

Fed. Inflation Law Sows 'Great Uncertainty' 1 Year Later

By **Max Kutner**

Law360 (August 15, 2023, 3:59 PM EDT) -- A year after President Joe Biden signed the Inflation Reduction Act into law, attorneys are watching for compliance hurdles and potential violations because of what they say has been a confusing rollout of the law's prevailing wage requirements.

Wednesday marks the one-year anniversary of the signing of the IRA, which, among other things, offers tax credits for the construction or alteration of green energy facilities. To receive the tax credits, **employers must pay workers** prevailing wages on those projects, based on what the federal government determines local workers are paid.

Federal contractors are used to paying prevailing wages under the Davis-Bacon and Related Acts, which apply to federally funded construction projects.

But employers seeking tax credits under the IRA, which Democrats and some union leaders have praised, could be paying prevailing wages for the first time. That could lead to compliance issues, especially when the government's guidance has been piecemeal and open-ended, attorneys said.

"There's just great uncertainty," said Craig Smith of Wiley Rein LLP, who represents government contractors.

Here, Law360 explores the IRA a year after it left Biden's desk.

Guidance is Developing

After Biden signed the legislation into law in August 2022, the U.S. Department of the Treasury issued a notice the following November containing follow-up guidance.

The notice said, for green energy projects to qualify for tax subsidies, starting Jan. 30, employers — the IRA and guidance refer to them as "taxpayers" — needed to pay all laborers and mechanics the prevailing wage for the local area in which the facility is located. The U.S. labor secretary determines and publishes the prevailing wages.

Employers that seek the tax credit and don't pay prevailing wages would have to pay workers the difference plus interest, as well as a \$5,000 penalty per worker to the Internal Revenue Service, the notice said. For willful violations, an employer would have to pay three times the difference and two times the penalty.

Projects that started construction before Jan. 30 could seek the tax credits without having to pay the prevailing wages, the government said.

The U.S. Department of Labor subsequently published additional guidance on the prevailing wage requirements.

Attorneys have found the guidance opaque.

"The surprise to me, at least, was the lack of direction and the lack of clarity," said Michael Schrier of Husch Blackwell LLP, who represents government contractors.

One aspect that has been particularly befuddling is the IRA's record-keeping requirements, said Scott Hecker of management-side firm Seyfarth Shaw LLP.

"The guidance is a bit squishy," Hecker said. "It says, 'Maintain what you need to show that you've done the right thing,' basically, which is a little bit circular, in my mind."

The guidance also seemed to leave open the issue of enforcement, Wiley's Smith said.

"We don't have a lot of information on what enforcement will look like," Smith said. "While I recognize that the tax benefits are substantial, I would urge taxpayers and other entities not to lose sight of the attendant compliance risk."

Davis-Bacon Raises Questions

The DOL has said the IRA does not fall under the Davis-Bacon and Related Acts, but the agency has also said guidance regarding the inflation law "does incorporate certain Davis-Bacon concepts and requirements."

There are outstanding questions about the interplay between the two laws, attorneys said, identifying differences between the Davis-Bacon Act and the IRA.

For the former, a federal contracting officer attaches the wage determinations to the construction contract while, for the IRA, the burden falls on the person or entity seeking the tax credit, for example.

Another difference is that Davis-Bacon requires prevailing wages for federally funded construction projects whereas the inflation law requires them only if someone wants to take the tax credit, said Lawrence Prosen of management-side firm Cozen O'Connor.

"I think it will create confusion," Prosen said. "What IRA says is, you don't have to take advantage of the tax benefits, but if you want to take advantage of the tax benefits at your election, you have to comply with the Davis-Bacon prevailing wages. But it's an election."

There are also questions about the role of the DOL in helping oversee the law that otherwise falls under the IRS, Seyfarth's Hecker said.

"Because it's a tax credit, it needs to be IRS," Hecker said. "But DOL's role is prevailing wages. So this is the administration trying to graft together two different agencies' spheres, and I think that is confusing, because I don't necessarily agree that all concepts are going to align."

One example of that apparent misalignment is that the IRA refers to taxpayers while Davis-Bacon refers to contractors and subcontractors, Hecker said.

And now the DOL is **finalizing a rule** to update how prevailing wages are calculated under Davis-Bacon, an overhaul that will further change things, attorneys said.

As those changes play out, employers under the IRA will have to keep an eye on the changing wage determinations and "pay greater attention to a system that they're not familiar with," Hecker said.

"It's a lot to put on folks who have probably made purposeful decisions not to be government contractors because it's a complicated area of the law," he said. "When you have previously avoided the government contracting arena, you're thrown into it here."

Violations Remain to be Seen

Unless the IRS proactively investigates whether employers who plan to claim the tax credit are paying prevailing wages, it will take at least until the 2024 tax season to see who has claimed a credit and failed to pay prevailing wages, attorneys said.

"These projects are still so new," Smith said. "It's going to be a couple of years."

In the meantime, employers that plan to seek the subsidies should be vigilant about compliance, especially if they are not already used to Davis-Bacon Act requirements, Schrier said.

"Those that are super reliant upon the tax credit, or if the tax credit is a motivating factor in their decision to launch the project, then it would be prudent for those owners and developers to make sure that they are set up for success under prevailing wages," he said.

For other attorneys, it is not clear how enforcement would happen.

"There's one big question mark that I still keep placing, which is, what will interpretation and enforcement look like?" Smith said. "We haven't seen ... a concrete explanation for who's going to be responsible for applying these requirements."

--Additional reporting by Daniel Wilson. Editing by Emma Brauer.

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