U.S. Department of Labor’s flawed DBA wage determination process and regulatory enforcement discriminate against nonunion contractors and imposes significant administrative burdens and unacceptable compliance risks—on smaller nonunion contractors in particular—as discussed in Section II of ABC’s response to this PWA NPRM.

Many ABC members also participate in the government-registered apprenticeship system. Nationwide, ABC chapters currently provide almost 450 government-registered apprenticeship programs—commonly known as GRAPs—in more than 20 construction industry trades such as electrical, plumbing, carpentry, HVAC etc.⁹ Of note, some ABC members have their own GRAPs approved by appropriate federal or state regulatory agencies in charge of apprenticeship programs. Other ABC members sponsor employee apprentices in ABC chapter GRAPs or other programs provided by third parties. Nevertheless, in contrast, the vast majority of the construction industry and ABC members believe that their privately run, nonregistered apprenticeship/workforce development programs—as well as industry workforce development programs provided by higher education, trade schools and other associations not registered with state or federal governments—develop the skills needed to perform construction work of specific interest to a specialized contractor, including “clean” energy construction. This is because progress within these programs is anchored in required skill competency and advancement is not necessarily time-based as is the case in four to five-year GRAPs. Many industry contractors also believe the government-registered apprenticeship system imposes unnecessary administrative burdens on contractors and codifies an outdated apprenticeship model primarily adopted and advocated for by all construction trade unions and unionized contractors, which does not serve the overall industry workforce development needs well.¹⁰

In short, the Biden administration’s aggressive promotion of GRAP policy and requirements—including its expansion onto IRA-funded clean energy projects that have been historically considered private construction work free from PWA regulations—is especially problematic as the construction industry already faces a significant shortage of skilled construction workers and qualified large and small contractors able to compete for and perform this work, as discussed in Section III of ABC’s response to this PWA NPRM.

Overall, ABC contractors are extremely concerned about the NPRM’s prevailing wage and GRAP requirements as currently proposed and may be less likely to bid on IRA projects unless

⁹ To review ABC chapter GRAPs, visit www.abc.org/GRAPMAP.

¹⁰ McSwigan, Curren, [How to Improve the Registered Apprenticeship System](#), Third Way, Oct. 26, 2023.

significant improvements are made. In response to an October 2023 ABC survey on the proposed rule, 98% of respondents said they would be less likely to bid on clean energy projects subject to IRA requirements, as proposed.¹¹ These contractors will be much more likely to participate in critical clean energy construction if the IRS provides greater clarity to these policies.

In addition, as discussed in Section I of ABC's response, the PWA NPRM regulatory process has been confusing for construction industry and clean energy stakeholders, and has needlessly increased costs, delayed the construction of clean energy construction projects and exacerbated challenges facing the construction industry.

Section IV of ABC's comments evaluates the IRS PWA NPRM's establishment of a discretionary process to waive or decline to assert penalties in the interest of sound tax administration.¹²

Section V of ABC's comments strongly oppose new PWA NPRM language, which dramatically departs from the IRA statute and illegally coerces owners into requiring discriminatory and inflationary project labor agreements as protection against additional penalties for intentional disregard violations of PWA requirements discussed in Section IV. ABC asserts there is no rationale to incentivize the use of PLAs on clean energy construction projects seeking enhanced IRA tax credits other than to promote the use of union labor and steer contracts to unionized contractors. ABC further asserts that such ill-advised coercion will increase construction costs, trigger additional project delays and exclude experienced large and small businesses and more than 88% of the U.S construction industry workforce from building clean energy construction projects seeking enhanced IRA tax credits. ABC urges the IRS to abandon the PWA NPRM's pro-PLA policies and promote fair and open competition on all clean energy projects receiving IRA funding.

Finally, Section VI of ABC's comments illuminates the IRS PWA NPRM's failure to conduct a thorough analysis of its paperwork burdens and new compliance costs on taxpayers and contractors, and harmful effects on small businesses.

I. ABC Perspective: The IRS's Cumbersome IRA PWA Regulatory Process Exacerbates Construction Industry Challenges

Before addressing the specific requests for comments posed by Treasury and the IRS in the PWA NPRM, ABC will highlight general comments on this rulemaking.

1. Disruptive and Inadequate IRA Regulations Have Delayed Construction of Clean Energy Projects

This is the first time that Congress has seen fit to impose either prevailing wage or government-registered apprenticeship requirements on purely private construction projects, i.e., projects with no direct government funding. Historically, Davis-Bacon Act regulations were

¹¹ [Survey: 98% of ABC Contractors Say Biden's Inflation Reduction Act Labor Mandates Limit Competition on Clean Energy Construction](#), Oct. 24, 2023.

¹² <https://www.federalregister.gov/d/2023-18514/p-104>

never intended to impose mandates on private construction projects and such projects are not well-suited for such regulations. Likewise, apprenticeship requirements were never intended to be applied to private construction work, nor government work, as the apprenticeship system established by the Fitzgerald Act was intended to be entirely voluntary. As a result, the issues presented to Treasury and the IRS for guidance and regulation pose novel and complex interagency jurisdictional and practical issues.

As set forth in greater detail in ABC's comments on the PWA NPRM, the IRA PWA requirements impose unprecedented and disruptive new mandates on private clean energy construction projects through the federal tax code. As a result, the IRA perversely discourages experienced contractors and a large portion of the construction industry's workforce from performing clean energy projects eligible for enhanced IRA tax credits, thereby reducing competition for such projects and increasing the costs for taxpayers and developers seeking to build clean energy projects. These new policies undermine efficient taxpayer investment in clean energy projects and will result in added costs that may ultimately be passed along to consumers and energy ratepayers. In addition, these policies are likely to delay projects and result in fewer clean energy construction projects and less private investment, all of which ultimately undermine the Biden administration's clean energy goal of creating middle-class jobs for Americans while reducing carbon emissions.

For these and other related reasons, ABC opposed the IRA¹³ and authored multiple opinion pieces opposing new anti-competitive and inflationary PWA requirements tied to federal tax incentives for clean energy projects.¹⁴

Notwithstanding the foregoing concerns about its PWA provisions, the IRA has now been enacted into law, and the IRS issued inadequate initial guidance that went into effect on Jan. 29, 2023, that will be replaced by the NPRM¹⁵ until a final IRS rule is implemented months from now.¹⁶

On Sept. 18, ABC submitted a letter to the IRS requesting a 30-day extension of the PWA NPRM's comment period to Nov. 30,¹⁷ as 60 days is not enough time to respond to the new concerns raised in the proposal. Regrettably, the IRS has not responded to requests from the regulated community for more time.

IRS and Treasury personnel should take more time to conduct additional outreach to construction industry stakeholders and affected developers and engage in inclusive listening sessions to explore all unintended consequences of these new IRA policies on large and small, women-, minority- and veteran-owned businesses with experience and/or interest in pursuing opportunities in this clean energy construction marketplace before issuing the initial IRS guidance and this PWA NPRM.

¹³ [Analysis—Democrats' Inflation Reduction Act Is a Reckless Tax-and-Spend Bill.pdf \(abc.org\)](#).

¹⁴ Fox Business, "[Sweetheart union deal will undermine Inflation Reduction Act's clean energy agenda](#)," Aug. 18, 2022, and Washington Examiner, "[Biden's Davis-Bacon bloat undermines taxpayer infrastructure investments](#)," Sept. 6, 2022.

¹⁵ <https://www.federalregister.gov/d/2023-18514/p-181>

¹⁶ According to the NPRM, 88 Federal Register 60036, sections 3 and 4 of Notice 2022-61 (the sections containing the current guidance for compliance with the PWA and GRAP) will be "obsoleted" upon the effective date of the Final Guidance Rule.

¹⁷ <https://www.regulations.gov/comment/IRS-2023-0042-0004>

ABC members are currently pursuing contracts to construct—or are actively building—projects that may be eligible to qualify for IRA’s new tax incentives. However, clean energy project investors, lenders, developers and ABC member contractors investigating ways to receive the full IRA tax incentives under the new IRA PWA policy have inundated ABC with questions and concerns regarding industry prevailing wage and GRAP practices and regulations, the IRS’s unclear and incomplete initial guidance and FAQs and the latest IRS PWA NPRM.

Many have reported needless delays and increased construction costs as a result of the IRS’s cumbersome IRA PWA regulatory process. Among respondents to ABC’s October 2023 survey who had bid on projects receiving IRA tax credits, 42% reported delays due to a lack of regulatory clarity. Comments on the survey indicated both developers and contractors remain uncertain regarding interpretation of IRA requirements, and that some developers are reconsidering whether IRA tax credits are worth pursuing given compliance costs and additional penalties and risk.¹⁸

In addition, the Aug. 22, 2022, passage of the IRA—as well as the IRS’s Oct. 24, 2022, request for comment notice on PWA issues,¹⁹ the IRS’s Nov. 30, 2022, notice of initial guidance concerning PWA requirements,²⁰ and the IRS’s Aug. 30, 2023, PWA NPRM—were issued at a time when the U.S. construction industry faces significant headwinds. The construction industry continues to face severe supply chain disruptions,²¹ unprecedented materials cost inflation of 41% since the onset of the COVID-19 pandemic,²² lackluster investment in structures,²³ increased finance and lending costs driven by a 22-year high interest rate and a widespread shortage of more than half a million skilled workers in 2023 alone.²⁴

All of these threats to the industry are exacerbated by problematic Biden administration policies promoting government-mandated project labor agreements²⁵ and drastic rewrites of Davis-Bacon Act prevailing wage regulations²⁶ and government-registered apprenticeship regulations²⁷ that will increase costs and reduce competition on private and government construction projects and disrupt the construction industry’s workforce development strategies.

¹⁸ [ABC Survey: 98% of ABC Contractors Say Biden’s Inflation Reduction Act Labor Mandates Limit Competition on Clean Energy Construction](#), Oct. 24, 2023.

¹⁹ On Oct. 24, 2022, the Treasury Department and the IRS issued Notice 2022–51, 2022–43 I.R.B. 331, requesting comments on aspects of the increased credits and deduction amounts enacted by the IRA, including the PWA provisions. ABC provided comments here:

²⁰ On November 30, 2022, the Treasury Department and the IRS published Notice 2022–61, [87 Federal Register 73580](#), corrected in [87 Federal Register 75141](#) (Dec. 7, 2022). Notice 2022–61 provided guidance on the PWA requirements that generally apply under sections 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, and 48E, and 179D, effective for taxpayers that have begun construction and installation of a facility on Jan. 29, 2023, and thereafter.

²¹ Sam Barnes, [“Missing Links,”](#) Construction Executive, April 2022.

²² [“ABC: Monthly Construction Input Prices Increase Slightly in September, Led by Higher Energy Prices,”](#) ABC Oct. 11, 2023.

²³ [“ABC: Nonresidential Construction Spending Increases in August, Led by Manufacturing and Public Works; Contractors Stay Upbeat,”](#) ABC, Oct. 11, 2023.

²⁴ [“Construction Workforce Shortage Tops Half a Million in 2023, Says ABC,”](#) ABC, Feb. 3, 2023.

²⁵ For example, see [www.TheTruthAboutPLAs.com](#), [“Biden’s Project Labor Agreement Schemes Aggravate Construction Industry’s Skilled Labor Shortage,”](#) June 30, 2023.

²⁶ [“ABC to Biden Administration: Withdraw the DOL’s Davis-Bacon Proposed Rule,”](#) ABC, May 2022.

²⁷ See later discussion on the DOL Office of Apprenticeship’s proposed rule on National Apprenticeship System Enhancements, which was sent to OMB’s OIRA for review on July 31, 2023. The NPRM will be informed by controversial ABC-opposed recommendations made by the Advisory Committee on Apprenticeships that will establish a new “Quality Seal” program that gives preferential treatment to GRAPs meeting certain requirements that is unlikely to be popular with employers and employees in the GRAP ecosystem.

It is important that the forthcoming IRA final rule does not frustrate the stated purpose of the IRA—to promote investment in clean energy projects—by further increasing costs for contractors and taxpayers, needlessly restricting the pool of qualified bidders and excluding experienced and qualified nonunion construction workers and apprentices via unclear or unfair guidance and coercive actions pushing developers to require project labor agreement schemes.

In short, clean energy stakeholders need complete, clear and timely guidance on all of the new issues raised by the PWA NPRM. Unfortunately, the current NPRM still fails to give proper guidance to industry stakeholders, and in many respects departs from the limited statutory authority of the IRA, which is why there will be significant delays to clean energy construction projects that partially depend on the full 30% of clean energy tax credits without disruptive PWA requirements.

2. The Proposed Rule Would Rescind the Original 2022 IRS Guidance in Violation of the Administrative Procedures Act.

The PWA NPRM purports to supplement and render “obsoleted”²⁸ the initial IRS guidance issued in 2022.²⁹ Because the initial guidance was used to justify implementation of the IRA on projects initiated after Jan. 29, the IRS should establish a new effective date for the IRA’s PWA requirements.³⁰ At a minimum, the new guidance set forth in the NPRM and final rule must be applied only prospectively, in order to protect the due process rights of taxpayers, contractors and subcontractors.

In addition, the rescission of the previous guidance issued in November 2022, particularly if done on a retroactive basis, must be deemed to be arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. 702, unless the IRS provides much greater explanation for its actions. An agency action reversing policy is arbitrary and capricious if the agency has “relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”³¹ The agency also acts arbitrarily when it fails adequately to consider reasonable alternatives to the change in policy; and where it fails to consider the reliance interests of the regulated community.³² Unless properly addressed, the final rule will fail all of the foregoing criteria for arbitrary and capricious rulemaking, as further discussed below.

²⁸ <https://www.federalregister.gov/documents/2023/08/30/2023-18514/increased-credit-or-deduction-amounts-for-satisfying-certain-prevailing-wage-and-registered#p-181>.

²⁹ Notice 2022–61, 87 Federal Register 73580, corrected in 87 Federal Register 75141 (Dec. 7, 2022).

³⁰ The IRA stated that its PWA and GRAP requirements were not supposed to go into effect until 60 days after the IRS issued “guidance” to taxpayers. See 26 U.S.C. 30C(g)(1)(C)(i), 45(b)(6)(B)(ii), 45Q(h)(2), 45V(e)(2)(A)(i), 45Y(a)(2)(B)(ii), 48(a)(9)(B)(ii), 48E(a)(2)(A)(ii)(II) and (a)(2)(B)(ii)(II), and 179D(b)(3)(B)(i), all of which are cited in the preamble to Notice No. 2022-61, 87 Federal Register 73580. Because the guidance issued by the IRS on Nov. 30, 2022, was entirely inadequate to meet the needs of the regulated community—and is now declared to be “obsolete” by the new guidance—the effective date of the law’s PWA requirements should be reset to a date no earlier than 60 days after the Final Rule containing the new guidance is issued. Projects completed since Jan. 29 should be deemed exempt from compliance with the Act’s PWA and GRAP provisions.

³¹ See *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–43 (1983). *Accord Sierra Club v. U.S. Env. Prot. Agency*, 939 F.3d 649, 663–64 (5th Cir. 2019).

³² See also *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020); *Encino Motorcars, LLC v. Navarro*, 579 U.S. at 221-22.

3. New and Forthcoming DOL Regulations on Davis-Bacon and GRAPs Will Further Disrupt IRA-Funded Clean Energy Projects.

ABC is also raising concerns about confusion among IRA clean energy tax credit stakeholders caused by two new DOL regulations on the Davis-Bacon Act and GRAPs that are germane to this NPRM.

On Aug. 23, the DOL issued a sweeping revision of Davis-Bacon regulations.³³ The DOL's final rule illegally rescinds almost 40 years of commonsense reforms and clarifications to DBA regulations, overturns precedent-setting legal decisions, weakens the DOL's already flawed wage determination process and dramatically changes the scope of covered workers and industries while creating additional compliance requirements for the regulated community.³⁴

The DOL Davis-Bacon final rule—in effect as of Oct. 23—is likely to create confusion and exacerbate many controversial issues with prevailing wage regulations described in this response and in ABC's comments on the DOL proposal. These issues are sure to artificially raise construction costs in the short and long term, increase risk for contractors, increase administrative burdens on contractors and decrease the quantity of contractors submitting bids on projects receiving IRA tax credits.

In addition, on July 31, the DOL's Office of Apprenticeship sent a proposed rule on National Apprenticeship System Enhancements³⁵ to the OMB's OIRA for review.³⁶ To date, the text is not public. However, according to the regulatory agenda, the proposed rule would overhaul the government-registered apprenticeship system with the stated goal of “enhancing worker protections and equity, improving the quality of registered apprenticeships, revising the state governance provisions, and more clearly establishing critical pipelines to registered apprenticeships such as pre-apprenticeships so that the National Apprenticeship System is more responsive to current worker and employer needs.”

On May 9, an ABC-led coalition of construction and business associations submitted a letter³⁷ to the Advisory Committee on Apprenticeships opposing the committee's recommendations to the DOL for changes to the GRAP system.³⁸ These ABC-opposed recommendations included a proposal to establish a new “Quality Seal” program to give preferential treatment to GRAPs meeting certain requirements that is unlikely to be welcomed by existing and potential employers and apprentices in the GRAP system.³⁹

The IRA's expansion of new prevailing wage and registered apprenticeship requirements on an entirely new segment of the private construction industry while these significant changes to DBA regulations are still new—and an apprenticeship proposal that won't be published in final

³³ See [88 Federal Register 57526](#)

³⁴ See [ABC's May 17, 2022, comments](#) on the DOL's Davis-Bacon NPR and ABC's press release, “[ABC: Final Davis-Bacon Rule Undermines Taxpayer Investments in Infrastructure](#),” Aug. 8, 2023, and analysis, “[DOL Increases Costs for Contractors and Taxpayer with Davis-Bacon Final Rule](#),” Aug. 9, 2023.

³⁵ See RIN 1205-AC13 <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=1205-AC13>.

³⁶ <https://www.reginfo.gov/public/do/eoDetails?rId=325412>

³⁷ <https://www.apprenticeship.gov/sites/default/files/Letter%20from%20ABC%20to%20the%20ACA.pdf>

³⁸ See ACA Meeting 7 agenda items from May, 10, 2023, <https://www.apprenticeship.gov/advisory-committee-apprenticeship/meetings>.

³⁹ See further ABC analysis, “[Advisory Committee on Apprenticeship Submits ABC-Opposed Recommendations to DOL](#),” May 17, 2023.

rule form until the middle of 2024, at best—will compound the regulatory burden, risk and uncertainty on taxpayers seeking IRA tax credits.

With the foregoing general comments in mind, the remainder of ABC’s comments focus on the issues the IRS has requested comments on specific to the PWA NPRM as well as other critical issues not contemplated by the NPRM.

II. ABC Response to the NPRM’s Specific Prevailing Wage Requirements

ABC is concerned about the IRA’s imposition of prevailing wage requirements on qualifying clean energy construction projects in order to access the full tax incentives. Specifically, the NPRM states that taxpayers must ensure laborers and mechanics involved in the construction of facilities or the alteration or repair of facilities receiving the IRA tax credits shall be paid at prevailing rates as determined by the secretary of labor under the Davis-Bacon Act.⁴⁰

Further, the NPRM states that the applicable prevailing wage rates are those in effect when construction, alteration or repair of the facility *begins* and remain in effect for the duration of the work performed. New wage determinations would be required if work on a facility is changed to include additional work not within the scope of the project, or where a project is extended beyond the time period originally obligated.⁴¹

The NPRM also establishes a new process for taxpayers and contractors to request supplemental wage determinations and additional classifications and rates from the DOL via email.⁴²

As our comments outline below, the IRA and the NPRM’s implementation of prevailing wage requirements are likely to needlessly increase construction costs and delay clean energy construction projects, as well as discourage participation from small businesses. In addition, the NPRM raises several technical questions regarding interpretation of the proposed requirements that must be addressed to ensure clarity for the regulated community.

