October 2, 2017
Highlight =
2017 Development

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

AGC Regulatory Tracker: Table of Contents

Agency	Regulatory Action Title	Type of Regulatory Action	Issue	AGC Action	AGC Resources
SAFETY & HEALTH					
DOL/ OSHA	Permissible Exposure Level (PEL) for Silica	Final Rule issued 3/25/16 OSHA issued 30-day enforcement policy on 9/20/17	The rule lowers employee exposure limit to silica to unfeasible compliance levels. In coordination with other business organizations, AGC petitioned the Fifth Circuit to review the rule on April 8, 2016. The Fifth Circuit subsequently transferred the case to the D.C. Circuit, where that latter consolidated it with several other challenges to the rule. Oral argument was held 9/26/2017. It is unclear when a decision will be issued. On 9/20/17, federal OSHA announced that during the first 30 days of enforcement OSHA will not issue citations to contractors who are putting forth good faith efforts in their attempt to comply with the new standard. Enforcement began on 9/23/17. If your construction company operates under OSHA state-plans in one of 26 states or two territories, it is important that you check to see if your OSHA state-plan agency is following the federal OSHA's lead with this enforcement policy.	In 12/16, AGC called on the presidential transition to end OSHA's pursuit of legal action challenging this rule. AGC also recommended that OSHA rescind it. On 3/10/17, AGC and its coalition partners submitted a letter to USDOL request to delay the compliance date to align with general industry – 6/23/18. As a result, OSHA extended the compliance date until 9/23/17. The AGC coalition submitted a letter on 5/3/17 requesting OSHA consider a petition for a limited re-opening and administratively stay the rule during this process. AGC brought up its concerns about the rule in a 6/15/17 meeting with Secretary Acosta, who remained tight lipped on the topic.	• AGC Educational Resources • AGC Webinar 9.18.17 • AGC Coalition Comments 2.11.14 • AGC News Story 4.4.16 • AGC News Story 4.7.17 • AGC News Story 6.16.17 • AGC News Story 9.21.17
DOL/ OSHA	Electronic Tracking of Workplace Injuries and Illnesses (Drug Testing)	Final Rule Issued 5/12/16 Electronic reporting req. delayed until 12/1/17	The rule requires electronic reporting of injury and illness records to OSHA and impacts post-incident drug testing and safety incentive programs. Following an AGC meeting in 8/16 with the head of OSHA and an AGC-backed letter from Congress in 10/16, the agency on 10/19/16 published new guidance that recalibrated the agency's position relating to post-incident drug testing within the context of this rule. Enforcement of the "anti-retaliation" provisions of the rule—under which contractor drug testing programs may fall under additional scrutiny—went into effect on 12/1/16. OSHA announced on 6/28/17 a delay in requiring certain contractors to electronically submit their 2016 Form 300A to 12/1/17. The original submittal deadline was 7/1/17. On 8/1/17, OSHA launched the Injury Tracking Application (ITA). The web-based form allows employers to electronically submit required injury and illness data from their completed 2016 OSHA Form 300A. The application is accessible from the ITA webpage.	In 12/16, AGC put forth a request for the presidential transition team to end OSHA pursuit of legal action challenging this rule. AGC also recommended that OSHA rescind this rule. In its 6/28/17 proposal, OSHA also announced its intention to issue a separate proposal to reconsider, revise or remove other provisions this rule. The provisions under future consideration could include the anti-retaliation provision that focuses on post-incident drug testing, disciplinary policies and safety incentive programs. AGC will again submit comments to OSHA detailing its concerns with the provision, as it did with the head of OSHA last year.	• AGC Coalition Comments 3.10.14 • Congress Hearing Letter 5.25.16 • AGC News Story 10.24.16 • AGC News Story 5.18.17 • AGC News Story 6.28.17 • AGC News Story 8.3.17

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DOL/ OSHA	Continuing Obligation to Make & Maintain Accurate Record of Recordable Injury & Illness	Final Rule Issued 12/19/16 Repealed on 4/7/17 via CRA	The agency's regulation establishes a 5.5 year statute of limitations was found to be unlawful by the DC Circuit Court of Appeals in AKM LLC d/b/a Volks Constructors v. Secretary of Labor, as the OSH Act only statutorily requires a six month SOL for recordkeeping violations. The rule became effective on 1/18/17 and was repealed via the Congressional Review Act on 4/7/17.	Thanks to AGC advocacy efforts, Congress passed and the president signed into law on 4/7/17 a bill that repeals this regulation under the Congressional Review Act. This rule was not on Congress's radar for repeal until AGC brought it to their attention and helped form a business coalition to repeal it.	• AGC Coalition Comments 10.27.15 • AGC Coalition Testimony 5.25.16 • AGC News Story 4.7.17
DOL/ OSHA	Standard Improvement Project (SIP's) IV	Proposed Rule Issued 10/4/16	This rulemaking, the fourth in a series, is designed to remove or revise outdated, duplicative, unnecessary, or inconsistent requirements in the agency's safety and health standards. While most of the changes appear to be minor in nature, there are three that raise significant concerns based on AGC's review that involve excavations, personal protective equipment and lockout/tag out.	AGC worked with a coalition of industry stakeholders to draft and submit comprehensive comments on 1/4/17.	
DOL/ OSHA	Crane Operator Qualification in Construction	Pre-Rule Stage Proposed Rule to further extend cert. issued 8/30/17	The proposal seeks to update the current crane operator certification requirements to accept those which do not specify "type and capacity" as being compliant. Currently, approximately 80% of certified operators possess certification by "type" only. This certification was previously extended. On 6/6/17, OSHA issued a notice that is considering a proposed rule to further extend the enforcement date for OSHA's crane operator certification requirement in the Cranes and Derricks in Construction standard for an additional year until 11/10/18. That proposed rule was issued 8/30/17. OSHA also proposes to extend the existing employer duty to ensure that crane operators are trained and competent to operate equipment safely for the same period of time.	AGC recommended in 12/16 to the transition team that this rulemaking to move forward. To do otherwise would be to jeopardize ongoing construction operations throughout the nation, as they may be shut down. OSHA discussed its proposal with AGC on 6/20/17 to delay this certification until 11/10/18, as AGC is the only construction association to sit on the OSHA Advisory Committee on Construction Safety and Health. AGC supported a delay and submitted comments to that effect.	• AGC News Story 6.8.17 • AGC Comments 3.12.14 • AGC Coalition Effort 10.30.14 • AGC News Story 6.8.17 • AGC News Story 9.19.17
DOL/ OSHA	Letter Granting Union Reps Walk Around Rights at Non-Union Workplaces	Guidance Issued 2/21/13 Rescinded on 4/25/17	Under this letter of interpretation, union officials or community organizers are allowed to participate in "walk around" OSHA inspections at non-union workplaces. This letter of interpretation was rescinded on 4/25/17.	In 12/16, AGC recommended to the presidential transition team that this guidance be rescinded. On 4/25/17, OSHA issued a memorandum rescinding this letter of interpretation.	• AGC Coalition Letter 6.12.13

