

This document has been prepared as part of the implementation project of Legal Pathways to Deep Decarbonization (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the project, see <https://lpdd.org>

To be used by states and adjusted to fit their respective labor, employment and procurement codes, existing state incentives and clean energy policy, and other legislation, as applicable

Legislative Text

Section 1. Definitions

[*Code Section*] is amended to [*read*][*add*]¹:

(1) "Project labor agreement" and "community workforce agreement" means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. Sec. 158(f).

(2) "Qualified Clean Energy Employer" means any state taxpayer who:

(a) is in full compliance with all federal, state and local labor, employment, procurement and contractor laws and regulations; and

(b) employs workers in the construction, operation, or maintenance of a Qualified Clean Energy Project.

(3) "Qualified Clean Energy Project" means any energy project which either:

(a) qualifies as a [renewable energy project]² pursuant to [*Code Section*]³ [and is capable of generating between [*size*] kilowatts and [*size*] kilowatts of electricity]⁴; or

¹ State legislatures employ different drafting techniques, but the legislation should indicate where and how the legislation is amending current state code. Definitions may need to be in a different section of the code than the rest of the text.

² Replace with applicable term.

³ The reference here should likely be to an applicable definition associated with renewable energy projects eligible for a renewable portfolio standard (RPS) or other clean energy incentive program.

⁴ Size limitation could be included here if necessary. It may be desired to draft in such a way that excludes very small projects, as incorporating labor standards may be cost prohibitive to such type of project development, or administering the exemption for small projects may be too costly for the state. Such levels should be discussed with stakeholders in the applicable state based on general size and prevalence of renewable energy projects – and their typical sizes - in the state. In the case of solar projects, for example, Washington sets this minimum at 500 kW; although smaller projects are subject to a different remittance structure. See WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, E2SSB 5116 – CLEAN ENERGY LABOR STANDARD CERTIFICATION 4 (OCTOBER 30, 2019), <https://www.lni.wa.gov/rulemaking-activity/ao19-30/CELSC05.pdf>

(b) qualifies as an energy efficiency project pursuant to [*Code Section*].⁵

Section 2.⁶ Remittance for Prevailing Wages; Community Workforce Agreement; Project Labor Agreement; Responsible Contractor Compliance

[*Code Section*] is amended to [*read*]/[*add*]⁷:

(1) Beginning [*Date*]⁸, through [*Date*]⁹, each Qualified Clean Energy Employer, subject to the requirements of this section, is entitled to an exemption from taxes paid pursuant to [*code section*]¹⁰, in the form of a remittance, in an amount equal to:

(a) [*Fifty percent*]/[*Seventy-five percent*]¹¹ of the applicable tax paid on machinery and equipment or labor and services rendered in respect to installing such machinery and equipment in connection with the construction of, the operation of, or the maintenance of, any Qualified Clean Energy Project, if the Qualified Clean Energy Employer compensates workers at prevailing wage rates determined by local collective bargaining, as determined by the [*Applicable State Agency*]¹²; or

⁵ For states that already have incentives for energy efficiency projects, this should be tied to definitions of existing energy efficiency projects.

⁶ Section 2 broadly creates a tax incentive in the form of a remittance for developers to use prevailing wages or project labor or community workforce agreements, by granting them a remittance on state and local taxes paid on machinery and equipment or labor and services used in connection with the development of a clean energy project. This policy is modeled off of Washington State's clean energy legislation. *See* WASH. REV. CODE § 82.08.962.

⁷ State legislatures employ different drafting techniques, but the legislation should indicate where and how the legislation is amending current code.

⁸ Insert desired effective date

⁹ Insert desired end date if applicable. Ten years is a recommended starting point; however, this could be drafted in coordination with RPS timelines.

¹⁰ This should be the section of the code where the taxes – to which there will be an exemption – are authorized/described. In Washington, for example, the reference is to WASH. REV. CODE § 82.08.020, which describes retail sales taxes.