1. Concerns With Government-Determined Prevailing Wages Set by the Davis-Bacon Act

Unfortunately, by relying on prevailing wages determined by the DOL under the Davis-Bacon Act, the proposed rule is setting IRA wage standards utilizing a deeply flawed process that will needlessly increase costs and potentially cause delays as clean energy developers and contractors unfamiliar with the DBA system attempt to comply with complex and often opaque job classification requirements and other regulatory practices.

A. Flawed Wage Determination Process

Government and industry concerns with the DOL’s antiquated, inefficient and flawed wage determination process is well-documented. Instead of using the U.S. Bureau of Labor

⁴⁰ <https://www.federalregister.gov/d/2023-18514/p-17>

⁴¹ <https://www.federalregister.gov/d/2023-18514/p-301>

⁴² <https://www.federalregister.gov/d/2023-18514/p-286>

Statistics' data and alternative methodologies to compute a timely and accurate prevailing wage, the DOL continues to rely on an unscientific and unreliable methodology to calculate prevailing wages that is inconsistent with the DBA's original statute and intent.⁴³

Likewise, the GAO⁴⁴ and the DOL Office of Inspector General⁴⁵ have repeatedly criticized the DOL for estimating DBA wages by relying on unrepresentative surveys. Instead of selecting a statistically representative sample of construction employees or employers, the WHD sends DBA surveys to every construction firm it can identify in a given region.⁴⁶ The DOL sends follow-up mailings to firms that do not initially respond, then makes DBA determinations on the data provided by those firms that do. The DOL calculates DBA rates using samples often too small for statistical reliability and without implementing standard techniques to mitigate nonresponse bias.

The DOL's current standards call for basing DBA rates on data from a minimum of six workers from three contractors. In some cases, the DOL sets DBA rates using data from three workers from two contractors.⁴⁷ Overall, the GAO reports that the DOL sets 26% of its DBA rates on data from six or fewer workers and 75% on data from 28 or fewer workers.⁴⁸ The median job classification is based on data from 13 workers.⁴⁹ The amount of responses in these cases are far too low to ensure survey accuracy. No pollster would report results from a survey of six or 13 voters. The DOL cannot accurately estimate prevailing wages using such small samples.

ABC obtained data on the DOL's DBA wage determinations through a Freedom of Information Act request⁵⁰ demonstrating that this methodology has led to wage determinations that vastly overrepresent union rates, with 63% of published DBA county-level wage determinations being collectively bargained union rates,⁵¹ despite unions representing less than 12% of the construction workforce.⁵² This means that wages required on IRA projects will fail to represent actual local prevailing wages and lead to unnecessary cost increases.

⁴³ See ABC's detailed discussion with the U.S. DOL Wage and Hour Division's flawed wage determination process in Section II. of ABC's comments on the DOL's Davis-Bacon NPRM, May 17, 2022.

⁴⁴ U.S. GAO, Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey, GAO-11-152, March 2011, <http://www.gao.gov/new.items/d11152.pdf> and U.S. GAO, Davis-Bacon Act: Labor Now Verifies Wage Data, but Verification Process Needs Improvement, HEHS-99-21, January 1999, <http://www.gao.gov/archive/1999/he99021.pdf>.

⁴⁵ U.S. DOL, Office of Inspector General, Better Strategies are Needed to Improve The Timeliness And Accuracy of Davis-Bacon Act Prevailing Wage Rates, Report Number 04-19-001-15-001m March 29, 2019, <https://www.oig.dol.gov/public/reports/oa/2019/04-19-001-15-001.pdf>; U.S. DOL OIG, Concerns Persist with the Integrity of Davis-Bacon Act Prevailing Wage Determinations, Audit Report No. 04-04-003-04-420, March 30, 2004, pp. 12-13, <http://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf>; and U.S. DOL OIG, Inaccurate Data Were Frequently Used in Wage Determinations Made Under the Davis-Bacon Act, Audit Report No. 04-97-013-04-420, March 10, 1997, http://www.oig.dol.gov/public/reports/oa/pre_1998/04-97-013-04-420s.htm.

⁴⁶ U.S. Government Accountability Office, Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey, pp. 57-58.

⁴⁷ Ibid, p. 12.

⁴⁸ U.S. Government Accountability Office, Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey, p. 23.

⁴⁹ Ibid. Note that GAO found that 49% of classifications were based on data from 12 or fewer employees.

⁵⁰ ABC requested the data that informed a DOL OIG report on DBA wage determinations. See U.S. Department of Labor, Office of Inspector General, Better Strategies are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates, Report No. 04-19-001-15-001, March 29, 2019 at <https://www.oig.dol.gov/public/reports/oa/2019/04-19-001-15-001.pdf>.

⁵¹ The OIG data cited above showed that 64,850 out of 134,738 total DBA rate determinations reflect union rates. However, because the union determinations cover on average more counties than those based on survey averages, union rates make up nearly two-thirds of all DBA county-level determinations—482,592 out of 770,973. In the 2022 final rule, the DOL provided some subsequent analysis suggesting that union rates prevailed in 48% of determinations in 2018 and 42% of determinations in 2022, although that percentage is likely to have been driven down to conformances as once a rate is designated as a collectively bargained rate it is almost impossible to reverse it to a blended rate. See <https://www.federalregister.gov/d/2023-17221/p-131>

⁵² ABC: A Record 88% of the US Construction Industry Workforce Does Not Belong to a Union.

Additionally, the DOL's current process for determining wages is extraordinarily lengthy, as determined by the OIG report referenced above. The OIG's analysis determined that the DOL took an average of 2.6 years to complete a wage survey, with one survey taking over three years to complete. Due to the lengthy nature of DOL's survey process, some wage rates were up to 40 years old at the time of OIG's survey.⁵³ By relying on the DOL's prevailing wages, the IRS will enforce extremely outdated wage rates on contractors complying with IRA requirements.

B. Prevailing Wage Laws Inflate Construction Costs

Volumes of research point to the inflationary impact of federal, state and local government-determined prevailing wage laws on construction costs.⁵⁴ The IRA's inclusion of prevailing wage requirements that must be satisfied in order to access the full tax incentives for clean energy construction projects will increase construction costs, as supported by the following points of research:

- A May 2022 study⁵⁵ from the Beacon Hill Institute finds the flawed method used by the federal government to calculate "prevailing wages" under the DBA adds at least 7.2% to the cost of federal and federally assisted projects and inflates wages by 20.2% compared to local market averages. This costs taxpayers an extra \$21 billion annually.
- In addition, researchers at Suffolk University found in a 2008 study⁵⁶ that DBA requirements add 9.9% to construction costs and cost U.S. taxpayers an additional \$8.6 billion annually.
- According to a 2011 Joint Economic Committee report,⁵⁷ government-determined DBA wages inflated labor costs an average of 22% above market rates.
- The Congressional Budget Office has estimated that repealing the DBA would save the federal government \$24.3 billion between 2023 and 2032.⁵⁸
- The Congressional Budget Office's DBA repeal savings estimates do not reflect the true cost savings to taxpayers if Davis-Bacon was repealed or reformed. The DOL's Davis-Bacon NPRM estimates that the DBA applies to roughly 60% of all public construction put in place by governments, as many state and local projects are partially or wholly funded with federal dollars that trigger DBA requirements. In 2022, \$376 billion of public construction was put in place. If 60% of such construction put in place (\$225 billion) was 7% less expensive—as conservatively estimated in the 2022 BHI report—that would save taxpayers roughly \$15.8 billion per year and more than \$158 billion over the next decade.

⁵³ U.S. DOL, Office of Inspector General, Better Strategies are Needed to Improve the Timeliness And Accuracy of Davis-Bacon Act Prevailing Wage Rates, Report Number 04-19-001-15-001m March 29, 2019.

⁵⁴ See ABC's resource, [Studies on the Negative Impact of the Davis-Bacon Act and Prevailing Wage Policies](#), updated January 2023. Of note, studies of similar state and local prevailing wage policies demonstrate government-determined prevailing wages drive up construction costs—and repeal of such laws increased construction job creation and did not result in wage suppression or a reduction of construction project quality or jobsite safety.

⁵⁵ William F. Burke, BSBA, David G. Tuerck, Ph.D., "[The Federal Davis -Bacon Act: Mismeasuring the Prevailing Wage.](#)" The Beacon Hill Institute for Public Policy Research, May 2022.

⁵⁶ Sarah Glassman, MSEP, Michael Head, MSEP, David G. Tuerck, Ph.D., Paul Bachman, MSIE, "[The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages.](#)" The Beacon Hill Institute for Public Policy Research, February 2008.

⁵⁷ "[Highway Robbery.](#)" Joint Economic Committee Republicans, March 2011

⁵⁸ CBO, "Repeal the Davis-Bacon Act," Dec. 7, 2022, <https://www.cbo.gov/budget-options/58674>

C. Technical Aspects of DOL Prevailing Wage Regulations Will Create Uncertainty, Reduce Competition and Increase Costs on IRA Projects Without Clear IRS Guidance

The PWA NPRM incorporates by reference numerous, long-standing DOL policies that have created confusion for the regulated community and remain unclear. In addition, new changes in Davis-Bacon Act regulations that expand the scope of the Davis-Bacon Act and favor the broader adoption of union prevailing wage rates, without defining job classification descriptions, will create additional confusion.⁵⁹

1. Contractors Need Regulatory Clarity Concerning the Correct Rates of Pay and Job Descriptions for Job Classifications Tied to Union Work Rules—Contained in Union Collective Bargaining Agreements—When Union Rates are Adopted as the Prevailing Rate in the Government Wage Determination

Under a 1977 DOL decision by its Wage Appeals Board in the case of Fry Brothers Corp.,⁶⁰ the DOL applies union work rules and job descriptions to any classification for which the union wage rate is found to “prevail” in the DOL’s wage determination process. Often these job duties are not published anywhere—except perhaps in union collective bargaining agreements that are generally not available to the public when a contractor is bidding on a project.

Despite this lack of transparency, nonunion contractors are frequently penalized for assuming that their understanding of commonly used craft terms like “carpenter,” “electrician” and “roofer”—and construction activity and union jurisdictional disputes associated with these crafts—are correct. This makes it difficult for taxpayers and contractors to determine the appropriate wage rate that corresponds with many construction-related jobs and activities. A lack of regulatory clarity has caused confusion by government, contractor and private-sector stakeholders. Unintentional violations have triggered resource-consuming DOL investigations, contract withholdings, penalties and even litigation—which all undermines a company’s ability to be profitable in an industry with extremely low profit margins. The result of this “cloak-and-dagger” regulation is needless added risk that discourages competition from small businesses and/or increases costs.⁶¹

In addition, this forced adoption of potentially inefficient union work rules and job classifications requires contractors to ignore the productive work practices successfully used in the merit shop construction industry that allow construction workers to perform activity

⁵⁹ 88 Federal Register 60024 – 26 <https://www.federalregister.gov/d/2023-18514/p-53>

⁶⁰ See Fry Brothers Corp., WAB No. 76-06 (WAB June 14, 1977), available at U.S. DOL Office of Administrative Law Judges Reporter website: https://www.oalj.dol.gov/public/dba_sca/decisions/arb_decisions/dba/76wb06w.htm?_ga=2.49393761.61535495.1697548768-1144311598.1693243350

⁶¹ Of note, companies that undergo government investigations for violating wage and hour laws report that the legal and administrative cost of defending against an alleged violation is often greater than the cost of alleged back wages owed. Many firms settle such claims without trying to prove innocence because of the costs. In addition, for firms that are exonerated during an investigation, the cost to prove innocence is often more than the alleged discrepancy in pay. In short, everyone loses when unclear prevailing wage laws are weaponized against certain firms.

across multiple trades.⁶² These regulations undermine the benefits of multiskilling, increase construction costs and eliminate a strategy to mitigate the industry's skilled labor shortage and increase labor productivity.⁶³

On the other hand, if the union wage scale does not prevail for a given trade listed in the wage determination, then the DOL will conduct an area practice survey to resolve disputes over which classification should perform the work. Contractors are held to be fully liable for incorrectly determining which job classification should perform each assigned tasks under a project, and only the position of the DOL, not the contracting officer or general contractor, controls the outcome.

In response to the October 2023 survey, ABC contractors expressed concerns regarding the impact of these opaque regulations on worker classification. In fact, 98% of respondents agreed that complying with union work rules where collectively bargained union wage rates prevail would increase the burden of complying with IRA prevailing wage requirements.⁶⁴ This is particularly concerning for the many contractors on IRA projects that will not have experience with the peculiarities of prevailing wage regulations.

ABC strongly recommends that the IRS clarify its guidance to state that taxpayers, contractors and subcontractors will not be penalized for failing to conform to job descriptions that are not published by the DOL and/or the unions whose wage scales are found to be "prevailing." At a minimum, no intentional violation penalty should be assessed in the absence of publication of the job descriptions for each trade, which can be readily accomplished by posting hyperlinks to union collective bargaining agreements, or the DOL's dictionary of occupation definitions.

Compounding the problem of unpublished classifications is that many clean energy projects covered by the IRA call for new technologies and new classifications of workers not covered by the established building trades. Taxpayers and contractors therefore require much clearer guidance to clarify whether individuals performing administrative, computing and professional tasks are construction laborers or mechanics in the first place. This problem is addressed more fully in the next section below.

2. The Department Should Clarify That Many Clean Technology Jobs Are Not Performed by Construction Laborers or Mechanics, But Are Instead Exempt Professional or Administrative Positions That Are Not Properly Covered by the IRA's PWA or GRAP Requirements

⁶² A 2004 [Electrical Contracting Foundation](#) study, [A Comparison of Operational Cost of Union vs. Non-Union Contractors](#), was commissioned by union-signatory contractors, "to investigate the main differences between unionized electrical contractors and open shop contractors, as well as to identify the main cost drivers and how they differ between the two" following "a 30-year decline" in market share of IBEW-signatory contractors. The study found that "the convoluted expectations and regulations of the labor union are an added cost without providing any added value to the stakeholders. On the other hand, open shop contractors enjoy a higher level of freedom that results in lower cost. ... Contrary to common perception, the main difference between the two styles of operations is not the labor cost, but rather how the labor is managed."

⁶³ Construction Industry Institute, "[An Analysis of Multiskilled Labor Strategies in Construction](#)," April 1998.

⁶⁴ [ABC Survey: 98% of ABC Contractors Say Biden's Inflation Reduction Act Labor Mandates Limit Competition on Clean Energy Construction](#), Oct. 24, 2023.

The preamble to the PWA NPRM requests comment on the treatment of working forepersons or owners 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.⁶⁵ This includes “working forepersons who devote more than 20 percent of their time during a workweek to laborer or mechanic duties and who do not meet the criteria for an exemption under 29 CFR part 541” but does not include workers “whose duties are primarily administrative, executive, or clerical.”⁶⁶

In response, the IRS should adhere to the longstanding exemption of working forepersons who spend 20% or less of their work time performing duties of a manual or physical nature. But even more important to the present proceeding is the need for the IRS to identify and exclude from the PWA requirements any employees in clean technology industries covered by the IRA, who are commonly viewed as professional, computing and/or administrative employees in the industry, or who are engaged in material supply and technical oversight, not construction.

More specifically, any workers performing job functions who are exempt under the part 541 rules should be clearly excluded from IRA’s PWA coverage of management employees, foremen, supervisors, architects and engineers.⁶⁷ To be consistent with existing guidance, the IRS should clarify that engineers, inspectors, wind or solar commissioning technicians and similar professional employees are not considered laborers or mechanics for purposes of the PWA requirements. Testers, technical assistants and troubleshooters should also be clearly excluded. Commissioning involves making sure that the new technology, such as wind turbines, are operational in accordance with contractual and industry specifications and compliant with safety guidelines, an activity which is distinct from the construction and installation of new technology products.

Additionally, the final regulations should define scenarios in which PWA requirements are applicable (or not applicable) to equipment installation activities. In general, the DBA does not cover installation work related to supply or service contracts, unless such installation substantially involves construction work that is distinct and separable from the non-construction aspects of the contract.⁶⁸ The IRS should clarify that the PWA requirements align with this treatment of installation services under the DBA and do not extend to supply or service contracts in such situations. The final IRS PWA rule should likewise identify and exclude specialized professional employees that are common in the clean energy industry such as engineers, inspectors, technical assistants, wind technicians and similar employees.

3. The Department Should Clarify the Conformance Process for Clean Technology Projects by Recognizing That New Technologies Have Created New Classifications.

The NPRM proposes to require taxpayers and contractors to request conformances in

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 29 C.F.R. Part 541.

⁶⁸ See, e.g., FOH, sec. 15d13(a) (citing the Service Contract Act regulations at 29 CFR 4.116(c)(2)).

accordance with the DOL's new rules governing conformance requests generally.⁶⁹ The IRS acknowledges that taxpayers may not reasonably determine until shortly before or even after construction begins that a conformance is necessary. But the IRS's PWA NPRM understates the problem confronting many clean energy projects attempting to comply with the IRA's prevailing wage requirements. Clearer guidance is necessary, and specifically the IRS should make clear that taxpayers/contractors will not be penalized for misclassifications arising from delays in DOL's approval of conformances.⁷⁰

In addition, the IRS should address and correct the DOL's inappropriate declaration in its FAQs to the effect that clean technology workers will generally be deemed covered and classified under so-called "established trades," particularly with regard to solar and wind turbine industries.⁷¹ This preemptive ruling—issued without any area practice surveys or meaningful legal support—will, if not corrected by the IRS, have the perverse effect of imposing 20th century job classifications on 21st century technology, in a manner directly contrary to the goals of the IRA to incentivize "new" clean energy construction technologies.

Certainly, where taxpayers and/or contractors can demonstrate that the classifications for which they seek conformances perform their work on a stand-alone basis, not as a component of some other nonprevailing trade in the local area, it is absurd to ignore the separate and unique characteristics of clean energy job classifications as they are currently performed.

4. ABC Comments on Establishing the Effective Date of DOL Wage Determinations

The IRS PWA NPRM states that wage determinations take effect on IRA-covered projects "when construction begins."⁷² In contrast, the DOL has long held that the WDs take effect when the project is "awarded," unless construction does not begin within a reasonable period (90 days).⁷³

At the same time, the IRS' reliance on the term of art under the tax code ("when construction begins") is a significant limitation on the applicability of prevailing wage requirements, i.e., excluding "preliminary activities that do not constitute "construction, alteration or repair."⁷⁴

⁶⁹ See 88 Federal Register 60025, referencing 88 Federal Register 57526.

⁷⁰ See information about the DOL's conformance process: <https://www.dol.gov/sites/dolgov/files/WHD/davis-bacon/conformance.pdf>.

⁷¹ See [Prevailing Wage and the Inflation Reduction Act | U.S. Department of Labor \(dol.gov\)](https://www.dol.gov/sites/dolgov/files/WHD/davis-bacon/conformance.pdf) (declaring without any legal basis that "solar installation" will not be listed as job classifications in DOL wage determinations, and that wind turbines should similarly be classified based on established trades in the wage determinations). See also 88 Federal Register 57592 ("Even if workers perform only a subset of the duties of a classification, they are still performing work that is covered by the classification, and conformance of a new classification thus would be inappropriate.").

⁷² 88 Federal Register 60020.

⁷³ See 29 C.F.R. 1.6(a): Application, validity, and expiration of wage determinations—(1) Application of incorporated wage determinations. Once a wage determination is incorporated into a contract (or once construction has started when there is no contract award), the wage determination generally applies for the duration of the contract or project, except as specified in this section.

⁷⁴ IRS, Beginning of Construction for Sections 45 and 48 (Notice 2016-31) at 8 – 9, available at: <https://www.irs.gov/pub/irs-drop/n-16-31.pdf> ("As provided in section 4.02(1) of Notice 2013-29, physical work of a significant nature does not include preliminary activities, even if the cost of those preliminary activities is properly included in the depreciable basis of the facility. Generally, preliminary activities include, but are not limited to: (1) planning and designing; (2) securing financing; (3) exploring; (4) researching; (5) conducting geologic mapping and modeling; (6) obtaining permits and licenses; (7) conducting geophysical, gravity, magnetic, seismic and resistivity surveys; (8) conducting environmental and engineering studies; (9) performing activities to develop a geothermal deposit prior to valid discovery; (10) clearing a site; (11) conducting test drilling to determine soil condition; (12) excavating to change the contour of the land (as distinguished from excavation for footings and foundations); and (13) removing existing turbines, solar panels, or any components that will no longer be part of the facility.").