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DOL/ OSHA	Multi-Employer Citation Policy	Policy 12/10/10 A 4/28/2017 OSHRC decision puts policy in the crosshairs	Under the policy, OSHA may cite employers on multi-employer worksites for violations that expose other employers' workers to occupational hazards. As of this date, the policy remains in effect. On 4/28/2017, an Occupational Safety and Health Review Commission Administrative Law Judge found a construction company not liable for an OSHA violation of one of its subcontractors under the multi-employer citation policy where the violation occurs within the jurisdiction of the 5th Circuit, based on 5th Circuit precedent. OSHA has appealed the decision to the 5th Circuit.	In 12/16, AGC recommended that the agency adjust its policy to hold that that employers are only legally responsible for protecting the safety and health of their own workers. An Occupational Safety and Health Review Commission decision under the Obama administration overturned a Bush era OSHRC decision on this policy interpretation.	• AGC News Story 9.2.10
DOJ	Criminal Prosecutions of Worker Safety and Environmental Law Violations	Guidance Issued 9/17/15 MOU b/w DOL and DOJ	Environmental and worker safety violations are being merged under DOJ's new "Worker Endangerment Initiative," which will lead to harsher fines and possible jail time. The initiative encourages DOJ and enforcement agencies to probe beyond areas of reasonableness in their investigations, press for unreasonable penalties of violations, and entangle innocent contractors in unwarranted litigation. Rather than using valuable enforcement resources wisely, these policies encourage fishing expeditions instead of calculated enforcement efforts to address the actions of bad actors. This initiative remains in effect.	In 12/16, AGC recommended that the incoming Attorney General withdraw this guidance and MOU and revisit the scope of this initiative.	• AGC News Story 3.29.16
DOJ	Individual Accountability for Corporate Wrongdoing	Guidance Issued 9/9/15	Under this guidance, DOJ intends to hold individuals responsible for corporate wrongdoing. As with its Worker Endangerment Imitative, this DOJ guidance encourages fishing expeditions rather than calculated enforcement efforts to address the actions of bad actors. The guidance remains in effect.	In 12/16, AGC recommended to the presidential transition team that the Trump Attorney General withdraw this guidance.	• AGC News Story 3.29.16

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LABOR RELATIONS					
NLRB	Representation -Case Procedures ("Quickie" or "Ambush" Elections Rule)	Final Rule Issued 12/15/14	The rule expedites and otherwise revises the election process for determining union representation and requires employer disclosure of employee email addresses and phone numbers. The effect is to limit employers' opportunity to communicate information with employees about union representation. The rule enhances unions' ability to organize open-shop contractors and to solidify relationships with 8(f) union contractors.	AGC recommended in 12/16 to the Trump transition that the rule be rescinded and replaced with a more balanced process such as that set forth in the Workforce Democracy and Fairness Act (H.R. 2776).	• AGC Comments • AGC News Story 12.16.14 • AGC Webinar Recording 5.18.15
DOL/ OLMS	Persuader Agreements: Employer and Labor Relations Consultant Reporting Under the LMRDA	Final Rule Issued 3/24/16 Perm. Injunction Issued 11/16/16 DOL proposed rule to rescind rule issued on 6/12/17	The rule expands the reporting obligations of labor relations "consultants" – which is broadly defined – who conduct activities to persuade employees about their rights to join a union or bargain collectively, as well as the reporting obligations of employers who receive assistance from such consultants. By narrowing the "advice" exemption to the reporting obligations, the rule requires reporting even when the consultant communicates only to the employer and has no direct contact with employees, if an object of the communications is to "persuade" employees. A federal judge issued a permanent injunction halting the rule nationwide on Nov. 16, 2016. Secretary of Labor Acosta wrote in an op-ed May 22 that the persuader rule would be the department's first effort under President Donald Trump to undo the Obama administration's regulatory legacy. The DOL issued a proposed rule to rescind the Obama rule on 6/12/17. On 6/15/17, U.S. Court of Appeals for the Fifth Circuit granted DOL's request to stay its appeal of a decision that blocked the rule. As a result, no action on the appeal is required for six months, or 30 days after the DOL issues a final rule rescinding the persuader rule, whichever comes sooner.	AGC recommended that the rule be rescinded by the Trump administration in 12/16. AGC also worked on efforts to block the rule in Congress. On, 8/10/17, AGC submitted formal comments on the proposed rule to rescind the Obama-era rule.	• AGC Comments 9.21.11 • AGC Comments 8.10.17 • AGC Newsletter Story 11.18.16 • AGC News Story 3.29.16 • AGC News Story 8.10.17

