

Treas. Reg. § 1.45-7(c)(3)

- ii. Meaning of intentional disregard. A failure to ensure that any laborer or mechanic employed in the construction, alteration, or repair of a qualified facility is paid wages at the prevailing wage rate is due to intentional disregard if it is knowing or willful.
- iii. Facts and circumstances considered. The facts and circumstances that are considered in determining whether a failure to satisfy the Prevailing Wage Requirements is due to intentional disregard include, but are not limited to—
  - (A) Whether the failure was part of a pattern of conduct that includes repeated or systemic failures to ensure that the laborers and mechanics were paid wages at rates not less than the applicable prevailing wage rate, including failures to pay prevailing wages as required under other applicable laws;
  - (B) Whether the taxpayer took steps to determine or review the applicable classifications of laborers and mechanics, such as through a quarterly, or more frequent, review of the applicable classifications of laborers and mechanics according to the actual duties performed by those laborers and mechanics;
  - (C) Whether the taxpayer took steps to determine or review the applicable prevailing wage rate(s) for laborers and mechanics to ensure usage of correct rates by all contractors and subcontractors, such as through a quarterly, or more frequent, review of the prevailing wage rates;
  - (D) Whether the taxpayer promptly cured any failures to ensure that laborers and mechanics were paid wages at rates not less than the applicable prevailing rates;
  - (E) Whether the taxpayer has been required to make a penalty payment under paragraph (c)(1)(ii) of this section in previous years;
  - (F) Whether the taxpayer undertook (or engaged an independent third party to aid in conducting) a quarterly, or more frequent, review of wages paid to mechanics and laborers to ensure that wages at rates not less than the applicable prevailing wage rates were paid (including by reviewing payroll information of contractors and subcontractors or by requiring contractors and subcontractors to regularly provide payroll information to the taxpayer or a third party acting on behalf of the taxpayer);

- (G) Whether the taxpayer included provisions in any contracts entered into with contractors that required the contractors and any subcontractors retained by the contractors to pay laborers and mechanics wages at rates not less than the prevailing wage rates and maintain records to ensure the taxpayer's compliance with recordkeeping requirements set forth in §1.45-12;
- (H) Whether the taxpayer posted in a prominent place at the qualified facility or otherwise provided written notice to laborers and mechanics during the construction, alteration, or repair of the qualified facility, the applicable wage rate(s) as determined by the U.S. Department of Labor for all classifications of work to be performed for the construction, alteration, or repair of the facility, that in order to be eligible to claim certain tax benefits, employers must ensure that laborers and mechanics are paid wages at rates not less than such wage rates, and instructions on how laborers and mechanics may contact the taxpayers' personnel departments or taxpayers' managers to report suspected failures to pay prevailing wages and/or suspected failures to classify workers in accordance with applicable wage determinations, employment tax violations, or violations of workplace standard laws without retaliation or adverse action;
- (I) Whether laborers and mechanics were given the opportunity to acknowledge notice provided by the taxpayer, contractor, or subcontractor that in order to be eligible to claim certain tax benefits, taxpayers must ensure that laborers and mechanics employed by the taxpayer, contractor, or subcontractor in the construction of a qualified facility are paid wages at rates not less than prevailing wage rates;
- (J) Whether the taxpayer had in place procedures whereby laborers and mechanics could report suspected failures to pay prevailing wages and/or suspected failures to classify workers in accordance with the wage determination of workers, employment tax violations, or violations of workplace standard laws to appropriate personnel departments or managers without retaliation or adverse action, and whether taxpayer investigated such reports by laborers and mechanics and had internal controls to prevent failures to pay prevailing wages and classify workers in accordance with the wage determination of workers, employment tax violations, and violations of workplace standard laws;
- (K) Whether all laborers and mechanics were provided with a written notice of the rights conferred by the whistleblower provisions of the Taxpayer First Act in section 7623(d);