The IRS should clarify that the distinct purposes of establishing the beginning of construction, as opposed to project award of contracts, Thus, applicable DOL wage rates should be established for the life of the project when construction contracts are awarded, not when construction begins (unless there is no contract award), consistent with current DOL rules. But the beginning of construction is the appropriate measure of when the prevailing wage requirements of the DBA begin to apply at all. It may take months for a project to break ground after a contract is awarded to a general contractor. It may take even longer for certain subcontractors to perform work on a qualifying project, depending on the sequence of construction. The application of any new wage rates following contract award will disrupt contractor's bids and project financing and create needless uncertainty and financial risk.

III. ABC Responses to the PWA NPRM's Apprenticeship Requirements

The PWA NPRM requires that taxpayers ensure that its construction contractors use apprentices from government-registered apprenticeship programs, commonly known as GRAPs, in order to access the new enhanced tax incentives within the IRA.

Most significantly, the NPRM requires taxpayers and contractors to utilize GRAP-enrolled apprentices for 12.5% of all construction work hours in 2023—and 15% of all construction work hours in 2024 and thereafter—for qualifying clean energy construction projects in order to access the enhanced tax incentives of the IRA.⁷⁵ Additionally, all contractors with four or more employees on a jobsite must utilize at least one registered apprentice and comply with applicable apprenticeship ratios.⁷⁶

The NPRM provides a Good Faith Effort Exception from these apprenticeship requirements. To receive the GFEE, taxpayers and contractors must submit a written request for GRAP-enrolled apprentices to a qualifying program with a usual practice of entering into agreements with employers for the placement of apprentices that is denied or ignored for five business days.⁷⁷

As outlined below, the INPRM's imposition of unprecedented GRAP participation requirements on private construction projects pose serious concerns regarding GRAP capacity and sufficient availability of registered apprentices. In addition, the PWA NPRM raises several questions regarding the interpretation of labor hour requirements, the usefulness of the GFEE and other provisions that must be clarified by the IRS final rule.

1. Understanding Limitations of Construction Industry Government-Registered Apprenticeship Programs

ABC and many ABC members support GRAPs as an important part of an all-of-the-above approach to workforce development within the construction industry.⁷⁸ As discussed in the About ABC section of this letter, many ABC members participate in the government-registered

⁷⁵ <https://www.federalregister.gov/d/2023-18514/p-370>

⁷⁶ <https://www.federalregister.gov/d/2023-18514/p-375>

⁷⁷ <https://www.federalregister.gov/d/2023-18514/p-377>

⁷⁸ [ABC: Government-Registered Apprenticeship System Alone Won't Solve Construction Labor Shortage](#), May 3, 2023.

apprenticeship system. However, the vast majority of the construction industry and ABC's membership participates in workforce development strategies outside of the GRAP system. For contractors who do participate in the GRAP system, they participate in different ways, which the PWA NPRM fail to account for and appreciate in its proposed Good Faith Effort exception, as is further discussed below.

Nationwide, ABC's network of 68 chapters currently provides almost 450 GRAPs in more than 20 construction industry trades such as electrical, plumbing, carpentry, HVAC, etc.⁷⁹ Typical ABC chapter GRAPs last four or five years—depending on the trade—and use curriculum created by the NCCER.⁸⁰ ABC chapter GRAP participants graduate to journey person status after completing all related technical instruction and on-the-job training hours identified in Appendix A of the approved apprenticeship standards.⁸¹

Typically, ABC member contractors who participate in ABC chapter apprenticeship programs sponsor individual employees through their progression in an ABC chapter apprenticeship program. In addition, a small handful of ABC chapters offer GRAPs with a pool of apprentices that are shared across multiple employer participants. Alternatively, many ABC members have their own GRAPs approved by appropriate federal or state regulatory agencies in charge of apprenticeship programs. Contractors run these independent of ABC chapters and/or rely on ABC to help take care of the paperwork and registration process, but classroom hours are not performed in ABC facilities. Other ABC members sponsor employee apprentices in other programs provided by third parties (schools, other trade associations, etc.) not affiliated with ABC. Finally, ABC's union-signatory ABC members typically participate in one or more joint-apprenticeship training committee programs administered by their signatory union(s) where multiple employers utilize apprentices from a shared pool of apprentices specific to a construction trade.

ABC has broad concerns that the current GRAP system cannot accommodate the influx of industry demand for participants in GRAPs in many regional marketplaces and trades because of new infrastructure spending and regulations. In the next five to 10 years, the construction industry is bracing for hundreds of billions of dollars of additional infrastructure spending and tax incentives above baseline levels of annual spending as a result of the \$270 billion in tax incentives in the IRA for the construction of clean energy construction projects; \$550 billion in additional infrastructure investments from the Infrastructure Investment and Jobs Act; \$50 billion from the CHIPS and Science Act to rebuild domestic microchip manufacturing; \$330 billion in federal funding from the American Rescue Plan Act of 2021 permitted to address state and local infrastructure needs; and additional government and private investments in infrastructure, public buildings, housing, manufacturing, clean energy, IT, health care, defense and other construction activity across America that will result in trillions of U.S. dollars in new domestic construction put in place.⁸²

⁷⁹ To review ABC chapter GRAPs, visit www.abc.org/GRAPMAP.

⁸⁰ National Center for Construction Education and Research, available at <https://www.nccer.org/>.

⁸¹ Of note, there are ways to accelerate the education and time-based requirements in certain circumstances; for example, the granting of advanced standing or credit for previously acquired experience, training or skills for all applicants equally, with commensurate wages for any progression step so granted.

⁸² See historical construction put in place by industry segment, https://www.census.gov/construction/c30/historical_data.html.

In the aforementioned survey, ABC contractors also expressed serious doubts that sufficient GRAPs and apprentices would be available to meet IRA requirements. Eighty-five percent stated that the necessary GRAPs have not been established in their area, and 90% agreed that not enough apprentices are currently enrolled in GRAPs to provide a workforce capable of meeting the GRAP labor hour requirements.⁸³

According to an ABC analysis of data from the DOL,⁸⁴ in FY 2022, the construction industry's state and federal government-registered apprenticeship system produced roughly 45,000 completers of its four-to-five-year apprenticeship programs. At current rates of completion, it would take 12 years for all construction industry GRAPS to supply the estimated 546,000 skilled construction workers needed just in 2023.⁸⁵ This workforce shortage estimate does not account for future additional construction spending from the IRA and other programs and the related demand on GRAP programs, instructors and participants.

In addition, a 2015 report issued by construction unions⁸⁶ claims that, "among [government-registered program] construction apprentices, 74% are trained in the unionized construction sector known as the joint apprenticeship training committee (JATC) system," according to DOL Employment and Training Administration data from 2014 referenced in the report.⁸⁷ If accurate, this means that roughly a quarter of all GRAP participants are enrolled in nonunion GRAPs.

These data demonstrate that the vast majority of upskilling and workforce development in the construction industry occurs outside of union and nonunion GRAPs. In addition, an even greater percentage of construction industry workforce development and upskilling occurs in programs not affiliated with union GRAPs because union-affiliated apprenticeship programs are almost all registered with the DOL and state equivalents and are captured in government data on GRAPs.

Coupled with the fact that just 11.7% of the U.S. construction workforce belongs to a union,⁸⁸ and in many states the union workforce membership is less than 5%,⁸⁹ there is a very real chance that the IRA's GRAP participation requirements will create a host of problems for clean energy developers and construction industry stakeholders that will be even more problematic in certain regions of the country.

⁸³ Id.

⁸⁴ According to communication and data from the DOL Office of Apprenticeship provided to staff to ABC on Feb. 10, 2023, data from the DOL's Registered Apprenticeship Partners Information Data System (RAPIDS) indicated that in FY 2022 the construction industry's 8,439 government-registered apprenticeship programs had 179,869 active apprentices and produced just 29,038 completers. There are a handful of states that do not contribute to the RAPIDS program dataset, so an ABC analysis of DOL data estimates roughly 45,000 apprentices completed GRAPs in 2022. See [data tables](#) hyperlinked in "ABC: Government-Registered Apprenticeship System Alone Won't Solve Construction Labor Shortage," ABC, May 3, 2023. Of note, in the summer of 2023, the DOL published a beta website containing data and statistics on GRAPs and participants etc., available at <https://www.apprenticeship.gov/data-and-statistics>.

⁸⁵ <https://www.abc.org/News-Media/News-Releases/construction-workforce-shortage-tops-half-a-million-in-2023-says-abc>

⁸⁶ See page 6 of Construction Apprenticeship, The "Other Four-Year Degree," by the North American Building Trades Unions, available at https://partners.aflcio.org/system/files/2_bctd-appren-four-yr-degree-2015.pdf.

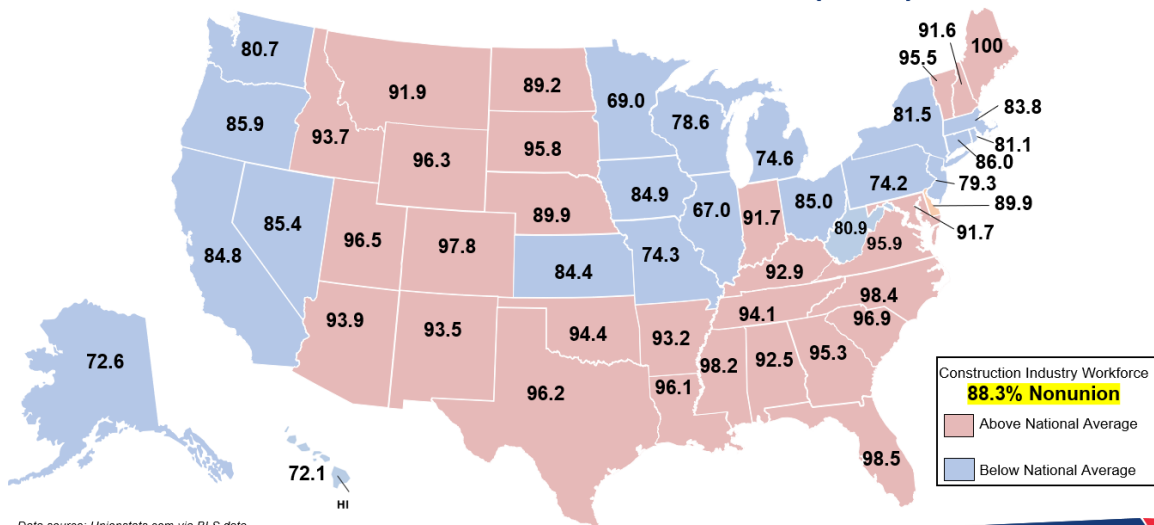
⁸⁷ Note: At the time this report was published, the DOL did not provide data on union vs. nonunion apprentices enrolled in registered apprenticeship programs to the public in an aggregate version/report. It is unclear if the DOL shared this data or if additional assumptions were made by report authors based on DOL data requested and calculated.

⁸⁸ "Union Members – 2022," Bureau of Labor Statistics, Jan. 19, 2023.

⁸⁹ See map: <https://thetruthaboutplas.com/2023/04/18/more-data-project-labor-agreement-schemes-hurt-vast-majority-of-u-s-construction-workforce/>.



STATE-BY-STATE CONSTRUCTION INDUSTRY NONUNION WORKFORCE DENSITY (2022)



For example, clean energy developers in the South who engage in carbon sequestration, solar, wind and other types of clean energy production are especially vulnerable to this IRA policy because there are few GRAPs in these markets and a small number of unionized workers and union hiring halls and affiliated apprenticeship programs. These new policies will result in delays until GRAPs can be registered and approved by federal and state governments and are widely adopted by contractors.

Feedback from ABC contractors who do not participate in GRAPs indicate they prefer existing, industry-driven workforce development programs that produce a safe, competent and productive workforce through innovative and flexible learning models like just-in-time task training, competency-based progression and work-based learning. In addition, some contractors participate in workforce development programs through vocational and technical schools and community workforce development program partnerships that are not registered with the state or federal government, in order to attract minorities, women, veterans and other stakeholders in a community into the construction industry. ABC's October 2023 survey confirmed that contractors continue to have these concerns when asked why they do not participate in a GRAP, with 48% citing the paperwork and regulations associated with GRAPs and 32% pointing to the sufficiency of in-house training.⁹⁰

It is a common misperception by construction industry outsiders that GRAPs are the only way to attract new workers into the construction industry and educate a skilled, safe, productive and diverse workforce. In general, the majority of construction industry workforce development

⁹⁰ [ABC Survey: 98% of ABC Contractors Say Biden's Inflation Reduction Act Labor Mandates Limit Competition on Clean Energy Construction](#), Oct. 24, 2023.

is done in-house by contractors without the GRAP bureaucracy, and progression is based on skill, merit, competency and safety in contrast to progression through GRAPs based on time.

In short, construction industry workforce development is done through an all-of-the-above strategy relying on employers, unions, trade associations, colleges, trade schools and community workforce development partners. Many of these programs are not GRAPs.

While it is likely handcuffed by bad policy contained within the IRA legislation itself, the IRS and clean energy proponents must recognize that Congress did not intend to exclude over 88% of the construction industry from performing work on clean technology projects, and created the GFEE to ensure that no such result occurs. Specifically, as is further discussed below, the IRS final rule should honor Congress's exemption of contractors who make good-faith efforts to register apprentices in a GRAP but are denied that opportunity by overly restrictive state or federal apprenticeship regulatory, or by the ongoing shortage of GRAP opportunities in the industry.

In addition, the PWA NPRM fails to consider the reality that there are already credentials for certain types of clean energy construction tasks and activity (solar, EV charger installation, etc.) independent of GRAPs. The IRA text and the IRS PWA NPRM fails to consider inclusion of these programs and fails to justify why these programs do not count toward workforce development goals and rigid apprenticeship utilization requirements. This is especially salient because the PWA NPRM makes it clear that GRAPs satisfy these requirements regardless of whether they have a curriculum specific to clean energy construction activity.

Nevertheless, the IRA's novel imposition of apprenticeship requirements on clean energy developers and contractors is leading to much confusion and rapid disruption within the industry, which can be somewhat alleviated with a thorough and clear PWA final rule addressing concerns raised in ABC's response to the NPRM.

2. Specific ABC Comments on the NPRM's Government-Registered Apprenticeship Utilization Requirement.

Developers and contractors have flooded ABC with questions about the IRA requirement that contractors utilize GRAP-enrolled apprentices for 12.5% of all construction work hours in 2023—and 15% of all work hours in 2024 and thereafter—for clean energy construction projects in order to access the IRA's new enhanced tax incentives.⁹¹

ABC's comments summarize common questions ABC has received that have not been adequately addressed in the Initial IRS Guidance, FAQs and the PWA NPRM.

A. ABC comments on stakeholder questions about the scope and timing of GRAP utilization requirements.

⁹¹ "Labor hours. The term labor hours means "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. Labor hours do not include hours worked by foremen, superintendents, owners, or persons employed in bona fide executive, administrative, or professional capacities (as defined in 29 CFR part 541)." <https://www.federalregister.gov/d/2023-18514/p-370>.

ABC supports—and the PWA final rule should clarify—that the IRA does not impose a total labor hours percentage of apprenticeship workers on any individual contractor or subcontractor. Section 45(b)(8)(C) makes clear that each individual taxpayer, contractor or subcontractor employing four or more individuals to perform construction, alteration or repair work is only required to employ “1 or more qualified apprentices to perform such work.” Allowing the clean energy project developer and its contractors flexibility to achieve this goal makes the most sense.

However, the PWA final rule must clarify the timeframe of when the total percentage of apprenticeship hours worked in relation to the total construction hours should be calculated by project developers/taxpayers. The IRA legislative text on its face appears to require that the calculation be made only at the conclusion of the project, or at least at the conclusion of the construction, alteration or repair portion of the project. This is logical because only then will the “total labor hours” of construction work performed on the project be known. In contrast to what some commenters have suggested, it will not be possible to guarantee a steady 15% of all construction work hours performed by apprentices at all times throughout a project because of the sequencing, subcontracting strategies and general nature of construction activity.

Likewise, some work performed by contractors and subcontractors may only occur at specific stages of the project and will be completed and paid for long before the total labor hours on the project are known at its completion.

The initial IRS guidance appears to support this commonsense interpretation as well.⁹² However, ABC has fielded questions from stakeholders suggesting that the PWA NPRM does not support this interpretation, or at least raises additional confusion about the timing.

B. ABC Comments on The Labor Hours Requirement “Denominator” Problem

ABC appreciates that the PWA NPRM defined which construction workers are eligible to meet the project’s labor hours requirement.⁹³

However, clean energy project developers and contractors need crystal clear guidance about the denominator (the total construction labor hours worked on a qualifying clean energy project) and the numerator (the construction hours worked by apprentices) of the calculation in order to satisfy the IRA’s goal that 15% of all work hours must be performed by apprentices enrolled in GRAPs in order for developers to receive enhanced IRA tax credits.

For example, it should be made clear that construction labor hours performed by small contractors with less than four employees do not count toward the total construction labor hours on a project (the denominator).⁹⁴ There may be a limited—but not insignificant—portion of labor hours performed by such small firms on a clean energy project. These small

⁹² See [87 Federal Register 73584](https://www.federalregister.gov/2023/07/27/73584): The IRS provided a hypothetical example of a taxpayer in full compliance with IRA GRAP requirements. One of the taxpayer’s contractors performed 1,000 labor hours and only employed GRAP apprentices for 100 labor hours, just 10% of the contractor’s total. The taxpayer remained in compliance as the total apprenticeship labor hours of the entire project (1,250 hours out of 10,000 total) met the 12.5% requirement for 2023.

⁹³ <https://www.federalregister.gov/d/2023-18514/p-414>

⁹⁴ Notably, the IRA does not impose a total labor hours percentage of apprentices on any individual contractor or subcontractor. Section 45(b)(8)(C) makes clear that each individual taxpayer, contractor or subcontractor employing four or more individuals to perform construction, alteration, or repair work is only required to employ “1 or more qualified apprentices to perform such work.”

contractors are not required by the IRA or the PWA NPRM to utilize at least one apprentice on the project. This exception is appropriate and logical because small specialty subcontractors are typically not large enough to benefit from participating in a GRAP—especially with GRAP apprenticeship-to-journeyman ratios that might limit apprenticeship utilization—as discussed further in ABC’s comments on ratio requirements.

In addition, there may be contractors who have employees operating in specialty trades performing construction-related activity that aren’t apprentice-able, meaning there are no GRAPs for this type of work.⁹⁵

Further, for contractors who are granted the GFEE discussed later in ABC’s comments, the IRS final rule should clarify that all hours performed by their journeymen do not count towards the total labor hours (denominator). If they do count toward the project’s total labor hours, that will create additional pressure on other contractors/trades to increase the use of apprentices, which may not be feasible with apprenticeship ratios and a limited population of apprentices enrolled in GRAPs.

ABC recommendation: All of the hours performed by such small, GFEE and other “exception” contractors discussed in this section should be eliminated from the project’s total labor hours of construction (the denominator) so apprenticeship utilization (the numerator) can be achieved fairly and realistically by remaining contractors/trades without additional regulatory burden.

C. ABC Comments on Apprenticeship Ratios

Treasury and the IRS have requested comments on the application of the Ratio Requirement for purposes of satisfying the Apprenticeship Requirement.⁹⁶

In general, apprenticeship ratios mandate the number of journeymen that must be used for each apprentice utilized on a project.