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HUMAN RESOURCES & TRAINING, EDUCATION & DEVELOPMENT					
EEOC/ OMB	Increasing Pay Equity Data Reporting in EEO-1 Form	Pres. Memo 4/8/14 Revised Form Issued 9/29/16 Stay of Revised EEO-1 Form 8/29/17	The data reporting requirements of this revised form are—in many ways—redundant and needlessly burdensome for the construction industry that already supplies similar information under the Davis-Bacon Act. On 8/29/17, the Office of Management and Budget (OMB) informed the EEOC that it is initiating a review and immediate stay of the effectiveness of the new pay data collection aspects of the EEO-1 form, in accordance with its authority under the Paperwork Reduction Act (PRA). OMB's action does not completely rescind the revised EEO-1 Report, but it does relieve employers of their obligation to file the new "Component 2" (W-2 pay and FLSA hours worked information). The previously approved EEO-1 form which collects data on race, ethnicity and gender by occupational category will remain in effect. Employers should plan to comply with the earlier approved EEO-1 (Component 1) by the previously set filing date of March 2018.	AGC recommended that the rule be rescinded by the Trump administration in 12/16. On 3/23/17 AGC and coalition allies urged the White House Office of Management and Budget to review and reject the EEOC's expansion of data reporting in the new EEO-1 form under the PRA.	• AGC Comments 8.15.16 • AGC Testimony 9.13.16 • AGC News Story 9.29.16 • AGC News Story 3.23.17 • AGC News Story 9.6.17
DOL/ WHD	Doubling Salary Threshold for Overtime Consideration	Pres. Memo Issued 3/13/14 Final Rule Issued 5/23/16 RFI issued 7/26/17 to review rule Court Perm. Injunction of Rule 8/31/17	The rule more than doubles the standard overtime salary threshold for exempt employees – from $455 per week ($23,660 per year) to $913 per week ($47,476 per year) effective December 1, 2016. To impose such a large and immediate increase as proposed will result in unintended consequences, particularly for small construction companies, construction employers in lower-wage regions, and construction personnel. On 11/22/17, a federal judge issued a nationwide preliminary injunction blocking the rule from taking effect as scheduled. That judge permanently enjoined implementation of the rule on 8/31/17. On 7/26/17, DOL's WHD issued a RFI on the 2016 overtime rule changes. The WHD could put forth new regulatory changes to existing overtime regulations.	AGC testified against the rule before Congress in 9/16. AGC supported legislative efforts to mitigate the impact of the rule during the 114th Congress. Further efforts are to be seen in the 115th Congress. AGC submitted its comments to WHD's RFI on 9/25/17.	• AGC Comments 9.4.15 • AGC Coalition Comments 9.4.15 • AGC Comments 9.25.17 • AGC Testimony 9.13.16 • AGC News Story 9.29.17

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DOL/ WHD	Child Labor Regulations	Final Rule 5/20/10	The rule leaves in place an AGC-supported exemption for 16- and 17-year-old apprentices and student learners working in construction, however, modernization is still needed. Several of the tools and processes prohibited by DOL for 16- and 17-year-olds have now been modernized with new technologically advanced and/or injury prevention mechanisms required by OSHA that were not in place when the Fair Labor Standards Act was written.	AGC recommended in 12/16 that the WHD modernize the regulatory guidance associated with the FLSA's Child Labor provisions in regards to the construction industry; especially the list of occupations and tools prohibited by the regulations and change the interpretation of intermittently, short periods of time, and direct and close supervision.	• AGC Comments 7.16.07 • AGC News Story 6.21.10
DOL/ ETA	Equal Employment Opportunity in Apprenticeship Training Programs	Proposed Rule Issued 11/6/15	The proposal seeks to update the equal employment opportunity regulations that implement the National Apprenticeship Act. If implemented, the proposed rule would add age and disability status to the list of protected classes, as well as specific, mandatory actions that program sponsors must take to ensure equal opportunity in apprenticeship training programs. Among the most significant changes are the requirement for plan sponsors to take affirmative action to recruit individuals in the protected class groups, including the requirement to set a 7% goal for the utilization of individuals with disabilities. The rule also contains specific outreach, record-keeping, training and other compliance requirements.	AGC recommended to the Trump transition in 12/16 that the agency simplify the steps that program sponsors must undertake to ensure equal opportunity; eliminate the 7% utilization goal for individuals with disabilities; eliminate requirement for applicants to self-identify as disabled both pre- and post-acceptance; consider "good-faith efforts" instead of goals that act as quotas; reduce sponsors' record-keeping burdens and costs of compliance; and clarify and/or provide additional guidance regarding the methods that may be used to select apprentices for program participation.	• AGC Comments 1.20.16 • AGC News Story 1.29.16
DOL/ WHD	Joint Employment Under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act	Guidance Issued 1/20/16 Rescinded on 6/7/17	The Wage and Hour Administrator's Interpretation sets forth a new standard for determining when two or more employers are "joint employers" under the FLSA and MSPA. The intent is to hold companies jointly accountable for FLSA and MSPA violations of their subcontractors, staffing agencies, joint venture partners, and the like through use of an "economic realities" analysis that is even broader than the controversial joint employer analysis recently adopted by the NLRB.	In 12/16, AGC recommended that the Trump transition team work to rescind this guidance. Following AGC's recommendation, Sec. Acosta announced on 6/7/17 the withdrawal of this guidance.	• AGC News Story 1.28.16 • AGC News Story 6.8.17