¹¹ In general, these percentages should be above fifty percent in order to maximize the use of these incentives, but the decision of what numbers to use should be based on discussions with applicable stakeholders and in consideration of specific state policies and specific state tax burdens. The model legislation was based off Washington State's S.B. 5116, passed in 2019, which used seventy-five percent for prevailing wages and benefits, and one hundred percent for Project Labor Agreements/Community Workforce Agreements. *See* WASH. REV. CODE § 82.08.962. Those percentages reflect the broader labor protections provided by PLAs/CWAs (which cover a wide range of working conditions and are enforceable as contracts) vs. prevailing wage/benefit statutes (which cover only wage and benefit rates and depend on enforcement and regulatory oversight).

¹² Insert the name of the state agency best suited to create rules about this legislation and ultimately be the agency to process applications. The applicable agency in Washington, for example, was the department of labor and industries.

(b) ~~[Seventy-five percent]~~**[One hundred percent]** of the applicable tax paid on machinery and equipment or labor and services rendered in respect to installing such machinery and equipment, in connection with the construction, operation, or maintenance of any Qualified Clean Energy Project, if such Qualified Clean Energy Project is developed under a community workforce agreement or project labor agreement, as defined in Section 1.

(2) A Qualified Clean Energy Employer claiming an exemption in the form of a remittance under Subsection (1)(a) or (b) of this Section 2 must pay the tax imposed by **[Code Section]** and all applicable local sales taxes imposed under the authority of **[code sections]**. The Qualified Clean Energy Employer may then apply to the **[Applicable State Agency]** for remittance in a form and manner prescribed by the **[Applicable State Agency]**. A Qualified Clean Energy Employer may not apply for a remittance under this section more frequently than once per quarter. The Qualified Clean Energy Employer must specify the amount of exempted tax claimed and the qualifying purchases for which the exemption is claimed. The Qualified Clean Energy Employer must retain, in adequate detail, records to enable the **[Applicable State Agency]** to determine whether the Qualified Clean Energy Employer is entitled to an exemption under this section, including: Invoices; proof of tax paid; and documents describing the machinery and equipment.

(3) In its application, each applicant must provide:

(a) a detailed description of the machinery and equipment purchased, or labor and services used, for which an applicant is seeking remittance, and the taxes paid on such machinery and equipment or labor and services, accompanied by supporting records as required by the **[Applicable State Agency]**;

(b) a description of the project for which the machinery and equipment or labor and services are being used, sufficient to demonstrate that such project meets the definition of a Qualified Clean Energy Project, accompanied by supporting records as required by the **[Applicable State Agency]**;

(c) evidence that the applicant is compensating all workers employed at the Qualified Clean Energy Project at prevailing wage rates determined by local collective bargaining as required under Subsection 1(a) of this Section 2; or evidence that the Qualified Clean Energy Project has been developed under a Community Workforce Agreement or Project Labor Agreement as required under Subsection 1(b) of this Section 2;

(d) evidence that the applicant is qualified to do business in the state;

(e) evidence that applicant has all necessary permissions and is in compliance with all applicable federal, state and local requirements applicable to the development of such project, as determined by **[Applicable State Agency]**;

(f) evidence that *[percentage]* % of all contracts and *[percentage]* % of all materials used in developing the Qualified Clean Energy Project were awarded to or procured from women-owned, minority-owned, or veteran-owned businesses;

(g) evidence that *[percentage]* % of the Qualified Clean Energy Project's total labor hours were performed by registered apprentices approved by *[Applicable State Agency]*;

(h) evidence that *[percentage]*¹³ % of the Qualified Clean Energy Project's total labor hours were performed by local residents; and

(i) all contracts were awarded to businesses that have no findings of violation of local, state or federal wage and hour laws;

provided that in the event that a Qualified Clean Energy Project is built without meeting the requirements set forth in subsections (f)-(i), and the applicant is able to demonstrate that it made all good faith efforts to meet these requirements but was unable to comply due to lack of availability of qualified businesses, apprentices, or local hires, the *[Applicable State Agency]* may waive such requirements.