According to 29 C.F.R. 29.(5)(b)(7), the federal code that governs the eligibility and approval requirements of an apprenticeship program, an apprenticeship program sponsor must include as a standard:

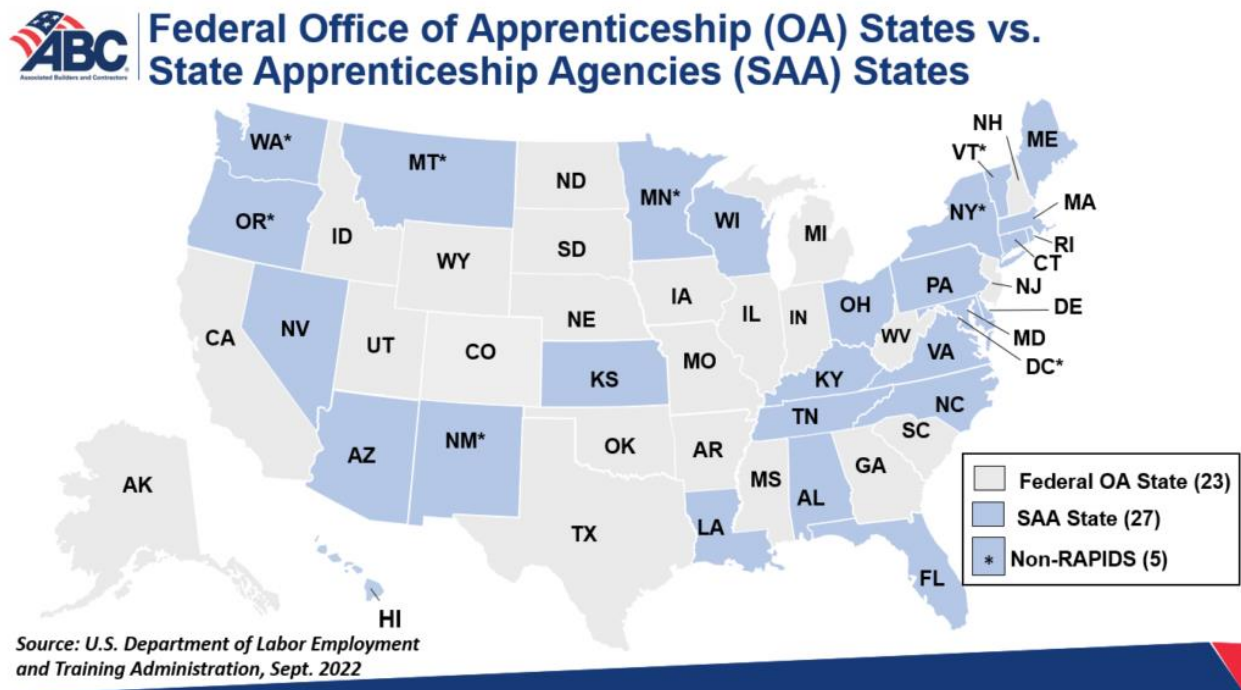
“A numeric ratio of apprentices to journeymen consistent with proper supervision, training, safety and continuity of employment, and applicable provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements. The ratio language must be specific and clearly described as to its application to the job site, workforce, department or plant.”

The DOL’s Office of Apprenticeship approves apprenticeship programs and oversees apprentices in 23 states commonly known as Office of Apprenticeship States. In OA states, the

⁹⁵ In general, ABC agrees with the IRS PWA NPRM’s assessment that pre-apprentice programs and participants do not count towards the PWA NPRM’s GRAP requirements of hours worked.

⁹⁶ <https://www.federalregister.gov/d/2023-18514/p-115>

DOL generally promotes a consistent apprentice-to-journeyworker ratio but it permits OA GRAP sponsors to request a more relaxed or restrictive ratio specific to certain trades.⁹⁷



The remaining states, known as State Apprenticeship Agency states, run their own state apprenticeship system—which includes approving new GRAPs and establishing related regulations, including regulations concerning apprenticeship ratios. However, SAA states operate within a broader regulatory framework established by the U.S. DOL’s OA in order to be recognized by the U.S. DOL Office of Apprenticeship.⁹⁸ This semi-autonomy can lead to differing ratios by trade, creating a complex web of laws and compliance requirements for contractors operating across multiple states and barriers to younger workers entering the workforce as apprentices.

Of note, government regulators in certain OA states delay or refuse to register new apprenticeship programs offered by providers not affiliated with unions. They weaponize the apprenticeship system to eliminate competition and steer contracts to unionized contractors. For example, California’s denials of nonunion GRAPs are based on a so-called “needs” test, meaning these programs already exist in a state or geography, so no more competing programs are necessary. This action has been disavowed by the DOL but it has done little else to bring California into compliance. In other OA states like Washington and New York, the entities responsible for approving new GRAPs are notorious for arbitrarily delaying and denying the approval of new GRAPs from applicants not affiliated with unions. Union interests then lobby the legislature and regulators in these discriminatory OA states to pass policy requiring the use of enrolled and/or graduated apprentices from SAA-approved GRAPs on public works projects, which restricts competition from qualified local nonunion contractors and

⁹⁷ See U.S. DOL Employment and Training Administration, OA, Circular 2021-02 Guidelines for Reviewing Apprenticeship to Journeyworker Ratio Request, Jan. 12, 2021: <https://www.apprenticeship.gov/sites/default/files/bulletins/Circular%25202021-02%2520FINAL%25201.12.21.doc>.

⁹⁸ https://www.apprenticeship.gov/sites/default/files/bulletins/circular-2023-02_0.pdf

denies jobs to local nonunion construction workers. Likewise, SAA regulators have been known to pervert apprenticeship ratio policies in order to give contractors affiliated with union GRAPs a competitive advantage in public works contracting.

Apprenticeship stakeholders have called for reforms to restrictive apprenticeship ratios because of the skilled labor shortage facing the construction industry and the need to simplify and modernize apprenticeship laws and regulations. Onerous and outdated apprentice-to-journeyworker hiring requirements—many of which haven’t been updated in years—only exacerbate this workforce shortage at the expense of new workers seeking to become an apprentice.

Under current laws and regulations in many states, when contractors and employers want to grow their company or replace departed workers by bringing on new apprentices, they are also required to also utilize multiple journeyworkers per apprentice. In too many trades, there aren’t enough journey-level workers to meet these requirements, meaning the apprentice is never hired and the contractor can’t grow and compete for more work. For example, a 2015 study required by the Connecticut General Assembly and written by the state’s bipartisan Legislative Program Review and Investigations Committee found that “nearly two-thirds of the occupations appear to be under-enrolling apprentices to meet projected demand for journeypersons,” while a quarter of the occupations “appear to have too many.”⁹⁹ Put simply, artificially inflated apprenticeship ratios handcuff contractors’ ability to hire and expand their businesses and invest in existing apprenticeship pipelines and tomorrow’s construction workforce.

Reforming these burdensome regulations is especially beneficial to small contractors, which often don’t have the resources to hire multiple journeyworkers to comply with exceptionally high apprenticeship ratio requirements.

In addition, some states permit a two-tiered apprenticeship ratio system. Under this nonsensical and discriminatory system, which is used in a handful of states, including Pennsylvania and Washington, union contractors and merit shop contractors abide by two different sets of apprenticeship ratios. In Pennsylvania, for example, nonunion programs follow a ratio of 1 apprentice for every 4 journeyperson, while union programs adhere to whatever is specified in their collective bargaining agreement, which is more favorable than the restrictive ratio that applies to nonunion contractors. Reforming these disparate ratios will level the playing field and allow all contractors to expand their companies and compete for more work.

Additionally, contractors that perform work in multiple states are burdened with complying with apprenticeship ratios that can significantly differ from state to state. Accepting apprenticeship-to-journeyworker ratios that are at least a 1-to-1 ratio—while still upholding the highest safety standards—will allow contractors to grow their businesses by making it easier to comply with regulations across state borders.

It is no surprise that apprenticeship ratio reform has gained momentum in recent years with numerous revisions to state ratios as a result of policy passed by state regulators and/or

⁹⁹ [“Apprenticeship Programs and Workforce Needs,”](#) Legislative Program Review and Investigations Committee, Connecticut General Assembly, December 2015, p. 27.

legislatures. For example, in 2016, Michigan reformed its apprenticeship ratio requirements by increasing the required ratio of electrical apprentice-to-journeyworker ratios from 1-to-1 to 3 apprentices-to-1 journeyworker. By instituting these reforms, Michigan lawmakers ensured that electrical contractors are able to meet increased hiring demands and employ a steady workforce for the future. In 2018, Wisconsin reformed an outdated apprenticeship ratio law that said the first apprentice may be hired on a 1-to-1 apprentice-to-journeyworker ratio. However, for each additional apprentice hired, the number of journeyworkers required increased for most trades. For example, if a contractor employed a second carpentry apprentice, they were then required to hire four journeyworker carpenters. The number of journeyworkers required per apprentice increased all the way up to the 12th apprentice, where thereafter three skilled carpenters were required for each additional apprentice. Reforms to this nonsensical and burdensome regulation were widely celebrated by apprenticeship stakeholders and it has led to growth in GRAP enrollment and contractor participation in Wisconsin.

In its October 2023 survey, ABC members cited apprenticeship ratios as a potential barrier to compliance with IRA requirements, with 84% of respondents agreeing that apprenticeship ratios are likely to limit their ability to meet the 15% labor hour requirement.¹⁰⁰

With respect to the PWA NPRM, restrictive apprenticeship ratios in certain states may make it difficult—if not impossible—for contractors to satisfy the IRA’s apprenticeship utilization requirements. This is especially likely if construction hours performed by contractors with less than four employees and firms receiving a GFEE from the apprenticeship requirement—as discussed previously—are not eliminated from the project’s total workforce hours denominator, as recommended by ABC.

With respect to GRAP apprenticeship ratio reciprocity, ABC appreciates the flexibility proposed by the PWA NPRM:

“v) Reciprocity of ratios and wage rates. If a taxpayer, contractor, or subcontractor is performing construction alteration, or repair work on a facility in a geographic area *other than the geographic area in which an apprenticeship program is registered*, the ratios and wage rates (expressed in percentages of the journeyworker’s hourly rate) applicable within the geographic area in which the construction, alteration, or repair work is being performed must be observed. If there is no applicable ratio or wage rate for the geographic area of the facility, the ratio and wage rate (expressed in percentages of the journeyworker’s hourly rate) specified in the registered apprenticeship program standard must be observed.”¹⁰¹

However, ABC recommends enacting additional flexibility that permits a contractor to choose the apprenticeship ratio from either where the GRAP is registered, *or* the state where the IRA project in question is being performed. This should help multistate contractors navigate complicated regulations and burdensome paperwork that impact labor productivity, crew mix and the hiring of additional apprentices. It will also reduce regulatory burdens for small

¹⁰⁰ [ABC Survey: 98% of ABC Contractors Say Biden’s Inflation Reduction Act Labor Mandates Limit Competition on Clean Energy Construction](#), Oct. 24, 2023.

¹⁰¹ <https://www.federalregister.gov/d/2023-18514/p-306>.

businesses. This change may also help alleviate discriminatory apprenticeship ratios enacted by GRAP regulators engaged in favoritism who have inappropriately perverted apprenticeship ratio policy to assist special interests. Contractors can develop appropriate tracking systems directly with subcontractors and owners to account for this change.

In addition, the IRS should use this PWA final rule as an opportunity to address the underhanded practice of OA states' unjustified delay and/or refusal to register apprenticeship programs proposed by nonunion applicants. ABC recommends that IRS grant contractors the GFEE in situations where states have illegally and unjustifiably delayed or denied GRAPs. This will help attract more contractors into the clean energy construction marketplace and push bad actor government regulators to enact reforms that develop the overall GRAP ecosystem instead permitting the pervasive culture of favoritism in some states without consequence.

D. Green Technology Occupations Not Approved as Apprenticeable Occupations by the DOL

On Aug. 25, the DOL's Office of Apprenticeship issued a bulletin addressing whether a solar panel installer is an "apprenticeable" occupation for which a registered apprenticeship program can be approved by OA or state apprenticeship agencies delegated authority by DOL to approve apprenticeship programs for federal purposes, including prevailing wage.

The bulletin states that, "based on the current information available, [the OA] is not able to conclude that solar panel installation occupations are clearly identified and commonly recognized as distinctive occupations because the work processes and job activities involved in these occupations significantly replicate those of other existing apprenticeable occupations, such as electricians, iron workers, operating engineers, carpenters, and laborers."¹⁰² The DOL issued this ruling in direct contradiction of its own O*NET dictionary of occupational definitions, which recognizes solar photovoltaic installers and related occupations as an established trade.¹⁰³

As discussed above, ABC recommends that the IRS should not adopt such a narrow definition of apprenticeable occupations, for all the reasons discussed above with regard to the current shortage of GRAP programs and apprentices generally. The IRS should use its influence to persuade DOL to approve more programs and not impose arbitrary restrictions such as those evidenced by the recent DOL bulletin.

E. ABC Comments on Good Faith Effort Exception

The IRS requested 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."¹⁰⁴

¹⁰² U.S. DOL Office of Apprenticeship [Bulletin No. 2023-124](#), Aug. 25, 2023. Accessed Oct. 29, 2023.

¹⁰³ See [O*NET 47-2231.00](#).

¹⁰⁴ <https://www.federalregister.gov/d/2023-18514/p-126>.

ABC comments that it is unlikely that the GFEE, as currently defined in the PWA NPRM,¹⁰⁵ is useful or practical for most nonunion contractors, which make up the vast majority of the construction industry and employ more than 88% of the U.S. construction workforce.

In addition, the GFEE process described in the PWA NPRM departs from the plain language of the IRA¹⁰⁶ by imposing arbitrary requirements such as the 120-day renewal, specific limiting information governing requests for apprentices and arbitrary limits on what constitutes a “denial” of a request for apprentices.

The PWA NPRM also imposes a new and arbitrary restriction on the geographic scope of requesting apprentices from registered programs that is not authorized by the statute.

The final rule should make clear that a taxpayer or contractor is *permitted* to request apprentices from a program located in the same geographic area as the project but is not required to do so. The PWA NPRM should also include a valid basis for the GFEE as long as any request to a GRAP for apprentices is denied because one or more GRAPs of an apprenticeable occupation have been arbitrarily denied approval by a federal or state apprenticeship agency. In any event, the PWA NPRM’s treatment of the GFEE should be substantially revised to avoid creating significant additional paperwork burdens for businesses that are not sufficiently recognized in the PWA NPRM’s inadequate regulatory analysis discussed further in Section VI of ABC’s comments.

ABC contractors that responded to the October 2023 survey agreed that the currently proposed GFEE is unworkable for nonunion contractors. In the survey, 91% stated that the current GFEE is not workable and does not align with their current GRAP practices, and 93% believe that the current GFEE guidance does not provide sufficient clarity regarding how it will apply to the overall labor hour requirements.¹⁰⁷

The IRS should clarify how the proposed GFEE might work for GRAPs that do not share a pool of apprentices, which is the format used by most union GRAPs. If the IRS is truly interested in developing a GFEE that is in alignment and workable for most nonunion contractors and workforce development stakeholders, ABC would welcome the opportunity to collaborate and develop some solutions with the IRS and other stakeholders.

Because of the way that the GFEE has been constructed by the IRA legislative text, ABC has been recommending that contractors participate in association, community-based or employer-run GRAPs to satisfy the IRA policy. ABC has also encouraged workforce development providers and contractors to set up GRAPs in markets underserved by GRAPs. As long as the final rule permits the flexible and practical solution of encouraging reciprocity that permits the use of GRAPs and GRAP participants established in nonlocal/out-of-state markets where nonunion contractors can get their GRAPs approved, the IRA’s GRAP requirements are theoretically workable, notwithstanding the fact that this requirement will increase costs and discourage competition from certain contractors. As proposed in the PWA NPRM, however,

¹⁰⁵ <https://www.federalregister.gov/d/2023-18514/p-377>.

¹⁰⁶ IRA section 45(b)(8)(D)(ii).

¹⁰⁷ [ABC Survey: 98% of ABC Contractors Say Biden’s Inflation Reduction Act Labor Mandates Limit Competition on Clean Energy Construction](#), Oct. 24, 2023.

the GFEE is unworkable for the majority of construction contractors and subcontractors who are needed to fulfill the IRA's statutory objective of incentivizing construction of clean energy projects.

IV. ABC Comments on Penalties, Intentional Disregard, Opportunity to Cure and Recordkeeping

ABC's comments highlight concerns with the approach the PWA NPRM takes regarding penalties for failing to comply with prevailing wage and GRAP requirements and its departure from the statute.

The NPRM outlines punitive correction and penalty procedures for any failure to pay Davis-Bacon prevailing wages. As well as paying back wages to workers to meet the prevailing rate with interest, taxpayers and contractors must also pay a penalty equal to \$5,000 multiplied by the total number of workers that were underpaid.¹⁰⁸ However, if the IRS deems that this underpayment was due to "intentional disregard," the back pay to workers is increased to three times the normal sum and the penalty payment is increased to \$10,000 per worker.¹⁰⁹

The PWA NPRM establishes a similar penalty procedure for failure to meet GRAP requirements, with a penalty of \$50 multiplied by the total labor hours for which GRAP requirements were not satisfied.¹¹⁰ This penalty increases to \$500 per labor hour if the IRS deems the taxpayer or contractor acted with intentional disregard.¹¹¹

The PWA NPRM outlines a number of factors the IRS would consider when analyzing whether a violation was committed with intentional disregard for both prevailing wage¹¹² and GRAP requirements.¹¹³

In addition, the PWA NPRM lays out exceptions to the enhanced intentional disregard penalties associated with failing to meet prevailing wage¹¹⁴ and GRAP requirements,¹¹⁵ respectively.

ABC appreciates the IRS PWA NPRM's creation of waivers for a prevailing wage penalty:¹¹⁶

"(i) Availability of waiver. The penalty payment required by paragraph (c)(1)(ii) of this section to cure a failure to satisfy the Prevailing Wage Requirements in paragraph (a) of this section is waived with respect to a laborer or mechanic employed in the construction, alteration, or repair of a qualified facility during a calendar year if the taxpayer makes the correction payment required by paragraph (c)(1)(i) of this section by the earlier of 30 days after the taxpayer became aware of the error or the date on which the increased credit is claimed under section 45(b)(6), and:

¹⁰⁸ <https://www.federalregister.gov/d/2023-18514/p-311>

¹⁰⁹ <https://www.federalregister.gov/d/2023-18514/p-319>

¹¹⁰ <https://www.federalregister.gov/d/2023-18514/p-390>

¹¹¹ <https://www.federalregister.gov/d/2023-18514/p-399>

¹¹² <https://www.federalregister.gov/d/2023-18514/p-323>

¹¹³ <https://www.federalregister.gov/d/2023-18514/p-401>

¹¹⁴ <https://www.federalregister.gov/d/2023-18514/p-337>

¹¹⁵ <https://www.federalregister.gov/d/2023-18514/p-411>

¹¹⁶ <https://www.federalregister.gov/d/2023-18514/p-337>

(A) The laborer or mechanic is paid wages at rates less than the amount required to be paid under paragraph (b) of this section for not more than 10 percent of all pay periods of the calendar year (or part thereof) during which the laborer or mechanic was employed in the construction, alteration, or repair of the qualified facility; or

(B) The difference between the amount the laborer or mechanic was paid during the calendar year (or part thereof) and the amount required to be paid under paragraph (b) of this section is not greater than 2.5 percent of the amount required to be paid under paragraph (b) of this section.

(ii) Project labor agreements.”