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ENVIRONMENT					
EPA/ USACE	Definition of WOTUS	Final Rule Issued 6/29/15 WOTUS EO Issued 2/28/17 Step 1 – Proposal to Rescind 2015 WOTUS Rule Step 2 (Pre-Proposal) – Docket ID No. EPA-HQ-OW-2017-0480	On 7/27/17, EPA and the U.S. Army Corps of Engineers proposed a rule to repeal the 2015 definition of "Waters of the United States" (WOTUS). The proposal is a "first step in a comprehensive two-step process intended to review and revise" the definition of WOTUS to be consistent with the Executive Order issued by President Trump. That order, *Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule* (issued 2/28/17), calls for a complete review of the WOTUS rule and directs the agencies to "consider interpreting the term 'navigable waters' . . . in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*." In step two, which is slated to occur by the end of the year, the agencies will propose a new, narrower definition of which streams and wetlands are protected under the Clean Water Act, in line with the principles that Justice Scalia outlined in the *Rapanos* opinion. The agencies currently are holding public meetings to hear stakeholders' recommendations and have established a non-regulatory docket to solicit written input.	In 12/16, AGC called for the Trump administration to repeal the rule and issue a new rule based on the Scalia opinion in the Rapanos case. On 5/8/17, AGC with the Waters Advocacy Coalition met with EPA Administrator Pruitt's Deputy Chief of Staff and his lead on WOTUS reform efforts to express support of the two-step process and to call to mind the extensive knowledge on this issue represented by the coalition. In comments filed 9/27/17, AGC offered strong support for the agencies' plan to re-codify regulatory text that existed prior to the 2015 WOTUS rule to "reflect[] the current legal regime under which the agencies are operating" following a nationwide stay of the rule by the U.S. Court of Appeals for the Sixth Circuit.	• AGC News Story 9.29.17 • AGC News Story 7.27.17 • AGC News Story 1.23.17 • AGC News Story 2.24.16 • AGC Comments 11.13.14 • AGC News Story 3.2.17 • AGC News Story 4.28.17 • AGC News Story 6.29.17
EPA	2017 Construction General Permit NAHB Petition for Review 2/6/17	Final Permit Issued 1/11/17	EPA's 2017 Construction General Permit (CGP) for stormwater runoff from construction jobsites took effect on 2/16/17 and will stay active for five years. The 2017 CGP replaced the 2012 CGP that expired on the same day. Closely tracking AGC's comments, the final permit does not require site operators to electronically report their site-specific stormwater pollution prevention plans (SWPPPs) for public examination. However, NAHB has filed a lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit challenging the "joint and several" liability language in the final permit. There is no court ruling to date that impacts the 2017 CGP and the case is expected to settle.	AGC submitted comments in May 2016 on EPA's proposed 2017 CGP. AGC met with OMB on 11/21/16, to reiterate its procedural and substantive concerns with EPA proposal. AGC continues to participate in conference calls and hold face-to-face meetings with the agency leads on the new permit – joint AGC-EPA compliance assistance programs are in the works.	• AGC News Story 1.25.17 • AGC News Story 1.19.17 • AGC Comments 5.26.16

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EPA	Regulations on Stormwater Permits for Small Cities (MS4s)	Final Rule Issued 12/9/16	Requires extensive public input and agency review of cities' stormwater management plans - including ordinances for runoff from active construction sites and post-construction developed sites. Results in public debate of what meets CWA "MEP" (max extent practicable) standard. AGC's strong advocacy and outreach efforts helped produce a final rule that maintains the flexibility cities need to manage stormwater pollution on a location-by-location basis — and without being tied to mandatory numeric permit requirements. But AGC Chapters and members should be on the lookout for evolving local stormwater requirements that will be out for comment across the country, per new federal public participation provisions, and take advantage of opportunities to offer construction-specific input.	AGC will consider whether regulatory changes or legislative fixes are available and appropriate to address its concerns.	• AGC News Story 12.12.16 • AGC News Story 4.27.16 • AGC Comments 3.21.16
EPA/ OAR	Exceptional Events	Final Rule Issued 10/3/16	EPA's final rule is intended to make it easier for states to exclude tainted data from EPA's future assessments of compliance or non-compliance with its NAAQS. This is critical for states looking for all possible options to help attain EPA's tighter ozone NAAQS issued in October 2015. Environmentalists have filed a lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit claiming that EPA illegally changed the definition of "natural events;" API (American Petroleum Inst.) has intervened in the case to help EPA defend its revised rule.	AGC may consider further action. AGC notes that business groups in the western states are concerned that the revised rule still does not provide a clear path to exclude transported background ozone from future designations. This issue is of particular importance to AGC contactor members in the intermountain states.	• AGC News Story 10.26.16
EPA/ OAR	NAAQS - Ozone	Final Rule Issued 10/26/15 Extension Deadline for Desig-nations 6/28/17 Extension Withdrawn 8/10/17	Under this rule, construction companies will feel the effects of tighter ozone limits, mainly via restrictions on equipment emissions in areas with poor air quality (direct impact), as well as additional controls on industrial facilities and planning requirements for transportation-related sources (indirect impact). Notably, nonattainment counties that are out of compliance with CAA ozone standards could have federal highway funds withheld. In August 2017, EPA reversed its June 2017 decision to delay by one year the final designation of counties that are not attaining the 2015 ozone national ambient air quality standard (NAAQS). EPA is on deadline to make those determinations in October 2017. The reversal came after states filed a lawsuit against EPA to enforce the original statutory deadlines.	AGC is considering the possibility of a legislative fix to: adjust the schedule for implementation of the 2015 ozone standard; move the 5yr review cycle to 10 yrs; expand "Exceptional Events" to cover ozone inversions; provide more "tools" for states to implement compliant SIPs.	• AGC Article 8.14.17 • AGC Article 10.2.15 • AGC Comments 3.16.15