- (L) Whether all laborers and mechanics were provided with paystubs (or access to individual payroll records) reflecting the amount they were paid per pay period (including the specific hourly rate and all deductions from wages);
  - (M) Whether the taxpayer investigated any complaints of retaliation or adverse action resulting from, reports of suspected failures to pay prevailing wages and/or classify workers in accordance with applicable wage determinations, employment tax violations, or violations of workplace standard laws and took appropriate actions to remedy any retaliation or adverse action and prevent it from reoccurring;
  - (N) Whether the taxpayer, contractor, or subcontractor contracted with contractors who, at the time the work was performed, was known by the taxpayer, contractor, or subcontractor to be debarred by a municipality, State, or the U.S. Department of Labor for violations related to the underpayment of local, State, or Federal prevailing wages; and
  - (O) Whether the taxpayer failed to maintain and preserve records in accordance with §1.45-12 sufficient to establish compliance with the prevailing wage requirements for relevant tax years.
- iv. Examples. The provisions of this paragraph (c)(3) are illustrated by the following examples, which take into account certain facts and circumstances described in paragraph (c)(3)(iii) of this section, that are considered in applying the enhanced correction and penalty payment requirements in the case of intentional disregard. These examples do not take into account any possible application of the exception for wages paid before a determination by the U.S. Department of Labor under paragraph (c)(5) of this section, or the penalty waiver under paragraph (c)(6) of this section. In each example, assume that the taxpayer uses the calendar year as the taxpayer's taxable year.
- (A) Example 1. Taxpayer D failed to satisfy the Prevailing Wage Requirements with respect to the construction of a qualified facility. Taxpayer D did not include contract language that requires the payment of prevailing wages in the contract executed with the contractor nor did it require similar contract provisions in any subcontracts. Taxpayer D did not post in a prominent place at the qualified facility or otherwise notify any laborers or mechanics that in order to claim certain tax benefits (the increased credit amount described in section 45(b)(6)(B)(iii)) taxpayers must ensure that laborers and mechanics are paid wages at rates not less than prevailing wage rates for construction of the qualified facility.

Taxpayer D did not have a process for laborers and mechanics to report suspected failures to pay prevailing wages and/or suspected failures to classify workers in accordance with applicable wage determinations. Additionally, Taxpayer D did not have a procedure for the review of wages paid to laborers and mechanics to ensure that wages at rates not less than the applicable prevailing wage rate were paid, nor did Taxpayer D undertake any actual review of the wages paid to any laborers or and mechanics employed in the construction of the qualified facility. Taxpayer D failed to maintain any records documenting wages paid to laborers and mechanics in connection with the construction of the facility. Considering all of the facts and circumstances, Taxpayer D's failure to satisfy the Prevailing Wage Requirements would be considered due to intentional disregard for purposes of this paragraph (c)(3) and Taxpayer D would be subject to the enhanced correction and penalty payments described in paragraph (c)(3)(i) of this section.

- (B) Example 2. Taxpayer E failed to satisfy the Prevailing Wage Requirements with respect to the construction of a qualified facility. Taxpayer E included contract language that requires the payment of prevailing wages in the contract executed with the contractor and required similar language be included in all subcontracts. Taxpayer E posted in a prominent place at the qualified facility that in order to claim tax benefits (that is, the increased credit amount described in section 45(b)(6)(B)(iii)) employers must ensure that laborers and mechanics are paid wages at rates not less than prevailing wage rates for the construction of the qualified facility. Additionally, Taxpayer E created procedures for a quarterly review of the applicable classifications of laborers and mechanics according to the actual duties performed by those laborers and mechanics and the actual wages paid to laborers and mechanics. In cases in which reviews found any instance that a laborer or mechanic was paid wages at rates less than the applicable prevailing wage rates, Taxpayer E promptly cured the failure. Considering all of the facts and circumstances, Taxpayer E's failure to satisfy the Prevailing Wage Requirements would not be considered due to intentional disregard for purposes of this paragraph (c)(3) and Taxpayer E would not be subject to the enhanced correction and penalty payments described in paragraph (c)(3)(i) of this section. Taxpayer E would be subject to the normal correction and penalty payments described in paragraph (c)(1)(i) of this section.