However, ABC recommends that this policy—which is not explicitly authorized in the IRA statute—be amended in the IRA PWA final rule. ABC recommends that it be changed from 30 days to 90 days after the taxpayer became aware of the error. In most circumstances, it will take more than 30 days to sort out some of the unintentional errors that are likely to happen by the novel imposition of unclear PWA policy. The DOL routinely takes months to respond to and resolve inquiries from the regulated community and resolution often involves discussions between multiple subcontractors and employees. In addition, there is no need for sections A and B, as this needlessly complicates efforts to make employees whole following unintentional violations. Of utmost importance, ABC vehemently opposes the PWA NPRM’s waiver of enhanced intentional disregard penalties if a clean energy construction project developer/taxpayer has required its contractors to sign an anti-competitive and inflationary union-favoring project labor agreement, as thoroughly discussed in Section V of these comments.

1. ABC Comments on Additional Criteria That Might Be Used as Part of a Facts and Circumstances Analysis of Intentional Disregard in This Context.

The PWA NPRM requested comments on “intentional disregard, including but not limited to additional criteria that might be used as part of a facts and circumstances analysis of intentional disregard and the applicability of a presumption against a finding of intentional disregard in certain situations.”¹¹⁷

In the absence of clearer guidance from both the IRS and the DOL with regard to the numerous issues discussed above, ABC recommends that no taxpayer or contractor should be penalized under the “intentional” provision of the IRA, absent an admission to that effect.

In addition, ABC recommends that the IRS PWA final rule illuminate the remedies available to developers/contractors to dispute IRS findings that developers/contractors have failed to satisfy the PWA requirement and/or have intentionally disregarded PWA.

2. ABC Comments on Recordkeeping

¹¹⁷ <https://www.federalregister.gov/d/2023-18514/p-106>

ABC raises four concerns specific to recordkeeping requirements in the PWA NPRM for consideration:

1. To the extent the PWA NPRM currently requires taxpayers to collect social security numbers and home address information from contractors regarding the contractors' employees, this creates potential privacy concerns, given that the taxpayers are not the employers of such employees and are not government agencies entitled to collect such information.
2. The PWA NPRM should set clearer limits on the length of time such records need to be maintained.
3. The level of detail imposed on the contractors and taxpayers to prove compliance is going to be extremely burdensome to maintain. Taxpayers should be allowed to rely on certificates of compliance.
4. There are potential antitrust concerns involved in sharing wage information between private parties.

V. ABC Comments Opposing Coercive Efforts To Promote Project Labor Agreement Schemes To Avoid Intentional Disregard Penalties

The PWA NPRM establishes exceptions to the elevated intentional disregard penalties associated with failing to meet prevailing wage¹¹⁸ and GRAP requirements,¹¹⁹ respectively. The PWA NPRM states that developers can avoid severe intentional disregard penalties if they have required contractors to sign a project labor agreement covering construction work on the project seeking enhanced tax credits under the IRA.

ABC is strongly opposed to waiving intentional disregard penalties if developers require PLAs. This violates the plain text of IRA, which includes no PLA requirement and certainly does not authorize waiver of intentional violations based on the discriminatory requirements of a PLA. As further discussed in ABC's comments, this arbitrarily establishes unequal treatment for intentional violations made by union contractors and nonunion contractors who are much less likely to execute PLAs. Typical PLA mandates, whether required by government entities or coerced through regulatory policy—as is the case in this NPRM—discourage competition from nonunion contractors, who employ the overwhelming majority of all construction workers, and deny jobs to their existing workforce through several common PLA provisions summarized in these comments.

In addition, this policy coerces owners into requiring discriminatory and inflationary PLAs as protection against violations attributable to unclear rules established in the IRS's incomplete and inadequate rulemaking on an extremely novel and disruptive application of new policy onto private clean energy construction projects.

¹¹⁸ <https://www.federalregister.gov/d/2023-18514/p-337>

¹¹⁹ <https://www.federalregister.gov/d/2023-18514/p-411>

As discussed further in this section of ABC's comments, there is simply no rationale to incentivize the use of PLAs on clean energy construction projects seeking enhanced IRA tax credits other than to promote the use of union labor and steer contracts to unionized contractors.

1. PLA Mandates Force Contractors to Replace Most or All Existing Employees With Workers From Union Hiring Halls

First, under typical PLAs, nonunion companies must obtain most or all of their employees from union hiring halls. Most often, PLAs prevent contractors from using their existing nonunion workforce. This provision is problematic because firms cannot use most or all of their existing employees whose safety, training, productivity and quality is already quantified so contractors are able to submit an accurate bid and timeline. This provision excludes more than 88% of the U.S. construction workforce from working on IRA clean energy construction projects.

In some PLAs, a nonunion contractor is permitted to use a small number of its existing nonunion workforce, but they must send these employees to the union hiring hall and hope the union dispatches the same workers back to the PLA jobsite, and/or the PLA requires existing nonunion employees to join a union within 10 days of employment on the project and/or pay union dues and fees as a condition of employment.¹²⁰ Survey responses by ABC contractors report that unfamiliar union workers may be of unknown quality and may delay time- and cost-sensitive construction schedules, making delivery of a quality, on-time and on-budget construction product less certain.

If the IRA PWA final rule makes the mistake of allowing developers enacting PLA requirements to avoid intentional disregard penalties, ABC recommends that the IRS define a PLA as one that does not limit participation of its existing workforce in any way.

2. PLA Mandates Require Companies to Obtain Apprentices From Union Apprenticeship Programs, Undermining Workforce Development Strategies

Second, PLAs typically require nonunion companies to obtain apprentices exclusively from union apprenticeship programs.¹²¹

Therefore, apprentices enrolled in federal and state government-registered nonunion apprenticeship programs provided by employers, trade associations, schools and community stakeholders—including almost 450 government-registered apprenticeship programs provided by ABC chapters—cannot work on a job covered by a PLA. This means future construction industry workers enrolled in qualified GRAPs will be excluded from working in their own community simply because these programs are not affiliated with construction unions. This strangles opportunities and career pipelines into the construction industry.

¹²⁰ See TheTruthAboutPLAs.com, [Understanding Core Workforce Provisions in Project Labor Agreements](#), April 7, 2014.

¹²¹ [www.TheTruthAboutPLAs.com](#), "Biden's Project Labor Agreement Schemes Aggravate Construction Industry's Skilled Labor Shortage," June 30, 2023.

Respondents to ABC's 2022 survey of contractor members said PLAs negatively affect company workforce development efforts, with 96% stating that a PLA's union apprenticeship requirements harm their existing workforce development investments.¹²²

In short, PLAs containing union apprenticeship requirements undermine apprenticeship investments and full and open competition, which are key reasons why federal agencies do not require GRAP policies in federal solicitations for construction services and the vast majority of state and local governments refrain from doing so as well. Simply put, a PLA's union-only apprenticeship are likely to exacerbate the construction industry's skilled labor shortage and undermine industry, company and community investments in workforce development that relies on an all-of-the-above mix of upskilling in the construction industry, including government-registered apprenticeship programs, as discussed in detail in Section III of these comments.¹²³

Of note, in rare and limited instances, PLAs can contain language permitting participants from union and nonunion GRAPs when permitted by local union CBAs. If the IRA PWA final rule makes the mistake of allowing developers enacting PLA requirements to avoid intentional disregard penalties, ABC recommends that the IRS define a PLA as one that permits both union and nonunion GRAP participation.

3. PLA Mandates Force Contractors to Follow Inefficient Union Work Rules

Third, PLAs require contractors to follow union work rules specified in each CBA of each construction union party to the PLA, which changes the way contractors otherwise would assign employees to specific job tasks—requiring contractors to abandon an efficient labor utilization practice called “multiskilling” and instead assign work based on inefficient and archaic union craft jurisdictional boundaries defined in each craft's relevant CBA. Open shop contractors achieve significant labor cost savings through multiskilling, in which workers possess a range of skills that are appropriate for more than one work process and are used flexibly across multiple trades on a project or within an organization. This practice has tremendous labor productivity advantages for contractors, but it is forbidden by typical union work rules in union CBAs and, by extension, PLAs.¹²⁴

Contractors forced to work under a PLA's restrictive work rules complain about the complexity of interpreting and matching each union's CBA/work rules to a corresponding construction activity on a jobsite. In addition, ABC contractors consistently raise concerns about how a PLA forces them to hire multiple workers from different unions with different and often conflicting CBAs to complete simple tasks across trade jurisdictions that can be performed by one of their existing employees or a smaller crew of existing employees.

If the IRA PWA final rule makes the mistake of allowing developers enacting PLA requirements to avoid intentional disregard penalties, ABC recommends that the IRS define a PLA as one

¹²² [Survey: 97% of ABC Contractors Say Biden's Government-Mandated Project Labor Agreement Policies Would Make Federal Construction More Expensive](#), ABC Newswire, Sept. 28, 2022.

¹²³ Learn more about ABC's all-of-the-above approach to workforce development at www.abc.org/workforce.

¹²⁴ See www.TheTruthAboutPLAs.com, [Understanding the Merit Shop Contractor Cost Advantage](#), May 17, 2010.

that permits contractors to utilize their own work rules that are independent of union CBAs and any union CBAs included in the PLA.

4. PLA Mandates Force Contractors To Pay Employee Benefits Into Union Plans, Exposing Workers to Wage Theft and Employers to Multiemployer Pension Plan Liabilities

Fourth, PLAs require nonunion companies to pay their workers' health and welfare benefits to union trust funds, even though these companies may have their own bona fide benefits plans. Workers cannot access any of their benefits accrued during the life of the PLA project in union plans unless they decide to leave their nonunion employer, join a union, work for union-signatory contractors and receive enough work and remain in good standing with the union until vested. Research suggests this loss in wages and benefits reduces nonunion employees' paychecks by 34% on PLA projects.¹²⁵ Because few nonunion employees choose to join a union after working on a PLA project, companies typically end up paying benefits twice—once to the union plans and once to the existing company plans—to ensure employees have direct access to earned retirement and benefits assets and to keep their existing employees happy with their current employer in the face of a competitive labor market. Nonunion contractors must factor this double benefits cost into their bid, which research suggests increase nonunion contractors' wage and benefits costs by an estimated 35%,¹²⁶ needlessly putting them at a competitive disadvantage against union contractors that are not saddled with these unnecessary costs.

In addition, paying into underfunded and mismanaged union-affiliated multiemployer pension plans may expose merit shop contractors to massive pension withdrawal liabilities.¹²⁷ Depending on the health of a union-managed multiemployer pension plan, signing a PLA could bankrupt a contractor¹²⁸ or prevent it from qualifying for construction bonds needed to build future projects for the federal government and other clients.¹²⁹

If the IRA PWA final rule makes the mistake of allowing developers enacting PLA requirements to avoid intentional disregard penalties, ABC recommends that the IRS define a PLA as one that does not require contractors to pay into union benefits funds as long as contractors have bona fide benefits and are satisfying Davis-Bacon prevailing fringe benefits standards.

¹²⁵ An October 2021 report by Dr. John R. McGowan, [Government-Mandated Project Labor Agreements Result in Lost and Stolen Wages for Employees and Excessive Costs and Liability Exposure for Employers](#), finds that employees of nonunion contractors that are forced to perform under government-mandated PLAs suffer a reduction in their take-home pay that is conservatively estimated at 34%. PLAs force employers to pay employee benefits into union-managed funds, but employees will never see the benefits of the employer contributions unless they join a union and become vested in these plans. Employers that offer their own benefits, including health and pension plans, often continue to pay for existing programs as well as into union programs under a PLA. The McGowan report found that nonunion contractors are forced to pay in excess of 35% in benefit costs above and beyond existing prevailing wage laws as a result of "double payment" of benefit costs. See further analysis at [www.TheTruthAboutPLAs.com](#), [Nonunion Workers Suffer Up to 34% in Wage Theft Under Government-Mandated Project Labor Agreements](#), Oct. 22, 2021.

¹²⁶ See McGowan report, *ibid*.

¹²⁷ See discussion of this concern in the McGowan report and an example of multiemployer pension plan liability extended to a firm performing work on a PLA project in New Jersey in *Third Circuit Joins Sister Circuits in 'Employer' Definition Under Multiemployer Pension Plan Amendments Act*, JD Supra, April 15, 2022, available at <https://www.jdsupra.com/legalnews/third-circuit-joins-sister-circuits-in-9647788/>.

¹²⁸ <https://www.jdsupra.com/legalnews/third-circuit-joins-sister-circuits-in-9647788/>.

¹²⁹ See [www.TheTruthAboutPLAs.com](#), [Taxpayer Bailout of Multiemployer Pension Plans and Government-Mandated Project Labor Agreements](#), March 17, 2021.

5. PLA Mandates Force Employees To Join a Union and/or Pay Union Dues/Fees as a Condition of Employment

Finally, nonunion employees must pay nonrefundable union dues and/or fees and/or join a union to work on many PLA projects, even though they have decided to work for a nonunion employer¹³⁰ and have freely chosen not to affiliate with a union. PLAs require unions to be the exclusive bargaining representative for workers during the life of the project. When agreeing to participate in a PLA project, union representation is elected by the employer rather than the employees.¹³¹ Construction employees often argue that forced unionization and/or representation—even for one project—is an infringement of their workplace rights and runs contrary to their intentional decision not to join a union.¹³²

If the IRA PWA final rule makes the mistake of allowing developers enacting PLA requirements to avoid intentional disregard penalties, ABC recommends that the IRS define a PLA as one that does not require workers to join a union or pay any fees or dues to a union for any reason.

6. PLA Mandates Discourage Competition From Unionized Contractors and Union Labor by Interfering With Existing Union Collective Bargaining Agreements

Most ABC member general contractors and subcontractors are not signatory to construction union CBAs. However, some ABC member general contractors and subcontractors are signatory to CBAs with construction unions, which requires them to hire unionized labor only from union hiring halls they are signatory to and follow the CBA's work rules and pension/benefits obligations. Many of these unionized contractors report that PLAs interfere with existing CBAs with unions and prevent unionized firms from competing to build projects funded by taxpayer dollars.¹³³

Union-signatory firms commonly argue that they invest substantial amounts of time and resources negotiating and executing a CBA with a specific union or unions they are signatory to. Yet a PLA will increase costs and stifle contracting opportunities by reintroducing inefficient and unfamiliar work rules, pay and benefits requirements that are not part of its existing CBA with a union(s).

¹³⁰ The legality of clauses in typical PLAs that require compulsory union membership and payment of union dues and fees to unions by workers in order to work on a PLA project depend on the state's right to work law status. See www.TheTruthAboutPLAs.com, [Understanding PLAs in Right to Work States](#), July 20, 2009. See also *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (finding a constitutional violation in government action forcing employees to pay union dues or fees).

¹³¹ While employed by a nonunion company, workers normally are permitted to choose union representation through a card check process or a federally supervised private ballot election. PLAs are called pre-hire agreements because they can be negotiated before the contractor hires any workers or employees vote on union representation. The [National Labor Relations Act](#) generally prohibits pre-hire agreements, but an exception in the act allows for these agreements only in the construction industry. In short, PLAs strip away the opportunity for construction workers to choose a federally supervised private ballot election or a card check process when deciding whether union representation is right for them.

¹³² Barriers to joining a union in the construction industry are relatively low. Any construction worker can go to the nearest union hiring hall and request to join a union. If admission is accepted by a union hiring hall, a worker typically pays initiation fees, regularly scheduled dues and must maintain good standing with the local union's rules in order to be dispatched to a union-signatory contractor's job. Union members may work for one or dozens of union-signatory contractors in a year or a career, depending on the trade, scope and volume of work and length of time a union-signatory company is going to be on a construction jobsite.

¹³³ See examples at TheTruthAboutPLAs.com, [Union Leaders and Contractors Oppose Government-Mandated Project Labor Agreements Too](#), March 1, 2021, including [a March 16, 2021 op-ed syndicated in USA Today](#) by Kevin Barry, director of the construction division of the United Service Workers Union based in Queens.

In addition, union-signatory firms complain that, in order to work on a PLA project, they are required to sign an agreement with a union designated in a PLA that the contractor is not signatory to. This would take away work traditionally performed by its existing union member employees. In this example, signing such a PLA would be in direct violation of its existing CBA and would expose the firm to litigation for breaching its CBA. Therefore, contractors with CBAs with certain unions not designated in a specific PLA are contractually unable to pursue contracts subject to PLA mandates.

For these reasons, the IRA's PWA NPRM will injure competition from certain qualified unionized contractors and their unionized employees from union hiring halls.

7. PLA Mandates Are Likely To Decrease Hiring of Local, Minority, Women, Veteran and Reentering Construction Workers and Minority, Women, Veteran and Disadvantaged Business Enterprises

By discriminating against the more than 88% of the U.S. construction workforce that chooses not to belong to a union and discouraging competition from diverse and small contracting businesses predominantly unaffiliated with unions,¹³⁴ PLA mandates are likely to decrease opportunities for local, minority, women, veteran and reentering construction workers and minority, women, veteran and disadvantaged businesses that perform taxpayer-funded work in the construction industry.

In ABC's recent member survey,¹³⁵ 94% of respondents said government-mandated PLAs would result in worse local hiring outcomes on a project while 5% said PLA mandates would have no impact. Fully 68% of respondents said PLA mandates decrease hiring of minority, women, veteran and reentering construction workers, while 28% said PLA mandates would have no impact. Finally, 70% of respondents said government-mandated PLAs will result in decreased hiring of minority, women, veteran and disadvantaged businesses, while 27% said PLA mandates would have no impact.

In contrast, PLA advocates frequently claim that government-mandated PLAs ensure a steady supply of local labor and more jobs for minority, women, veteran and reentering construction workers. They also claim PLAs can be a tool to increase hiring of minority, women, veteran and disadvantaged business enterprises.

However, there is no credible evidence to support this erroneous claim. Likewise, there is no evidence that local and disadvantaged business and workforce hiring outcomes are better on government-mandated PLA projects compared to projects benefiting from fair and open competition free from PLA mandates.

Anecdotal evidence strongly indicates that government-mandated PLAs harm rather than benefit local and diverse workforce hiring and contract awards. Such harm has been documented by members of the local and minority construction workforce and contracting

¹³⁴ See discussion on the impact of PLAs on IRA contractor small businesses in Section VI of this comment letter.

¹³⁵ Ibid.

communities in Baltimore;¹³⁶ Boston;¹³⁷ Chicago;¹³⁸ Detroit;¹³⁹ Des Moines, Iowa;¹⁴⁰ Jersey City, New Jersey;¹⁴¹ Las Vegas;¹⁴² Los Angeles;¹⁴³ Meriden, Connecticut;¹⁴⁴ New Bedford, Connecticut;¹⁴⁵ New York City;¹⁴⁶ Oakland, California;¹⁴⁷ Philadelphia;¹⁴⁸ San Diego;¹⁴⁹ San Francisco;¹⁵⁰ Seattle;¹⁵¹ Washington, D.C.;¹⁵² and other communities across America.¹⁵³ Local and minority construction industry leaders have complained that government-mandated PLAs and construction union hiring halls fail to deliver jobs for local and minority construction workers and contractors,¹⁵⁴ despite promises by pro-PLA lawmakers and construction trade unions.

Minority and small business advocates have long argued PLAs disproportionately harm minority- and women-owned contractors and their diverse workforces¹⁵⁵ because the vast majority of these firms are not signatory to a union¹⁵⁶ and minority craft labor employees are unlikely to belong to a union¹⁵⁷ due to a variety of factors, including historical¹⁵⁸ and institutional racism in the construction unions.¹⁵⁹

¹³⁶ See www.TheTruthAboutPLAs.com, [Minority Contractor Speaks Out Against Proposed Baltimore City PLA Requirement](http://www.TheTruthAboutPLAs.com), April 8, 2010.

¹³⁷ [Boston Construction Sites Still Have Very Few Black Workers. Who's To Blame For That?](http://www.WGBH.org) WGBH.org, Paul Singer, Aug 1, 2022.

¹³⁸ [Rahm Emanuel Blames Unions For Lack of African-American Jobs](http://www.NBCChicago.com), NBC Chicago, Oct. 3, 2012.

¹³⁹ [Detroiters Get 30% Fewer DPS Construction Jobs Than Promised](http://www.DetroitFreePress.com), Detroit Free Press, July 15, 2011.