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FWS	Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions	Final Rule Issued 9/27/16	FWS' final rule, effective 10/27/16, revises the petition process to require petitioners to submit information one species at a time and include a "certification" that state input was sought before anything is sent to FWS. This will reduce the number of petitioned species in coming years. AGC supported reform of the ESA's petition and listing process because citizen actions have increased in recent years, thereby overwhelming FWS resources with multi-species petitions – and ultimately resulting in mega "Sue & Settle" agreements.	AGC recommended to the Trump transition that this rule remain in place to improve implementation and efficiencies of the Endangered Species Act. AGC submitted detailed ESA reform ideas to Congress on 5/23/17.	• US Chamber Comment Letter 5.23.16 • AGC News Story 5.25.17
EPA/ OPPTS	LRRP Program Expansion to Public & Commercial Bldgs	Advanced Notice of Proposed Rulemaking Issued 5/6/10 Moved to Long-term Action List	The Spring 2017 update to the Unified Agenda noted a delayed schedule for determining whether or not to propose lead paint "work practice" rules for public and commercial buildings. EPA continues to attempt to expand the LRRP program to cover all work that disturbed lead-based paint in commercial and public buildings. For years, EPA has been trying to determine whether such work creates a lead-based paint hazard. AGC testified at an EPA public hearing on 6/26/13 that the existing OSHA standards for lead adequately protects workers and the surrounding public. EPA must make a decision on whether or not to issue a proposal by propose work practice and other requirements by 3/31/17, pursuant to a legal settlement with environmental groups.	AGC recommended to the Trump transition that EPA adopts the OSHA standards. There is a lack of information on the existence of, and any causal impacts from, lead-based paint hazards caused by remodeling activities in commercial buildings.	• AGC News Story 7.26.17 • AGC Coalition Comments 4.1.13 • AGC News Story 7.3.13 • AGC Testimony Presentation 6.26.13
EPA/ OW	Post Construction Stormwater Rule	Info. Collection Request Issued 5/1/10 Rule Withdrawn 6/6/17	EPA is no longer pursuing revisions to stormwater regulations governing post-construction discharges. The Spring 2017 update to the Unified Agenda included and official statement that the agency is no longer pursuing stormwater regulations governing post-construction discharges (marked as "completed action"). For years, EPA had considered regulating stormwater runoff from completed/developed construction sites, in response to Chesapeake Bay Foundation lawsuit. EPA struggled with the significant cost of this rulemaking, predicted to be one of the mostly costly rules ever considered. Such new federal requirements would have increased the cost of construction and presented liability issues concerning the contractor's legal/contractual obligations to the site and the owner after the contractor leaves the site.	AGC recommended that the rulemaking be shelved indefinitely. The fact remains that developed land, generally, does not meet the definition of point source discharge to WOTUS and it has not been designated for any regulatory program by EPA through the process set forth by Congress. State and local authorities are in a better position to identify the best practices.	• AGC News Story 7.25.12 • AGC News Story 7.26.17

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CEQ	NEPA GHG Guidance "Final Guidance for Federal Dept's & Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate	Guidance Issued 8/1/16 Rescinded on 3/28/17 via EO	NEPA requires an assessment of the impact on the environment of a proposed Federal action including rulemakings, permitting, overarching programmatic decisions, and specific projects – including some construction projects. The guidance encourages agencies to quantify direct and indirect GHG emissions for construction projects (and other actions) where NEPA applies, as well as, short-term and long-term effects, cumulative effects and impacts from connected actions—as well as for all the alternative options being evaluated, including the option of taking no action.	AGC recommended to the Trump transition that the New CEQ Head to Withdraw Guidance; Revoke: Executive Order 13693 -- Planning for Federal Sustainability in the Next Decade. On 3/28/17, the president issued an executive order entitled "Promoting Energy Independence and Economic Growth" that rescinded this guidance, per AGC's recommendation.	• AGC News Story 8.4.16 • AGC News Story 3.30.17 • AGC News Story 4.28.17
FWS/ NOAA/ NMFS	Changes to Endangered Species Act Critical Habitat Designations and 'Adverse Modification' Definition	"Services" jointly finalized a policy and two rules imposing 2/11/16	One rule revises the definition of "destruction or adverse modification" of critical habitat. The other rule clarifies the procedures and standards used for designating critical habitat. The new policy addresses how the Services consider exclusion of areas from critical habitat designations. The result will be more designation of state, local and private land as critical habitat, and increased regulatory burdens and costs on land activities.	AGC recommended that the Trump administration entirely repeal the rule and policy. AGC submitted detailed ESA reform ideas to Congress on May 23, 2017.	• AGC Article (Proposal) 5.30.14 • AGC News Story 5.25.17
USACE	"Assumable Waters" Determination	Report due out in 2017	Subcommittee expected to release report in early 2017 to provide advice to EPA. Central issue: confusion over how Congress intended to divide the responsibility between the states and USACE to issue these 404 permits under two different statutes. Subcommittee is examining status of waters that are "adjacent" to navigable waters, which fall under the Rivers and Harbors Act.	AGC supports the timely release of a report that would clarify the exact scope of waters for which a state/tribe would "assume" permitting responsibility if/when it takes over the Clean Water Act (CWA) section 404 program.	• EPA Information

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FWS	Fish and Wildlife Service Mitigation Policy and ESA Compensatory Mitigation Policy	Final Mitigation Policy Issued 11.21.16 Final Compensatory Mitigation Policy under ESA Issued 12.27.16 Rescinded on 3/28/17 via EO	On Nov. 21, 2016, the U.S. Fish and Wildlife Service (FWA) finalized its first revision to the Mitigation Policy since the policy was enacted in 1981. The Mitigation Policy is a far-reaching policy that addresses all types of mitigation – avoidance, minimization, and compensatory or offsetting – as it pertains to mitigating the adverse impacts of projects on fish, wildlife, plants and their habitats. It encourages market-based approaches to mitigation – with a preference for conservation banking. On Dec. 27, 2016, FWS published the Compensatory Mitigation Policy to comprehensively address compensatory mitigation under the ESA, for the first time. Both documents use a landscape-scale approach to planning and implementing compensatory mitigation and call for a net-gain/no net loss goal for conservation – per an Obama Presidential Memorandum. Notably, FWS declined to provide specific, quantifiable measures to achieve the goal of no-net loss/net gain.	AGC recommends that the Trump administration revisit these policies. The mitigation principles are presented as "goals" but industry remains concerned that they could be treated as binding requirements. In that regard, FWS could hold up projects until applicants agree to certain mitigation – even though there is a lack of established metrics for credits. On 3/28/17, the president issued an executive order entitled "Promoting Energy Independence and Economic Growth" that rescinded this guidance, per AGC's recommendation. AGC submitted detailed ESA reform ideas to Congress on May 23, 2017.	• Final Mitigation Policy • Final ESA Compensatory Mitigation Policy • AGC News Story 10.26.16 • AGC News Story 4.28.2017 • AGC News Story 5.25.17