(4) No later than *[Date]*¹⁴, the *[Applicable State Agency]* must adopt rules to set requirements for applicants to follow in claiming exemptions under Section 2(1)(a) and Section 2(1)(b) and providing the necessary documentation, as applicable, pursuant to Section 2(2) including:

(a) define what federal, state and local requirements applicants must comply with pursuant to Section 2(3)(e); and define what evidence will be required to demonstrate compliance with those requirements;

(b) define what evidence applicant must present to demonstrate compliance with the requirements of Section 2(3)(a)-(i); <https://lni.wa.gov/licensing-permits/electrical/electrical-installation-information/clean-energy-projects>

(c) establish a timeline for submission and review of materials by the *[Applicable State Agency]*, with such review and denial or acceptance of a remittance application to take no longer than 60¹⁵ days from the date of submission by applicant of all required information; and

¹³ These percentages set forth in subsections (f)-(h) should be determined by each state depending on related procurement laws and regulations, public policies, and local conditions. With respect to sub-section (h), which mandates that labor be performed in part by local residents, separate percentages can be used for urban and rural communities. Washington State's clean energy tax refund program, for example, sets the requirement at 35 percent generally, but 20 percent in rural counties. *See Clean/Renewable Energy Program, WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES*, <https://lni.wa.gov/licensing-permits/electrical/electrical-installation-information/clean-energy-projects> (last visited Dec. 10, 2021).

¹⁴ This should be the desired date for rules to be issued; the drafter recommends six months.

¹⁵ This date can be adjusted, or multiple deadlines used instead, based on the Applicable State Agency feedback as to what is feasible and based on process requirements that the Applicable

(d) develop a process for application, including an application form or application forms for applicants to submit to the department when applying for remittance.

Section 3.¹⁶ [Incentive/Resource Name] Eligibility and Occupational Wage Standards

[Code Section] is amended to [read][add]:

(1) Beginning on [Date]¹⁷, all [*or at least* ____¹⁸ percent] of the total [name of grants][incentives] awarded under [Code Section] each [year] must be allocated to projects that, in addition to meeting the requirements of [Code Section], meet one of the following criteria:

(a) workers employed to assist with the development of the project will be compensated at prevailing wage rates determined by local collective bargaining; or

(b) the project will be developed under a community workforce agreement or project labor agreement.

(2) [Applicable State Agency] shall issue rules by [Date] to implement Section 3(1), including the development of a process for certifying compliance and a process for verifying ongoing compliance of [grant][incentive] recipients to these requirements during the duration of project development.

State Agency deems necessary (perhaps, for example, the Applicable Stage Agency will determine that some information needs to be submitted by an applicant before project construction begins, whereas others, such as evidence of the use of local labor, can only be submitted once a project is complete).

¹⁶ Section 3 contains an additional policy option to Section 2, conditioning state grants or incentives that already exist for renewable projects on meeting occupational wage and benefit standards. Another approach would be to exempt developers from certain regulations if they meet these same criteria. This section would amend the code section which authorizes the applicable program or describes the specific regulation. Drafting would need to be modified depending on the specific structure of such programs or regulations, but this is intended to provide sample language defining the criteria.

¹⁷ Insert effective date.

¹⁸ Policymaker to consider if this should be a percentage or apply to all of the grant or incentive allocated. This may depend on the current use of the grant program or the specific interests of stakeholders in the state. Making this a requirement for all recipients would be the best approach, as it would create an even playing field for applicants, protect area labor standards, and, with respect to applicants who elect the PLA/CWA option, assure a stable and well-trained workforce and timely, well-built facilities that will best serve the needs of communities that use them. Another option would be to consider a phased-in approach of this criteria, depending on the size and anticipated duration of the state incentive.