¹⁴⁰ See www.TheTruthAboutPLAs.com, [Project Labor Agreement on Iowa State Penitentiary Fails to Fulfill Local Hiring Promises](http://www.TheTruthAboutPLAs.com), Oct. 16, 2013, and [Much Work on Prison Went to Non-Iowans](http://www.DesMoinesRegister.com), Des Moines Register, Oct. 11, 2013.

¹⁴¹ See www.TheTruthAboutPLAs.com, [Jersey City Project Labor Agreement Policies Fail to Deliver Local Jobs](http://www.TheTruthAboutPLAs.com), Jan. 28, 2013.

¹⁴² [Ironworkers Union Settles Dispute Over 'Traveling'](http://www.LasVegasReviewJournal.com), Las Vegas Review-Journal, May 14, 2010.

¹⁴³ See www.TheTruthAboutPLAs.com, [Minority Contractors and Business Associations Take Leadership Role in Fighting Project Labor Agreements in California Coastal Cities](http://www.TheTruthAboutPLAs.com), March 9, 2011.

¹⁴⁴ See www.TheTruthAboutPLAs.com, [No Surprise: Big Labor Fails to Meet Meriden PLA Hiring Goals](http://www.TheTruthAboutPLAs.com), May 19, 2014

¹⁴⁵ [Dredging union struggles to provide local workers to South Terminal](http://www.SouthCoastToday.com), SouthCoast Today, Sep. 14, 2013.

¹⁴⁶ See www.TheTruthAboutPLAs.com, [Project Labor Agreement Fails On Tappan Zee Bridge Construction: Jobs Outsourced to Robots](http://www.TheTruthAboutPLAs.com), June 9, 2014.

¹⁴⁷ [Black Contractors Call Oakland's Proposed Project Labor Agreement 'Modern Day Slavery'](http://www.SanFranciscoBayView.com), San Francisco Bay View, Aug. 15, 2019. [Black construction workers in Bay Area say employers don't stop abuse](http://www.SanFranciscoChronicle.com), San Francisco Chronicle, Sept. 28, 2020.

¹⁴⁸ See www.TheTruthAboutPLAs.com, [National Black Chamber of Commerce Blasts Lack of Diversity in Construction Trade Unions](http://www.TheTruthAboutPLAs.com), July 29, 2013.

¹⁴⁹ See www.TheTruthAboutPLAs.com, [San Diego Unified School District PLA Fails to Meet Local Hiring Goals](http://www.TheTruthAboutPLAs.com), July 11, 2011.

¹⁵⁰ See www.TheTruthAboutPLAs.com, [Construction Fatalities and Protest by Minority Contracting Community Plague New 49ers Stadium Project](http://www.TheTruthAboutPLAs.com), Oct. 15, 2013.

¹⁵¹ See www.TheTruthAboutPLAs.com, [Project Labor Agreement on Seattle Tunnel Mega-Project Fails to Deliver on Many Promises](http://www.TheTruthAboutPLAs.com), Jan. 23, 2014.

¹⁵² See [Broken Promises, Big Losses: The Story of DC Workers Watching from the Dugout as the \\$611 Million Washington Nationals Ballpark is Built](http://www.DCProgress.com), District Economic Empowerment Coalition, Oct. 2, 2007, and [The True Cost of the Washington Nationals Ballpark Project Labor Agreement](http://www.DCProgress.com), DC Progress, November 2009. In addition, data collected by Del. Eleanor Holmes-Norton, D-D.C., on federal projects subject to PLA mandates located in the District of Columbia under the Obama administration's pro-PLA policy demonstrated that PLAs delivered worse local hiring outcomes for District of Columbia residents than other large-scale federal projects not subject to a PLA in the region. See [TheTruthAboutPLAs.com](http://www.TheTruthAboutPLAs.com), [Data Busts Myth That Project Labor Agreements Result in Increased Local Hiring](http://www.TheTruthAboutPLAs.com), March 11, 2013.

¹⁵³ See www.TheTruthAboutPLAs.com, [Project Labor Agreements and Big Labor Fail at Local Job Creation](http://www.TheTruthAboutPLAs.com), Aug. 5, 2010.

¹⁵⁴ Many PLA projects experiencing issues with minorities and women are documented in ABC General Counsel Maury Baskin's report, [Government-Mandated Project Labor Agreements: The Public Record of Poor Performance \(2011 Edition\)](http://www.ABCGeneralCounsel.com).

¹⁵⁵ See [testimony](http://www.MinorityBusinessEnterprise.com) of Anthony W. Robinson, president of the Minority Business Enterprise Legal Defense and Education Fund linked in [Congressional Testimony Says Project Labor Agreements Harm Minority Contractors and Employees](http://www.MinorityBusinessEnterprise.com), Oct. 26, 2010, and [How Union-Only Labor Agreements Are Harming Women- and Minority-Owned Businesses](http://www.U.S.HouseCommitteeOnSmallBusiness.com), U.S. House Committee on Small Business hearing, Aug. 6, 1998.

¹⁵⁶ BLS and other government data sources do not track the union-signatory status of small and disadvantaged businesses. However, various trade associations and interest groups representing minority contractors and construction workers raise these concerns in public policy debates. See the National Black Chamber of Commerce's [Policy Statement on Project Labor Agreements](http://www.NationalBlackChamber.com) and other statements on PLAs [here](http://www.NationalBlackChamber.com).

¹⁵⁷ [Union Construction's Racial Equity and Inclusion Charade](http://www.StanfordSocialInnovationReview.com), Stanford Social Innovation Review, Travis Watson, June 14, 2021.

¹⁵⁸ [Prevailing Wage Legislation and the Continuing Significance of Race](http://www.GeorgeMasonLaw.com), George Mason Law and Economics Research Paper No. 18-14, David E Bernstein, June 1, 2018.

¹⁵⁹ [Why Are Philly's Construction Unions So White? Six Takeaways From Our Reporting On Racism In The Building Trades](http://www.PhiladelphiaInquirer.com), The Philadelphia Inquirer, Sept. 1, 2022.

One such advocate, the National Black Chamber of Commerce, opposes PLA mandates¹⁶⁰ because:

“African American workers are significantly underrepresented in all crafts of construction unions. The higher incidence of union labor in the construction industry, the lower African American employment will be realized. This is constant throughout the nation. Also, and equally important, the higher use of union shops brings a correlated decrease in the amount of Black owned businesses being involved on a worksite.”

Likewise, in a 2020 letter to Virginia Gov. Ralph Northam (D), the late NBCC CEO Harry Alford wrote:¹⁶¹

“African American-owned contracting firms are typically small businesses and employ their own core workforce of skilled construction workers who are not unionized and are generally more diverse than construction workers coming from union hiring halls. Despite efforts of various construction trade unions to diversify their membership over the years, they simply are not recruiting enough African American members into the trades. In addition, claims that a PLA can be a tool to ensure minority construction workers and businesses are used on a public project is a farce. These goals can be achieved via contracting and workforce requirements independent of a discriminatory PLA mandate.”

As noted by the NBCC, many private owners and municipalities have local hiring goals for construction projects independent of a government-mandated PLA, which can be problematic when construction unions have few local union members or not enough available union labor to meet a project’s workforce needs. When demand for union construction workers is greater than supply, union hiring halls frequently call workers from out-of-area union halls called “travelers” or “boomers” to address a union-signatory contractor’s labor needs. Under PLAs and typical union hiring hall rules, these union travelers/boomers receive hiring preference over qualified local nonunion workers—who comprise more than 80% of the local construction workforce in almost all markets across the country.

For these reasons, the IRS PWA NPRM’s proposal is likely to undermine construction industry efforts to attract a local, diverse and inclusive workforce and pool of contractors.

If the IRA PWA final rule makes the mistake of allowing developers enacting PLA requirements to avoid intentional disregard penalties, ABC recommends that the IRS define a PLA as one that does not apply to small, minority, women and other disadvantaged contractors.

8. PLA Coercion Via the PWA NPRM Will Otherwise Harm Competition

Because of the significant adverse impact of PLAs on nonunion and some union general contractors and subcontractors and their nonunion and union employees described in these comments, the inevitable result of the IRS PWA NPRM will be to limit competition for IRA clean

¹⁶⁰ See NBCC’s [Policy Statement on Project Labor Agreements](#) and other statements on government-mandated PLAs [here](#).

¹⁶¹ [Letter from NBCC CEO Harry Alford to Gov. Northam requesting veto of pro-PLA legislation](#), March 17, 2020.

energy construction projects by significantly reducing the number of bidders for such projects, which will increase costs and result in delays that will result in the rapid construction of clean energy projects.

Contractors responding to the Oct. 2023 survey agreed that PLA incentives would limit competition and increase costs. 98% responded that if developers choose to mandate PLAs in response to the IRS's incentives, they will be less likely to bid on IRA projects.¹⁶²

Likewise, in response to ABC's September 2022 survey on PLAs and a Biden administration proposed rule requiring PLAs on federal construction projects of \$35 million or more,¹⁶³ ABC member contractors overwhelmingly opposed the proposed rule, with 99% stating they would be less likely to begin or continue to bid on federal construction contracts if the proposed rule is finalized and 97% agreeing that PLAs reduce competition from subcontractors. Additionally, 97% of respondents who self-identified as small business federal contractors said they would be less likely to bid on contracts if the proposed rule is finalized, potentially affecting the federal government's small business procurement goals. Likewise, 99% of respondents who currently do not perform federal contracting work said they would be discouraged from beginning to do so by the proposed rule, indicating the proposal would likely suppress competition from new federal contractors if finalized.

Individual comments by survey participants repeatedly mention problematic terms and conditions in typical PLAs discussed previously. The survey results show that government-mandated PLAs are likely to harm competition. By extension, such PLAs would also likely harm competition on projects receiving IRA tax credits.

ABC's September 2022 PLA survey results should be concerning to IRS and Biden administration officials, as these firms perform a significant portion of federal contracts and are likely to perform an even greater share of clean energy projects. For example, from fiscal year 2009-2022, ABC member prime contractors were awarded 49.52% of all federal construction contracts over \$25 million, including 55% of the \$147 billion in total value of all such large-scale contracts.¹⁶⁴ Given that the vast majority of ABC general contractor members would be discouraged from bidding on contracts subject to PLAs via the NPRM's PWA strategy to coerce owners into mandating PLAs, it is undeniable that full and open competition would be impossible to achieve with this new scheme.

9. PLAs Will Increase Clean Energy Construction Costs Significantly

The PWA NPRM fails to identify any factual justification to support the coercive promotion of PLA mandates in order to avoid stricter intentional disregard penalties.

¹⁶² [Survey: 98% of ABC Contractors Say Biden's Inflation Reduction Act Labor Mandates Limit Competition on Clean Energy Construction](#)

¹⁶³ [Survey: 97% of ABC Contractors Say Biden's Government-Mandated Project Labor Agreement Policies Would Make Federal Construction More Expensive.](#)

¹⁶⁴ See data and graphics available in "[April 2023 Update: ABC's Fight Against Government-Mandated Project Labor Agreements Intensifies](#)," TheTruthAboutPLAs.com, April 20, 2023. Federal contract award data downloaded from usaspending.gov compared to list of general contractors with membership in ABC, December 2022. This data does not count general contractors who are not signatory to a union and are not members of ABC. This data does not include work performed by ABC member subcontractors because the federal government does not track this data.

PLA advocates may claim that the IRS NPRM is good policy because PLAs allegedly reduce the cost of construction on projects. However, there is no factual basis for claims that PLAs will reduce costs on construction projects.¹⁶⁵

In contrast, recent surveys of contractors, robust academic studies and overwhelming evidence from the few PLA mandates on federal projects subject to the Obama administration's pro-PLA policy strongly suggest that PLA mandates needlessly increase costs.

For example, a DOL Job Corps Center in Manchester, New Hampshire, was originally bid with a PLA mandate in 2009. After nearly three years of PLA-related delays and litigation, the project was bid with a PLA in January 2012 and then rebid without a PLA in October 2012. Results of bids without a PLA requirement prove PLAs increase costs and reduce competition. Without a PLA, there were more than three times as many bidders (nine versus three) and the low bidder's offer was \$6,247,000 (16.47%) less than the lowest PLA bidder. In addition, firms that participated in both rounds of bidding submitted an offer that was nearly 10% less than when they submitted a bid with a PLA. Without a PLA, a local firm from New Hampshire won the contract and performed it safely, on time and on budget to the satisfaction of the DOL. In contrast, the low bidder under the PLA mandate was from Florida.¹⁶⁶

In another example of increased costs and litigation¹⁶⁷ on a federal PLA project, in 2010, the General Services Administration awarded a \$52.3 million contract to a general contractor to build the federal Lafayette Building in Washington, D.C., but then forced the contractor to sign a change order post-award and build it with a PLA. The PLA requirement needlessly cost taxpayers an additional \$3.3 million.¹⁶⁸

Another GSA project awarded in 2010, the GSA Headquarters at 1800 F St. in Washington, D.C., suffered a 107-day delay when members of a local construction trade council refused to accept the terms of a PLA the contractor presented for negotiations post award of the federal contract that had already been signed by the carpenters union not affiliated with the local construction trade council.¹⁶⁹ Following the impasse, the GSA instructed the prime contractor to proceed without a PLA with the trades council. This delay increased costs by millions of dollars and affected the project significantly. A subsequent review of documents related to change order negotiations between the GSA and the contractor revealed the GSA clawed back

¹⁶⁵ For example, the Beacon Hill Institute for Public Policy research has thoroughly debunked misleading claims and reports that PLA mandates reduce construction costs in [Belaboring PLAs: A Critique of the Seeler Reports](#), Oct. 15, 2021; [Affidavit of Prof. David G. Tuerck, PhD, before the Government Accountability Office, concerning Protests of Eckman Construction, Turnstone Corporation and Wu & Associates, Inc. No. B-406526.1: Solicitation DOL121RB20457](#); June 2012; and Pages 43-62 of Tuerck's Cato Journal article, [Why Project Labor Agreements Are Not in the Public Interest](#), Winter 2010. It should be noted that in virtually every instance when PLA apologists have attempted to demonstrate how PLAs can reduce construction costs, they do so by comparing the costs of an already unionized project workforce with and without a PLA. There is no comparison of cost savings on a project with and without a PLA if the project was dominated by nonunion contractors and workers, as is the case in most markets across America.

¹⁶⁶ See [www.TheTruthAboutPLAs.com](#) for full details on the project, [Union's Criticism Misses Mark on U.S. Department of Labor's New Hampshire Job Corps Center Project Labor Agreement Scheme](#), Sept. 3, 2013.

¹⁶⁷ Of note, prior to award, the project was delayed during the bidding process because the GSA was forced to remove a PLA mandate after a contractor filed a bid protest with the Government Accountability Office. See [TheTruthAboutPLAs.com](#), [GSA admits Jumping the Gun With PLA Gift to Unions?](#), Dec. 29, 2009, Updated Feb. 2010.

¹⁶⁸ See [TheTruthAboutPLAs.com](#), [GSA Wasted Millions on Union Handout, Where's the Outrage?](#) April 10, 2012.

¹⁶⁹ See [www.TheTruthAboutPLAs.com](#), [Delays and Increased Costs: The Truth About the Failed PLA on the GSA's Headquarters at 1800 F Street](#), March 5, 2013.

millions of dollars from the contractor built into its original bid related to the added costs associated with performing the project under a PLA.¹⁷⁰

In addition to these real-world examples of added costs on federal construction projects under the Obama administration's pro-PLA policy, multiple academic studies of thousands of taxpayer-funded affordable housing¹⁷¹ and school construction projects¹⁷² found that government PLA mandates increase the cost of construction by 12% to 20% compared to similar non-PLA projects when all projects are subjected to prevailing wage regulations.¹⁷³

In addition to these studies, PLA mandates on construction projects procured by state and local governments¹⁷⁴ have revealed many instances in which PLAs have failed to achieve promised cost savings, and have instead led to cost overruns, delays, local hire failures and safety incidents¹⁷⁵ on such diverse public projects as stadiums,¹⁷⁶ convention centers,¹⁷⁷ civic centers,¹⁷⁸ power plants¹⁷⁹ and airports.¹⁸⁰

In addition, ABC has collected more than a dozen examples of projects that were bid both with and without PLA mandates. In every instance, fewer bids were submitted under the PLA mandate than were submitted without it, or the costs to the public entity went up or both.¹⁸¹

Finally, according to a September 2022 survey of ABC member contractors,¹⁸² 97% of survey respondents said a construction contract that required a PLA would be more expensive

¹⁷⁰ On March 16, 2011, the [House Oversight and Government Reform Committee's](#) Regulatory Affairs, Stimulus Oversight and Government Spending Subcommittee held the hearing [Regulatory Impediments to Job Creation: The Cost of Doing Business in the Construction Industry](#). GSA officials testified that the prime contractor on the 1800 F St. building could not finalize a PLA with numerous trade unions in the area. The contractor could only reach an agreement with the local carpenters' union, leading to delays and increased costs on the project. The financial impact of this delay has not been accurately calculated but is estimated to be in the millions of dollars.

¹⁷¹ Ward, Jason M., The Effects of Project Labor Agreements on the Production of Affordable Housing: Evidence from Proposition HHH. Santa Monica, CA: RAND Corp., 2021. https://www.rand.org/pubs/research_reports/RR1362-1.html.

¹⁷² See multiple studies measuring the impact of PLA mandates on public school construction already subject to state prevailing wage laws in Connecticut, Massachusetts, New Jersey, New York and Ohio by the Beacon Hill Institute (<http://beaconhill.org/labor-economics/>); an October 2010 report by the New Jersey Department of Labor and Workforce Development, Annual Report to the Governor and Legislature: Use of Project Labor Agreements in Public Works Building Projects in Fiscal Year 2008 (https://www.nj.gov/labor/forms_pdfs/legal/2010/PLAReportOct2010.pdf); and a 2011 study by the National University System Institute for Policy Research, Measuring the Cost of Project Labor Agreements on School Construction in California (<https://thetruthaboutplas.com/wp-content/uploads/2011/07/Measuring-the-Cost-of-Project-Labor-Agreements-on-School-Construction-in-California-NUSPIR-2011.pdf>).

¹⁷³ With or without a PLA, all federal projects are subject to federal labor and employment laws, including federal Davis-Bacon prevailing wage regulations, which require government-determined wages for building, heavy and highway projects that are typically union-scale wages where PLAs are most likely to be mandated. The research conducted looked at affordable housing and school construction projects subject to prevailing wage laws regardless of whether a PLA was required, which undermines arguments by PLA proponents that PLAs are needed to ensure high wages and savings from non-PLA projects are a result of undercutting wages and benefits.

¹⁷⁴ See www.TheTruthAboutPLAs.com, [Government-Mandated Project Labor Agreement Failures on Federal and Federally Assisted Construction Projects](#), March 10, 2021.

¹⁷⁵ Many problematic PLA projects are documented in ABC General Counsel Maury Baskin's report, [Government-Mandated Project Labor Agreements: The Public Record of Poor Performance \(2011 Edition\)](#).

¹⁷⁶ Nationals Park Costs Rise, Sports Commission Struggles, Washington Examiner, Oct. 21, 2008. Similar cost overruns were experienced on PLA-covered stadiums in Cleveland, Detroit and Seattle. See "Mayor's Final Cost at Stadium 25% Over," Cleveland Plain Dealer, June 24, 2000; "Field of Woes," Crain's Detroit Business Magazine, June 18, 2001; and "New Seattle Stadium Battles Massive Cost Overruns," ENR, July 27/Aug. 3, 1998, at 1, 9. By contrast, Baltimore's Camden Yards and Washington's FedEx Field, among many other merit shop stadiums built around the country over the past two decades, were built without any union-only requirements, with no cost overruns.

¹⁷⁷ Washington Business Journal, March 2003.

¹⁷⁸ "Troubled Center Moves Ahead," Des Moines Register, July 12, 2003; "Say No to Project Labor Agreement," Des Moines Register, July 23, 2003; "Civic Center Bids Exceed the Budget," Post-Bulletin, Sept. 28, 1999.