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TAX					
IRS	Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest	Proposed Rule Issued 8/4/16	The proposed rules would eliminate "lack of control" and "lack of marketability" valuation discounts for family members receiving interest in a family-controlled business. Left as proposed, the rules would increase estate and gift taxes by 30 to 50 percent or more on family-owned businesses, resulting in few family construction companies surviving from one generation to the next. These burdensome regulations would be particularly damaging to family-owned construction companies, which often have illiquid capital assets due to equipment and rolling stock, but maintain relatively modest annual incomes.	AGC recommended to the Trump transition that this rule be withdrawn. The association will work with Secretary Mnuchin to address this.	• AGC Comments 11.1.16 • AGC News Story 12.1.16 • AGC Letter from 730+ Companies 10.5.16
TRANSPORTATION					
DOT	Geographic-Based Hiring Preferences in Administering Federal Awards	Pilot Program and Proposed Rule Issued 3/6/15 In 8/17 DOT announced its intent to terminate proposed rule	Overturns prohibitions against states using local hiring requirements on federal-aid highway contracts. It restricts competition and violates the U.S. Supreme Court ruling in *United Building & Construction Trades v.Camden* which held that in-state hiring preferences discriminate against non-residents, violating the Privileges and Immunities Clause of the Constitution. USDOT established a pilot program to allow states to use local hire mandates and has issued a Notice of Proposed Rulemaking to make this change permanent. The Obama administration extended the pilot program for 5 years (thru 3/6/22) on 1/17/17. According to its August Significant Rulemaking Report, DOT intends to terminate the proposed rule. This notice does not address the pilot program. However, DOT is expected to eliminate the pilot program as well.	In 12/16, AGC recommended to the Trump transition team that it discontinue the pilot program and ensure that the rulemaking does not move forward, as it is patently illegal and a blatant example of executive overreach. On 1/31/17, the day of Sec. Chao's confirmation, AGC urged her to do the same.	• AGC Comments 5.1.15 • AGC News Story 5.7.15 • AGC Letter to Sec. Chao 1.31.17 • AGC News Story 1.20.17 • AGC News Story 3.24.17 • AGC News Story 9.6.17

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DOT	DBE Program Implementing Modifications	Final Rule Issued 10/2/14	DOT's approach to increasing DBE participation on DOT assisted contracts is to focus on compliance with achieving numerical goals rather than on business development. Much of the regulatory requirements are paperwork exercises that significantly increase state DOT, prime contractor, and DBE workloads that are costly to implement and carry out. These additional burdens and costs have not increased DBE success. As of 7/20/17, DOT was preparing guidance to clarify that states must require all bidders to submit DBE utilization information regardless of whether the state requires the bidder to submit the information at time of bid or allows a five day grace period following bid submission. On 6/16/17, AGC formally requested that the guidance be changed to require only the apparent low bidder to submit this information. On 7/7/17, DOT indicated to AGC that it plans to move ahead with guidance that requires all bidders to submit DBE commitments even if states choose the five day grace period.	AGC has encouraged DOT to explore creating opportunities for giving incentives to contractors for DBE utilization and to focus the program on business development. In a 1/31/17 letter to Sec. Chao, we also pressed this issue. On May 16, 2017, the U.S. Court of Appeals for the Ninth Circuit reaffirmed that that the states within that circuit cannot lawfully impose contract goals for DBE participation in federal-aid highway projects unless, and until, they "establish the presence of discrimination within [their] transportation contracting industr[ies]." In May of 2015, AGC of America and its Montana chapter had jointly filed a friend-of-the-court brief in the Ninth Circuit in support of the contractor's position.	• AGC Comments 12/20/12 • AGC Supplemental Comments 12/20/13 • AGC News Story 10.1.14 • DOT IG Report on Issues with DBE Programs 4.23.13 • AGC DOT Meeting on IG Report 10.24.14 • AGC News Story 7.20.17
FMCSA	Commercial Truck Driver Hours of Service	Final Rule Issued 12/27/11	The major provisions in the this rule that impacts commercial motor vehicle drivers in the construction industry are as follows: Construction industry drivers transporting construction materials and equipment to and from an active construction site within a 50- air-mile radius of the driver's normal work reporting location are allowed to restart the on-duty counting period following any off-duty period of 24 or more successive hours. Drivers that do not meet the construction driver definition can restart the weekly on-duty clock following a 34-hour off duty period that includes at least two periods between 1:00 a.m. and 5:00 a.m. The rule limits the use of the "34-hour restart" to once a week thus limiting restarts to one every 168 hours. The practical effect of new on-duty limits result in weekly driving time being reduced from 82 to 70 hours during a seven consecutive day driving period.	AGC recommended to the Trump transition that FMSCA revisit this rule and exempt construction drivers from its application. If no exemption, increase the distance coverage to a 150-air-mile radius for construction industry drivers. AGC put this request forth in a 1.31.17 letter to Sec. Chao.	• AGC Comments 3.4.11 • Supplementary AGC Comment 6.8.11 • Previous AGC Comment 3.17.08 • AGC News Story 6.21.13

Agency	Regulatory Action Title	Type of Regulatory Action	Issue	AGC Action	AGC Resources
FMCSA	Electronic Logging Devices for Hours of Service Enforcement	Final Rule Issued 12/16/15	The rule requires the installation and use of electronic logging devices (ELDs) on commercial motor vehicles used in interstate commerce but does not fully account for the uniqueness of construction truck needs. The effective date of the rule was Feb. 16, 2017, and the compliance date is Dec. 18, 2017, after which there is a two-year phase-in period. Accordingly, beginning Dec. 16, 2019, all drivers and carriers subject to the rule must use certified, registered ELDs that comply with the ELD rule and regulations. Rep. Brian Babin (R-Texas) introduced legislation to delay the mandate for two years. AGC is supporting this legislation in the hope that the delay will allow the necessary time to make the case with FMCSA that this requirement is unnecessary for construction. On 9/11/17, an amendment to a House omnibus appropriations bill to extend this mandate for one year was defeated by a 173-246 vote.	AGC has sought an exemption from this requirement for construction industry truck drivers but that request has not been accepted. Specifically, AGC has sought to exempt the construction industry from this rule. Section 395 of the National Highway System Designation Act allows FMCSA to provide special consideration to construction drivers in the hours-or-service regulations. To date, the Trump Administration has not signaled that it will modify the ELD rule or delay its implementation. Congress initiated the rule in 2012, mandated as part of the Moving Ahead for Progress in the 21st Century Act (MAP-21).	• AGC Comments 6.26.14 • AGC News Story 12.11.15 • AGC News Story 8.3.17 • AGC News Story 9.12.17
FMCSA	Minimum Training Reqs for Entry-Level Commercial Vehicle Operators	Final Rule Issued 12/8/16 Delayed effective date until 6/5/2017	The rule sets a core classroom curriculum for those seeking a CDL. It also requires behind-the-wheel training, but it does not require a minimum amount of behind-the-wheel training time. The rule was slated to take effect 2/6/17, however the agency delayed the rule's effective date to 3/21/17, to comply with Trump's order to federal agencies to freeze new. On 3/21/17, the agency announced another delay of the rule to 5/22/17. And, on 5/22/17 the agency announced another delay to 6/5/17. The rule's Feb. 7, 2020, compliance date does not appear to be affected by the delay, however.	AGC recommended that the final rule drop the 30 hour behind the wheel training requirement that was included in the proposed rule. That provision was dropped.	• AGC Comments 4.6.16 • AGC News Story 4.8.16 • AGC News Story 2.16.17

Agency	Regulatory Action Title	Type of Regulatory Action	Issue	AGC Action	AGC Resources
DOT/ FHWA	National Performance Management Measures relating to GHG	Final Rule Issued 1/18/17 Agency suspended on 5/19/17 States sue Agency 9/20/17 Agency lifts suspension 9/28/17	The rule requires state DOTs to establish performance measures for climate-related (greenhouse gas) emissions. The rule goes beyond MAP-21 requirements by attempting to use the rulemaking to address the Obama administration's climate agenda. MAP-21 specified what performance standards were to be adopted and GHG was not included. FHWA also suggested it may include emissions from off road construction equipment as part of this metric. Though the rule was set to take effect on 2.17.17, it is was under a regulatory freeze until 5/20/17. On 5/19/17, FHWA suspended the portions of the rule of concern to AGC and its members. On 9/20/17, eight states sued DOT, challenging its suspension of the rule. On 9/28/17, DOT lifted its indefinite suspension of the rule. However, the agency is expected to undertake a rulemaking to formally withdraw the GHG measurements in the rule.	AGC requested that the Trump transition take action to halt and repeal this rule. We requested similar action in a letter to Sec. Chao on 1/31/17. On 2/13/17, USDOT announced that the rule falls under the regulatory freeze until 3/21/17. Then, on 3/21/17, the agency announced a further delay of the rule until 5/20/17. On 5/19/17, FHWA suspended the portions of the rule of concern to AGC and its members.	• AGC Comments 8.19.16 • AGC-backed letter to House T&I Committee 8.18.16 • AGC News Story 2.16.17 • AGC News Story 5.18.17 • AGC News Story 9.22.17
DOT/ FHWA	Buy America Nationwide Waiver Notification for COTS Products With Steel or Iron Components and for Steel Tie Wire Permanently Incorporated in Precast Concrete Products	Notice of Proposed Rulemaking Issued 10/18/16	This proposed rule will help contractors with Buy America requirements on Federal-aid Highway contracts that have been expanded to include small components and subcomponents of products that are impossible to monitor. To meet Buy America mandates, contractors must request certifications from their suppliers indicating that products provided fulfill these requirements. Taken to its extreme, manufactured products that incorporate a variety of iron and steel components need to have individual certifications for each of the various component parts. The process is burdensome, costly and not in the public interest.	AGC strongly supports this proposed rule. AGC recommends that the final rule: (1) allow FHWA to issue a nationwide waiver for specialized steel lifting devices that are incorporated in precast concrete products; (2) raise the dollar threshold for the minimum amount of steel products that can be exempted from Buy America requirements from $2,500 to $20,000 or base it on a PPI escalator; and (3) exempt utility relocation work required as part of highway improvement projects. Given the recent executive actions seeking to narrow and limit Buy America/n waivers, it seems unlikely that further movement on finalizing this rule will occur under this administration.	• AGC Comments 12.2.16 • AGC Comments on Previous Buy America Waiver Notice 9.9.13 • AGC News Story 12.2.16 • AGC News Story 1.14.16 • AGC Request for FHWA to Clarify Buy America Requirement 2.23.16