¹⁷⁹ "Power Plant Costs to Soar," Pasadena Star-News, March 21, 2003.

¹⁸⁰ "SFO Expansion Project Hundreds of Millions Over Budget," San Francisco Chronicle, Dec. 22, 1999.

¹⁸¹ See www.TheTruthAboutPLAs.com, [Great Scott: Projects Bid With and Without PLA Mandates Show PLAs Increase Costs and Reduce Competition](#), April 18, 2013.

¹⁸² [Survey: 97% of ABC Contractors Say Biden's Government-Mandated Project Labor Agreement Policies Would Make Federal Construction More Expensive](#), ABC Newsline, Sept. 28, 2022.

compared to a contract procured via free and open competition. Survey respondents generally commented that PLA mandates increase construction costs by:

- Reducing competition from general contractors and subcontractors and their employees, including small and diverse subcontractors required to meet federal agency small business contracting goals;
- Imposing inefficient union work rules unique to union CBAs on nonunion contractors who use multitasking strategies to increase labor productivity;
- Requiring contractors to contribute into union benefits programs, resulting in double benefits costs solely paid by nonunion contractors, as well as multiemployer pension plan withdrawal liability risk; and
- Added attorney costs and administrative staff costs needed to negotiate/understand a PLA, comply with the PLA and applicable CBA requirements and facilitate payments into unfamiliar benefits plans.

In light of the evidence in demonstrating how and why PLAs increase costs to taxpayers, there can be no rational claim that the IRS PWA NPRM is justified in promoting the use of PLAs.

10. PLA Mandates Will Lead to Delays During the Construction of IRA Projects

If the IRS NPRM's coercive incentive results in owners requiring PLAs, it is likely the PLA will lead to delays.

According to ABC's September 2022 survey of ABC member contractors, 85% said PLA mandates decrease the likelihood of completing a project on time and on budget, with 9% saying there would be no impact. Respondents repeatedly referenced the following general reasons why a PLA mandate would specifically lead to delays during the construction phase of a project:

- PLAs reduce the pool of general contractors and subcontractors willing and able to compete for contracts to build a project. Less competition may exclude the best firms and/or result in weaker companies performing projects that can lead to delays related to inefficient use of labor, poor scheduling and construction quality.
- PLAs force contractors to replace its existing workforce with unfamiliar union labor that may harm a contractor's productivity, safety and quality construction practices that can lead to delays on a project.
- PLAs can artificially exacerbate the construction industry's skilled labor shortage by eliminating 87.4% of the industry's construction workforce because they have chosen not to affiliate with a union.
- PLAs will harm inclusion of small and disadvantaged businesses needed to meet federal agency prime and subcontracting goals because these firms are not unionized.

11. Strikes Are Rare in Today's Construction Industry, But Have Occurred on PLA Projects

PLA advocates may claim PLAs are important tools to avoid project delays by preventing strikes and labor disputes on a project. However, there is little evidence of strikes and/or labor unrest on clean energy construction projects or other large-scale construction projects, such as federal construction projects. For example, ABC is unaware of any strikes or labor unrest on a federal agency project subject to a PLA since ABC started monitoring federal contracts for such issues in 2001 through 2022, when PLA mandates were not used on more than 99% of hundreds of billions of dollars' worth of federal construction projects.

In addition, there are other strategies to mitigate union-orchestrated strikes, work stoppages, slowdowns and other labor unrest through strong contracting language and other best practices commonly employed on projects independent of PLAs and their anti-competitive and costly provisions.

Historically, strikes and labor unrest executed by rank-and-file union members can shut down a jobsite and delay the opening of a project, potentially costing public and private construction owners time and money and harming the project end user's bottom line. In fact, one of the key reasons PLAs were originally developed in the 1930s was as a solution to prevent costly strikes on important large-scale public works projects like dams during an era when more than 80% of the U.S. construction workforce belonged to a union.

However, today, less than 12% of the U.S. construction workforce belongs to a union, according to the U.S. Bureau of Labor Statistics—a total reversal.

In addition, nonunion construction workers do not strike and there have been no reports of nonunion construction workers striking in the construction industry on federal projects.

PLA advocates display a classic case of “firefighter-arson syndrome” when promoting PLAs as a tool to prevent labor unrest. Unions offer lawmakers PLAs as a solution to a problem they create in exchange for a labor monopoly on taxpayer-funded construction projects. But the truth is that strikes in today's construction marketplace are relatively rare, and there have been strikes on PLA projects, which calls into question the value of these agreements preventing labor unrest.

In 2021, ABC reviewed the most recent data available from the U.S. Bureau of Labor Statistics' Work Stoppages Program, which tracks major work stoppages involving 1,000 or more workers, and found there were just 10 major work stoppages in the construction industry on public and private projects between 2010 and 2019.¹⁸³

In addition, in 2021 ABC reviewed the most recent data available from the Federal Mediation and Conciliation Service¹⁸⁴ on historical construction industry work stoppages through FY 2019 and found there were just 45 construction industry work stoppages from 2015 to 2019 and 101

¹⁸³ See <https://www.bls.gov/web/wkstp/annual-listing.htm> and ABC data at: <https://thetruthaboutplas.com/wp-content/uploads/2021/03/BLS-Work-Stoppages-Over-1000-Employees-Data-Downloaded-031221.xlsx>.

¹⁸⁴ See <https://www.fmcs.gov/resources/documents-and-data/>

work stoppages from 2010 to 2014 on public and private projects valued at trillions of dollars of construction put in place.¹⁸⁵

Likewise, a labor action tracker provided by Cornell University's School of Industrial and Labor Relations shows just 11 labor actions specific to the construction industry from January 2020 through November 2023.¹⁸⁶

In the words of an ABC survey respondent, "Why lawmakers continue to rob taxpayers with a 20% cost premium markup on construction contracts because of a solution to a problem that is rare and rewards the party that creates the problem is baffling."

It's even more puzzling after examining the public record of union strikes on nonfederal public and private projects subjected to PLA mandates, despite promises that PLAs prevent strikes. For example, Joseph Hunt, who retired from serving as the president of the Ironworkers Union in 2011, devoted an entire column in a membership publication urging Ironworkers Union members not to strike on PLA projects.¹⁸⁷

"Once again, it is my duty to inform you there has been an increase in work stoppages on jobs governed by project labor agreements. A No Work Stoppage-No Lock Out clause is the most important because it is the foremost reason owners and contractors are willing to use the agreement [a PLA] to commit to an all-union job. They [owners] have a choice, and they know that the nonunion do not have jurisdictional disputers, nor do they have strikes."

Hunt's admission that PLAs result in an all-union job, that nonunion workers don't disrupt jobsites and that ironworkers have been striking on PLA projects undermines decades of misinformation told by PLA advocates and sympathetic lawmakers who attempt to disguise what PLAs really are: schemes whereby government cronies cut competition from quality local nonunion contractors and union-signatory firms not affiliated with the unions favored in the PLA and steer contracts to political donors—in this case union-signatory contractors and union labor—at inflated costs shouldered by hardworking taxpayers.

Examples of strikes and walkouts on notable private and taxpayer-funded PLA projects across the country call into question the value of PLAs and their controversial no-strike promise.¹⁸⁸

Media reports have called the federal, state and local taxpayer-funded Highway 99 tunnel mega-project underneath Seattle's downtown waterfront¹⁸⁹ the "West Coast's Big Dig,"¹⁹⁰ noting parallels to Boston's notoriously delayed and budget-busting series of tunnels and highway improvements.¹⁹¹ The Seattle project has been plagued by delays, cost overruns,

¹⁸⁵ See <https://thetruthaboutplas.com/wp-content/uploads/2021/03/Construction-Industry-Work-Stoppages-1984-FY19-downloaded-from-FMCS-013021-V-022421.xls>.

¹⁸⁶ Search for construction in the Cornell ILR's tool at <https://striketracker.ilr.cornell.edu/>.

¹⁸⁷ See Hunt's President's Page column, [Ironworkers Have Tradition and Honor in Project Labor Agreements](#), *The Ironworker*, February 2008.

¹⁸⁸ A chapter in ABC General Counsel Maury Baskin's report, [Government-Mandated Project Labor Agreements: The Public Record of Poor Performance \(2011 Edition\)](#), documents construction delays and cost overruns caused by strikes on more than a decade of various PLA projects across the country.

¹⁸⁹ https://www.fhwa.dot.gov/ipd/project_profiles/wa_alaskan_way.aspx.

¹⁹⁰ [Seattle confronts prospect of its own long-delayed Big Dig](#), *The Washington Post*, Reid Wilson, Dec. 30, 2014.

¹⁹¹ [Editorial: Construction plans show state learned little from Big Dig](#), *Gloucester Times*, June 22, 2010.

featherbedding, union strikes and labor disputes, a poor safety record, employees working on the jobsite while drunk, sexual harassment allegations and violations of state and federal minority contracting rules.¹⁹² Both projects were procured with controversial government-mandated PLAs.

In 2018, the National Labor Relations Board imposed a settlement requiring that the Steamfitters Union stop illegal strikes and job actions against firms working at the \$20 billion Hudson Yards multibuilding private development in New York City, which was subject to a PLA.¹⁹³ In 2015, the project was also subjected to a PLA-violating strike that impacted 30 other NYC jobsites and was resolved after a judge issued a restraining order against striking workers.¹⁹⁴

Federally assisted projects that were part of the World Trade Center reconstruction following the 9/11 attacks in New York City suffered strikes in 2015,¹⁹⁵ 2013¹⁹⁶ and 2011,¹⁹⁷ despite no-strike promises contained in these projects' PLAs. Of note, the 4 World Trade Center jobsite suffered a crane accident in February 2012. In August 2012, the *New York Post* reported the Port Authority cracked down on drinking by construction union members following a series of accidents and reports of excessive workday boozing by union tradespeople employed at various World Trade Center construction projects, including 4 World Trade Center.¹⁹⁸

In addition, Chicago was a relative hotbed of strikes on PLA projects in 2010,¹⁹⁹ but the most famous private project subjected to a strike in the city occurred on the \$850-million Trump International Hotel and Tower in downtown Chicago. In June 2006, the Trump company developing the \$850-million project in downtown Chicago sued three labor organizations for breaching the terms of a PLA after union members walked off the project during a strike.²⁰⁰

The Trump development company eventually settled the suit against the Chicago and Cook County Building and Construction Trades Council, the Construction and General Laborers' District Council of Chicago and Vicinity and Laborers' International Union Local 6.

Joseph Gagliardo, managing partner of the firm Laner, Muchin, Dombrow, Becker, Levin and Tominberg Ltd., represented 401 North Wabash in the action and told the media that the unfortunate lesson emerging from this strike and suit was to question the real value of PLAs with Chicago's construction unions.

¹⁹² See www.TheTruthAboutPLAs.com, [The West Coast's Bid Dig Boondoggle Woes Continue: Seattle's Tunnel PLA Job Dangerous for Workers](#), March 22, 2016, and [Despite Project Labor Agreement, Union Dispute Shuts Down Seattle Tunnel Job For Four Weeks](#), Sept. 18, 2013.

¹⁹³ [Labor Board Requires Hudson Yards Unions to Stop Strikes](#), New York Post, Carl Campanile, July 31, 2018.

¹⁹⁴ [Judge points to PLA in ordering union workers to end strike](#), Real Estate Weekly, July 6, 2015.

¹⁹⁵ See www.TheTruthAboutPLAs.com, [NYC Union Strike Shuts Down Project Labor Agreement Jobsites Again](#), July 13, 2015.

¹⁹⁶ See www.TheTruthAboutPLAs.com, [NYC Carpenters Union Breaks Project Labor Agreement's No-Strike Promise at 4 WTC Jobsite](#), July 2, 2013.

¹⁹⁷ See www.TheTruthAboutPLAs.com, [Another PLA Myth Busted: PLAs Fail to Prevent Strikes on NYC Projects](#), Aug. 2, 2011.

¹⁹⁸ [Port Authority cracking down on drinking by WTC construction crews](#), New York Post, Josh Margolin, Aug. 6, 2012.

¹⁹⁹ See www.TheTruthAboutPLAs.com, [PLA Projects Delayed by Chicago Construction Union Strike: Another PLA Myth Busted](#), July 17, 2010.

²⁰⁰ See case [401 North Wabash Venture LLC v. Chicago and Cook County Building and Construction Trades Council](#), N.D. Ill., No. 06-CV-3077, 6/5/06.

“The whole purpose of the project labor agreement is to prevent interruption and prevent delay and have labor peace,” he said. “So the question this strike raises is—and I don’t know the answer to it—what impact will this strike have on the willingness of other building owners to engage in a project labor agreement?”

This government data on the scarcity of construction industry strikes and examples of strikes on PLA projects undermine assertions that PLAs are needed to prevent strikes and labor unrest on projects.

If the IRA PWA final rule makes the mistake of allowing developers enacting PLA requirements to avoid intentional disregard penalties, ABC recommends that the IRS define a PLA as one that contains contractual language making unions financially responsible for delays and damages caused by a union-led strike, despite a PLAs’ alleged no-strike promise.

12. PLAs Will Not Achieve Greater Efficiency in Terms of Safety, Quality or Project Delivery

There is no evidence to support claims that PLAs guarantee better safety, quality or construction project delivery. For example, as discussed in Section V. 13, ABC federal contractors have continued to win the majority of large-scale federal contracts and deliver quality work safely, on time and on budget without harmful government-mandated PLAs.

In addition, the majority of ABC’s September 2022 survey respondents said PLA mandates would either result in construction projects that are less safe (65%) or have no impact on safety (34%). Three-quarters (75%) said PLAs would result in poorer quality or have no impact on quality (24%). Fully 85% said PLA mandates decrease the likelihood of completing a project on time and on budget, with 9% saying there would be no impact.²⁰¹

Improved safety has been frequently cited as a justification for PLA mandates. However, there is no evidence to suggest that PLAs improve safety. Contractors are already required to follow all applicable federal, state and local safety regulations whether a project is built with or without a PLA mandate. Construction superintendents and others responsible for jobsite safety are required to comply with safety regulations that are constantly being issued and updated by the DOL’s Occupational Safety and Health Administration.

Many states also have state and local workplace safety regulations that may be more expansive than federal OSHA regulations, and these also must be followed as a condition of complying with a government contract. These measures remain in place on jobs built with and without PLAs mandates.

Many construction contractors have additional internal company safety education programs, jobsite safety plans and in-house safety departments and rely on third-party experts and external safety professionals to bolster jobsite safety. ABC believes maintaining world-class safety is no accident and created the STEP Safety Management System, a program that helps

²⁰¹ [Survey: 97% of ABC Contractors Say Biden’s Government-Mandated Project Labor Agreement Policies Would Make Federal Construction More Expensive](#), ABC Newsline, Sept. 28, 2022.

industry contractors improve jobsite safety.²⁰² STEP measures how much leading indicators—proactive injury and hazard elimination tools on the jobsite—improve safety performance.

ABC's Safety Performance Report presents empirical evidence from members doing real work on real projects, which shows that implementing STEP best practices can produce world-class construction safety programs.²⁰³ The 2023 report documents the dramatic impact of deploying proactive health and safety practices—leading indicators such as new hire safety orientation, substance abuse prevention and toolbox talks—to reduce recordable incidents by up to 85%, making the best-performing companies nearly seven times safer than the industry average.

Creating an effective company safety culture and formal process for tracking these leading indicators and acting on them has produced positive and meaningful safety outcomes without the necessity for a PLA.

In addition, BLS data suggests that pro-PLAs policies do not measurably improve safety. An ABC analysis of the 2019 BLS Survey Occupational Injuries and Illnesses and the BLS Census of Fatal Occupational Injuries demonstrate that states with laws prohibiting government-mandated PLAs had average of 2.4 total recordable construction incidents, while states that allow and encourage government-mandated PLAs had an average of 3.5 total recordable construction incidents.²⁰⁴

In fact, a PLA mandate can undermine a company's safety culture by replacing all or most of its existing workforce with construction workers from union hiring halls with unknown safety education and no familiarity with a company's existing safety program and culture.

Likewise, a PLA mandate can also undermine a project's quality by requiring that contractors get most or all of their labor from union hiring halls and follow inefficient union work rules. ABC contractors raise concerns that both factors are likely to result in the performance of a project that fails to meet a company's quality standards. ABC contractors say the use of existing employees and multiskilling helps ensure quality work and consistent labor costs, but those are undermined when a PLA is mandated.

Based on the lack of evidence for improvements to safety, quality or project delivery, there is no "efficiency"-based justification for the IRS NPRM's promotion of PLAs.

13. PLAs Remain a Solution in Search of a Problem

The IRS PWA NPRM and the Biden administration's rationale used to justify PLA mandates ranges from factually incorrect to preposterous.²⁰⁵

²⁰² <http://www.abc.org/step>.

²⁰³ ABC.org/SPR, 2023, The 2023 edition was based on data gathered from ABC STEP participants recording more than 850 million hours of work in construction, heavy construction, civil engineering and specialty trades.

²⁰⁴ See www.TheTruthAboutPLAs.com, [Setting the Record Straight: Do Government-Mandated Project Labor Agreements Really Improve Safety Performance?](#) March 16, 2021.

²⁰⁵ See policy rationale in [Section 1 \(a\) and \(b\) of EO 14063](#).

For example, Section 1 of the EO 14063 requiring PLAs on federal construction projects of \$35 million or more justifies the use of government-mandated PLAs because “Construction employers typically do not have a permanent workforce, which makes it difficult to predict labor costs when bidding on contracts and to ensure a steady supply of labor on contracts being performed.”²⁰⁶ The proposal and EO offer no support for this claim. In contrast, as discussed in these comments, ABC contractors assert that nonunion contractors do have a permanent workforce and a PLA’s requirement to replace most or all of its existing workforce with unfamiliar workers from union hiring halls and obey unfamiliar union work rules will result in unpredictable labor costs and expose a firm to additional productivity, quality and safety risks that would not otherwise exist on a project subject to fair and open competition standards free from government-mandated PLAs.

In fact, unionized contractors are the parties that typically do not have a permanent workforce—they build projects in a geographic region and receive labor from various signatory union halls containing local and out-of-area traveler workers with union cards. Unionized firms are more likely to have concerns with a steady supply of labor because union hiring halls may not have enough labor to meet a project’s needs in a tight labor market, which require the use of union travelers dispatched from out-of-area union hiring halls. This is consistent with the fact that less than 12% of the U.S. construction industry workforce is unionized and less than 10% of the construction industry workforce is unionized in 26 states.²⁰⁷

As further discussed in these comments, the Biden administration has repeatedly made unsubstantiated claims that a PLA mandate will “advance the interests of project owners, contractors, and subcontractors, including small businesses.” But the truth is that the real value of PLAs is that they address areas of concern unique to union-signatory contractors and inefficiencies in union CBAs.²⁰⁸ The PLA’s solutions to these “union problems” chill efficiencies and robust competition by nonunion firms. In addition, many of the alleged benefits of PLAs related to workforce development, drug testing, targeted local and diverse hire and contracting goals, safety and labor dispute avoidance are routinely handled on large-scale federal, state, local and private construction projects without the need for discriminatory and costly language in typical PLAs. In short, from the perspective of quality nonunion contractors, government-mandated PLAs are a solution in search of a problem.

Finally, contractors have always been able to negotiate and enter into PLAs with labor unions independent of government requirements or coercion, as guaranteed by the NLRA. If PLAs are beneficial to a contractor and its government client, they can negotiate and execute one independent of a disruptive government-mandated PLA scheme, as illegally proposed in this NPRM. The PWA NPRM is not needed to ensure the use of voluntary government-mandated PLAs.

As such, the Biden administration and the IRS PWA NPRM offer no factual justification for its claim that PLAs “promote economy and efficiency in federal procurement” and are necessary

²⁰⁶ See <https://www.federalregister.gov/d/2022-02869/p-2>.

²⁰⁷ TheTruthAboutPLAs.com, [More Data: Project Labor Agreement Schemes Hurt Vast Majority of U.S. Construction Workforce](#), April 18, 2023

²⁰⁸ See discussion on the impact of government-mandated PLAs on costs in Section II. A. of this comment letter.

because “large-scale construction projects pose special challenges to efficient and timely procurement by the federal government.”²⁰⁹

The truth is the federal government’s pro-PLA policy of the last 12 years that encourages—but does not require—federal agencies to mandate PLAs provides the public with a comprehensive real-world demonstration that the proposed rule’s assertion that PLAs “may provide structure and stability needed to reduce uncertainties for all parties connected to a large-scale construction project” has no basis in fact.²¹⁰

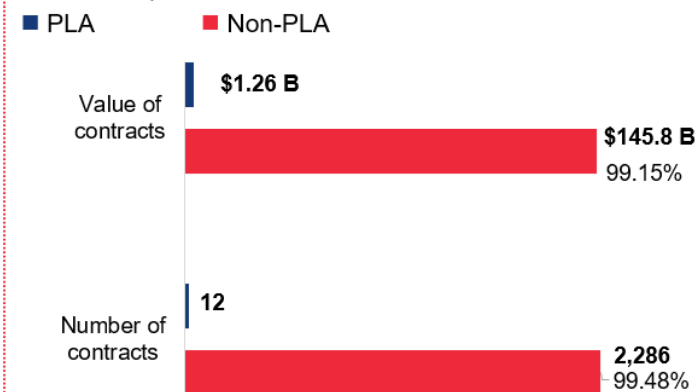
In February 2009, President Barack Obama signed EO 13502, which encourages—but does not require—federal agencies to mandate PLAs on large-scale federal construction projects exceeding \$25 million in total cost.²¹¹ Notably, this policy allowed federal agency contracting officers to make decisions about PLA mandates on a case-by-case basis. It is not surprising that PLAs were rarely required.

Between fiscal years 2009 and 2022, 2,298 federal contracts worth \$147 billion were subject to the Obama policy, but just 12 federal contracts worth a total of \$1.25 billion were issued with a PLA mandated by a federal agency.²¹² More than 99% of all federal construction contracts of \$25 million or more during this time period were not subject to a government-mandated PLA.



PLA MANDATES ON FEDERAL CONTRACTS

Total value of PLA mandate/preference contracts greater than \$25M, FY2009-FY2022



Source: USASpending.gov (accessed 1/13/23) cross-referenced with known list of federal government-mandated PLAs

- Non-GMPLA contracts far outnumber GMPLA contracts by value (99.15%) and number of contracts (99.48%) on \$147B of fed. projects greater than \$25M.
- There have been no fed. GMPLAs during the Trump and Biden administrations.

²⁰⁹ See Section 1 of EO 14063: <https://www.federalregister.gov/d/2022-02869/p-2>.

²¹⁰ See quoted language in the proposed rule preamble: <https://www.federalregister.gov/d/2022-17067/p-10> and Section 1(b) of EO 14063: <https://www.federalregister.gov/d/2022-02869/p-3>.

²¹¹ See <https://www.gpo.gov/fdsys/pkg/FR-2009-02-11/pdf/E9-3113.pdf>. EO 13502 also permits recipients of federal assistance to mandate PLAs on state and local public works projects.

²¹² Chart available at: <https://thetruthaboutplas.com/wp-content/uploads/2022/04/PLA-Mandates-on-Federal-Contracts-FY2009-FY2021-033022.png>.

These data²¹³ illustrate that federal procurement officials—when given the freedom to assess whether government-mandated PLAs will benefit a large-scale construction contract—almost universally decided against requiring PLAs.

In addition, from 2001 to its repeal by the Obama policy, President George W. Bush's Executive Orders 13202 and 13208²¹⁴ prohibited government-mandated PLAs on \$147 billion worth of direct federal construction projects.²¹⁵

Yet for more than 20 years there have been no widespread reports of federal construction projects suffering from increased costs,²¹⁶ strikes,²¹⁷ labor shortages,²¹⁸ safety issues²¹⁹ or poor quality specifically attributable to the lack of a government-mandated PLA, which undermine common arguments PLA proponents use to justify PLA schemes.

In addition, there have been no widespread reports of similar problems attributable to a lack of PLA mandates on public works construction projects in the 25 states that have passed laws restricting government-mandated PLAs on state, state-assisted and local construction projects to some degree—totaling more than \$1 trillion billion worth of public works construction put in place over the last 13 years.²²⁰

²¹³ This data is confirmed in the FAR Council's proposed rule, "According to the data collected by OMB, between the years of 2009 and 2021, there were a total of approximately 2,000 eligible contracts and the requirement for a PLA was used 12 times," at <https://www.federalregister.gov/d/2022-17067/p-29>.

²¹⁴ [Executive Order 13202: Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects](#), Feb. 17, 2001, and Executive Order 13208: Amendment to Executive Order 13202, [Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects](#), April 6, 2001, also prohibited government-mandated PLAs on federally assisted construction projects procured by state and local governments.

²¹⁵ See research in [Project Labor Agreements on Federal Construction Projects: A Costly Solution in Search of a Problem](#), The Beacon Hill Institute, August 2009: "One would expect there to be dozens of tales about labor strife, slowdowns and significant cost overruns that characterized this PLA-free world. Yet, we found no record of such tales."

²¹⁶ See [www.TheTruthAboutPLAs.com](#), [Government-Mandated Project Labor Agreement Failures on Federal and Federally Assisted Construction Projects](#), March 10, 2021.

²¹⁷ See [www.TheTruthAboutPLAs.com](#), [Do Project Labor Agreements Stop Strikes on Construction Jobsites?](#), March 29, 2022.

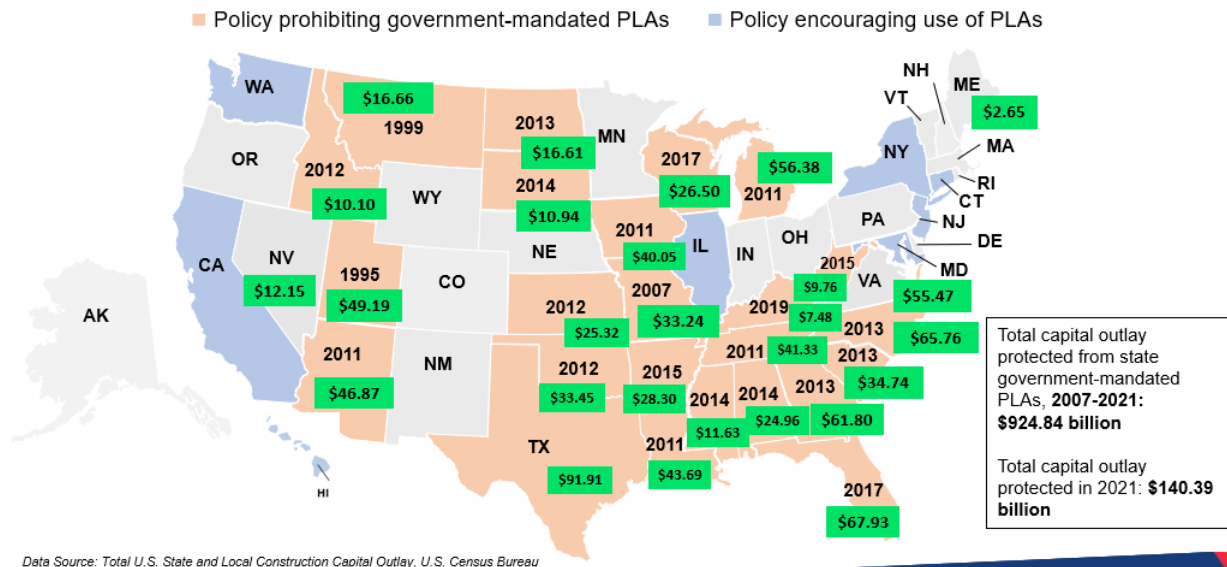
²¹⁸ See [www.TheTruthAboutPLAs.com](#), [Biden's Project Labor Agreement Schemes Exacerbate Construction Industry's Skilled Labor Shortage](#), June 29, 2022.

²¹⁹ See [www.TheTruthAboutPLAs.com](#), [Setting the Record Straight: Do Government-Mandated Project Labor Agreements Really Improve Safety Performance?](#) March 16, 2021.

²²⁰ See ABC analysis of U.S. Census Bureau data on value of state and local public construction projects at <https://thetruthaboutplas.com/wp-content/uploads/2022/10/Cap-Outlay-for-Construction-in-PLA-Reform-States-through-2021-ABC-Update-080322.xlsx> and related map at <https://thetruthaboutplas.com/wp-content/uploads/2022/09/State-Map-Cap-Construction-Outlay-Protected-from-PLAs-Via-State-FOCA-Laws-Through-2021-080122.png>.



Construction Capital Outlay Protected From PLAs Via State FOCA Laws (Billions of USD Through 2021)



In fact, of the few federal construction projects subjected to government-mandated PLAs under the “PLA optional” Obama policy, many projects experienced delays,²²¹ poor local hire outcomes,²²² reduced competition and increased costs²²³ as described in these comments.

Despite this evidence, the Biden EO 14063 and IRS’s PWA NPRM’s default pro-PLA policy assumes a project procured with a PLA will result in superior outcomes compared to a project procured via fair and open competition. As discussed in these comments, this just isn’t the case and the claimed justifications for the NPRM’s PLA policy is contrary to the record of evidence and fail to justify PLA mandates at all.

VI. ABC Comments on Paperwork Reduction Act, Regulatory Flexibility Act Impact on Small Businesses

It is concerning and remarkable that the IRS PWA NPRM has done inadequate and incomplete analysis of the regulatory costs of this NPRM, as is required by the Paperwork Reduction Act, the Regulatory Flexibility Act and other federal statutes. The IRA’s imposition of prevailing wage and GRAP requirements on taxpayers/developers and their contractors building clean energy projects introduces novel and considerable regulatory familiarization costs, paperwork burdens and increased regulatory compliance costs. Small businesses generally have a much harder time absorbing additional regulatory costs—and their costs are proportionately greater

²²¹ See TheTruthAboutPLAs.com, [Delays and Increased Costs: The Truth About the Failed PLA on the GSA’s 1800 F Street Federal Building](#), March 5, 2013.

²²² Data collected by Del. Eleanor Holmes-Norton, D-D.C., on federal projects subject to PLA mandates located in the District of Columbia under the Obama administration’s pro-PLA policy demonstrated that PLAs delivered worse local hiring outcomes for District of Columbia residents than other large-scale federal projects not subject to a PLA in the region. See TheTruthAboutPLAs.com, [Data Busting Myth That Project Labor Agreements Result in Increased Local Hiring](#), March 11, 2013.

²²³ See TheTruthAboutPLAs.com, [Government-Mandated Project Labor Agreement Failures on Federal and Federally Assisted Construction Projects](#), March 10, 2021, and [GSA Wasted Millions on Union Handout, Where’s the Outrage?](#) April 10, 2012.

compared to larger firms—which generally will discourage small business participation and harm all stakeholders and the public in numerous ways.²²⁴

1. The IRS Failed to Conduct a Regulatory Impact Assessment

ABC is disappointed that the IRS PWA NPRM asserts it does not need to conduct a Regulatory Impact Assessment.²²⁵

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

The novel imposition of PWA requirements on private clean energy construction projects through groundbreaking changes in the federal tax code generates significant new costs to taxpayers/developers applying for enhanced tax credits, as well as large and small contractors performing construction activity for the taxpayers/developers. Despite its justification, the IRS should conduct thorough evaluation of the application of controversial labor policy through the federal tax code to anticipate and understand the intended and unintended consequences of new regulations on affected stakeholders.

2. ABC Concerns About Inadequate Paperwork Reduction Act Analysis

The IRS PWA NPRM estimates that 70 trust and estates may claim the increased credit and that it could take approximately 40 hours to compile the data needed for the statement attached to their return, totaling 2,800 hours of recordkeeping annually.²²⁶ In addition, the IRS estimates that 70,000 filers may claim the increased credit and that it could take approximately two hours to display the prevailing wages rates and to request the dispatch of apprentices, totaling 140,000 hours annually.²²⁷

ABC requests clarity concerning how the IRS arrived at these estimates. How and why did the IRS determine 70 trusts and estates and 70,000 filers may claim the increased credit? Why is there a discrepancy of compliance time of 40 hours for trusts and estates, and only two hours for filers? It is hard to assess whether an estimate is correct or incorrect if there is no explanation for initial estimates or guidelines and citations on developing such estimates.

To create an accurate estimate of regulatory costs and establish a comprehensive Paperwork Reduction Act analysis, ABC suggests the IRS collaborate with the Treasury and the White House to estimate the number of clean energy projects anticipated as a result of this new policy change and additional \$270 billion in tax incentives from the IRA. The IRS most certainly has records of the number of projects that have previously filed for tax credits that have been altered by the new IRA PWA policy.

In addition, ABC suggests that the IRS attempt to establish the size of the construction market devoted to clean energy projects eligible for IRA tax credits, or at least determine the size of

²²⁴ See Mercatus Center, George Mason University, [Regulatory Accumulation and Its Costs](https://www.federalregister.gov/d/2023-18514/p-218), May 4, 2016.

²²⁵ <https://www.federalregister.gov/d/2023-18514/p-218>

²²⁶ <https://www.federalregister.gov/d/2023-18514/p-190>

²²⁷ <https://www.federalregister.gov/d/2023-18514/p-190>

the private nonresidential construction marketplace.²²⁸ With this information, the IRS should be able to construct a model estimating future clean energy construction activity that may be subjected to additional investments from the IRA.

Finally, the IRS should estimate the number of construction firms—including large and small businesses—that perform such clean energy construction work,²²⁹ as well as the number of subcontractors on a typical project seeking tax credits,²³⁰ in order to adequately assess the impact of these new regulations.

3. ABC Comments About Inadequate Regulatory Flexibility Act Analysis

The IRS PWA NPRM invites comments on both the number of entities affected and the economic impact on small entities.²³¹

ABC maintains that the IRS PWA NPRM will have a significant economic impact on a substantial number of small entities and looks forward to reviewing comments from the chief counsel of advocacy of the Small Business Administration for comment on its impact on small business.²³²

The numerous concerns raised throughout our comments will be particularly burdensome to small businesses, which make up the vast majority of construction contractors, as discussed previously. Of all construction firms, 82% have fewer than 10 employees²³³ and construction companies that employ fewer than 100 construction professionals comprise 99% of construction firms in the United States.²³⁴ Without the financial and legal resources available to larger contractors, these businesses may struggle to implement the onerous and complex prevailing wage and GRAP requirements associated with the IRA. In turn, this will discourage taxpayers from seeking out small business contractors to minimize their own risk.

In ABC's October 2023 survey on the PWA NPRM, respondents who self-identified as owning small businesses—according to the Small Business Administration's size standards—expressed the following concerns:²³⁵

- 85% stated that sufficient GRAPs had not been established in their area to comply with the NPRM's requirements

²²⁸ ABC suggests looking at https://www.census.gov/construction/c30/historical_data.html and establishing the amount of private nonresidential construction to get a ballpark estimate of construction put in place.

²²⁹ ABC suggests reviewing methodology used by the DOL on its Davis-Bacon rule to see if similar methodology can be developed to estimate IRA clean energy contractors: <https://www.federalregister.gov/documents/2023/08/30/2023-18514/increased-credit-or-deduction-amounts-for-satisfying-certain-prevailing-wage-and-registered>.

²³⁰ There are typically 20-40 subcontractors on a large-sized construction project.

²³¹ "Although there is uncertainty as to the exact number of small businesses within this group, the current estimated number of respondents to these proposed rules is 70,000 taxpayers as described in the Paperwork Reduction Act section of the preamble. The Treasury Department and the IRS expect to receive more information on the impact on small businesses through comments on this proposed rule."

²³² <https://www.federalregister.gov/d/2023-18514/p-205>

²³³ <https://www.federalregister.gov/d/2023-18514/p-201>

²³⁴ U.S. Census Bureau 2021 County Business Patterns:

<https://data.census.gov/table?q=CBP2021.CB2100CBP&tid=CBP2021.CB2100CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.html>.

²³⁵ U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States and Selected Geographies: 2021, available at <https://data.census.gov/table/CBP2021.CB2100CBP?q=CBP2021.CB2100CBP&hidePreview=true>.

²³⁶ [Survey: 98% of ABC Contractors Say Biden's Inflation Reduction Act Labor Mandates Limit Competition on Clean Energy Construction](#)

- 90% stated that the GFE is not workable as written and/or does not align with current GRAP practices in their area, with 92% calling for additional clarity on how the GFE will apply to overall labor hour requirements
- 98% indicated that if developers choose to require PLAs in response to the NPRM's incentive to avoid willful penalties, they will be less likely to bid on IRA projects
- 98% said the NPRM's overall prevailing wage and GRAP requirements would make them less likely to bid on IRA projects

Further, the proposed rule drastically underestimates the costs it will impose on entities that must familiarize themselves with the rule to ensure compliance on any IRA projects they may be awarded. Regarding the NPRM's PWA requirements, the proposed rule estimates that impacted entities will have an average annual burden of just two hours to display prevailing wage rates and request apprentices.²³⁶

It is unclear how this number was established. Also, this estimate fails to account for the time that will be taken by contractors to read and understand the proposed rule's prevailing wage and apprenticeship requirement, research and understand local prevailing wage rates and associated work rules, and other activities necessary to comply with the proposal outside the scope of simply displaying wage rates and requesting apprentices. Taxpayers and contractors will be required to track the payment of prevailing wages and usage of apprentices, which will take hundreds of hours on a project and varies depending on a project's size and scope.

However, even simply considering only the time taken for the activities of posting prevailing wage rates and requesting apprentices, ABC contractors strongly disagreed with the PWA NPRM's assessment. When asked in the September 2023 survey to estimate the time that these activities would take annually, 70% of respondents estimated nine or more hours.²³⁷ Clearly, the potential burden to contractors of the proposal has been vastly underestimated and should be reassessed.

For example, the IRS PWA NPRM is 40,000 words, which would take almost three hours to read at an average American silent reading rate of 238 words per minute.²³⁸ The final rule will likely be about double the number of words, requiring at least six hours of initial regulatory familiarization to read the final rule. Then the business would have to hire expensive attorneys on an hourly basis specializing in labor and employment law and the construction industry to understand the rule and operationalize it across its business (HR, accounting, foreperson, etc.) and contracting arrangements with other general contractors and subcontractors.

VII. Conclusion

ABC remains seriously concerned that the prevailing wage and apprenticeship requirements in the IRA—and the unclear initial IRS guidance and the IRS's PWA NPRM—may cause additional significant risk, uncertainty, cost increases, project delays and overall confusion for the regulated community without extensive clarification. ABC urges Treasury and the IRS to further engage with stakeholders to ensure these requirements can be implemented while

²³⁶ <https://www.federalregister.gov/d/2023-18514/p-197>

²³⁷ [Survey: 98% of ABC Contractors Say Biden's Inflation Reduction Act Labor Mandates Limit Competition on Clean Energy Construction](#)

²³⁸ <https://www.sciencedirect.com/science/article/abs/pii/S0749596X19300786#:~:text=Abstract,and%20260%20wpm%20for%20fiction>

minimizing disruption and harm to critical clean energy projects and the existing marketplace of developers and contractors that already build this type of work successfully and safely.

ABC appreciates the opportunity to comment on the IRS PWA NPRM and would welcome the chance to facilitate additional industry outreach, collaboration and discussions on these issues at the appropriate time. Please do not hesitate to contact us with any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Brubeck".

Ben Brubeck
Vice President of Regulatory, Labor and State Affairs
Associated Builders and Contractors
brubeck@abc.org

Of Counsel: Maurice Baskin, Esq.
Littler Mendelson, P.C.
815 Connecticut Ave. NW
Washington, DC 20006