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DOT/ FHWA	DBE Prompt Payment and Return of Retainage: Questions and Answers	Guidance Issued 4/15/16	FHWA issued new guidance to states regarding the prompt payment requirements in the DBE program. The guidance is not new policy but reemphasizes what is already in the DBE regulations and points out the need for state DOTs to monitor payments to subcontractors. The provision requires primes to pay all subcontractors (DBE and non-DBE) within 30 days of the prime receiving payment from the state. The payment should include any retainage held by the prime on the sub after the sub has successfully completed it subcontract. According to the guidance, states are supposed to accept portions of the work on a contract as completed thereby eliminating the need for the prime to hold retainage.	AGC has informed the Trump Transition of its opinion on this guidance. Retainage is a standard industry practice used by owners and contractors to ensure that construction work is completed according to the contract specifications and is acceptable to the owner. Contractors should be allowed to withhold retainage on subcontractors until their completed work is formally accepted by the owner and this guidance should explicitly state this notion.	• AGC News Story 5.13.16
FEDERAL CONTRACTING					
FAR	Use of Project Labor Agreements for Federal Construction Projects, FAR Rule	Final Rule Issued Exec. Order Issued 2/6/09	The rule encourages federal agencies to mandate project labor agreements on projects valued at $25 million or more. AGC strongly believes that the choice of whether to adopt a project labor agreement should be left to the contractor-employers and their employees, and that such a choice should not be imposed as a condition to competing for, or performing on, a publicly funded project. Government mandates and preferences for PLAs can restrain competition, drive up costs, cause delays, lead to jobsite disputes, and disrupt local collective bargaining. To date, this rule is still in effect.	AGC recommended that President-elect Trump revoke this rule and the executive order and replace it with former President George W. Bush's PLA Executive Order 13202 in 12/16 to the transition team. AGC joined coalition allies in urging the president to take that action in a letter on 1/10/17. AGC supported the introduction of the Fair and Open Competition Act (S. 622 / H.R. 1522) by Sen Jeff Flake (R-Ariz.) and Dennis Ross (R-Fla.) in 3/17. A House Committee passed the legislation shortly after it was introduced. In a 6/15/17 meeting with the GSA COS, AGC called on the agency to abandoned its bid preference policy for PLA proposals.	• AGC PLA Website • Recent PLA Letter to Agency • AGC News Story 1.12.17 • AGC Coalition letter to Trump 1.10.17 • AGC News Story 3.23.17

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FAR	Fair Pay and Safe Workplaces Federal Acquisition Regulation, FAR Rule (Blacklisting)	Final Rule Issued 8/25/16 Exec. Order Issued 7/31/14 Repealed on 3/27/17 via the CRA	The rule establishes an unnecessary, unfounded and unlawful regulatory regime under which federal contracting officers, with the advice of agency labor compliance advisers, may de-facto debar federal contractors for past and alleged violations of federal and state labor laws, in spite of the existing suspension and debarment process. The rule additionally puts forth a system under which enforcement agencies—by requiring federal contractors sign labor compliance agreements—directly insert themselves into procurement agency contracting decisions counter to the Federal Procurement Act. There is no limit to the terms the enforcement agency could include in such compliance agreements. For AGC comments and testimony click here and here, respectively. A federal court issued a temporary injunction on 10/24/16, halting implementation of the rule—with the exception of the paycheck transparency provisions. Those provisions took effect 1/1/17.	AGC urged Congress to use the Congressional Review Act to repeal this rule on 11/14/16. After a concerted AGC advocacy effort, the House and Senate voted for repeal. The president signed the repeal bill into law on 3/27/17.	• AGC Blacklisting Website • AGC News Story 11.17.16 • AGC News Story 4.3.17
DOL/ WHD	Establishing Paid Sick Leave for Federal Contractors, FAR Rule	Executive Order Issued 9/7/15 Interim Final Rule Issued 9/30/16 Final Rule slated to be issued 11/17	The requirements of this rule are ill-fitting and impractical given the project-based, transitory, and seasonal character of construction work and the history of paying craft workers only for time worked. Additionally, the mandate is inconsistent with the Davis-Bacon Act and would increase costs and inefficiency in federal procurement. Furthermore, construction contractors should be allowed to take credit for paid leave toward meeting DBA prevailing wage obligations and meet their paid leave obligations by contributing to a benefit trust fund. The administration signaled that it will not repeal the rule, but rather permanently finalize it with a final rule in 11/17. There has been no indication to date that the GOP controlled Congress will take legislative action to block the rule. The optics of the issue are too much for the GOP to overcome: the taking away of a benefit to American workers. There is an effort underway to enact a voluntary opt-in ERISA style safe harbor from state/local mandates for employers who offer a minimum threshold of compensable leave and flexible work arrangements to all employees. The effort would include language to satisfy the EO on sick leave. The bill may be introduced sometime this year.	AGC recommended to the Trump transition team in 12/16 that this final guidance and the executive order be rescinded. AGC contractors are not alone in voicing their displeasure with the EO and other mandates. A coalition, Employers for Flexibility (E4F), will be launching to support a legislative option. Once we see the final legislative language AGC may join and this effort.	• AGC Comments 4.12.16 • AGC Testimony 9.13.16 • AGC News Story 9.30.16

Agency	Regulatory Action Title	Type of Regulatory Action	Issue	AGC Action	AGC Resources
SBA	Credit for Lower Tier Small Business Subcontracting	Final Rule Issued 12/23/16	The rule allows prime contractors to count first tier and lower tier small business contractors towards the prime's small business subcontracting goals. The rule went into effect on 1/23/17. However, credit for lower tier small business subcontractors will not be available until the FAR Council issues a rule implementing the SBA rule.	AGC was successful in passing legislation forcing this rulemaking in 2013. AGC will continue to work with the FAR Council to work on implementation. AGC met with GSA—a member of the FAR Council—in 2/17 on this issue, during which time the agency noted that it is reviewing how to update the electronic subcontracting reporting system to meet the needs of this rule. It is unclear when the FAR Council will issue a rule to implement this initiative.	• AGC Comments • AGC News Story 1.5.17 • AGC Testimony 9.18.15 • AGC Testimony 5.23.13