



## The Regulatory Road Ahead

AGC's primary regulatory objective is to help build a construction-friendly regulatory environment. With President-elect Trump taking office, there are a host of Obama administration executive orders, rules, and other requirements that are in AGC's crosshairs for repeal or alteration. And, with a Republican Congress, an opportunity exists to significantly reform the regulatory process to curb executive overreach. Questions remain, nevertheless, as to where traditional business interests and the populist president-elect's message will overlap and diverge.

### The Regulatory Short-Term

#### ***Contractors Must Comply with the Law, Not Campaign Promises***

We can only be sure of one thing: what the law is today. No construction contractor should ignore the law on the books in reliance of a candidate's campaign promise. Remember, among candidate Barack Obama's biggest promises in 2008 was to close the prison at Guantanamo Bay, Cuba. That has not happened. Some of President-elect Trump's campaign promises may not come to fruition, or take longer to implement than expected. There are no guarantees. Again, construction contractors should not rely on campaign promises when it comes to deciding how their companies comply with the law. The answer is simple; your company must comply or otherwise risk the penalties for violations.

#### ***The "Midnight Regulations" Taking Effect Between Now and Inauguration Day***

There are a number of federal agency regulations that will take effect—either partially or wholly—have taken effect, or could be issued between now and Inauguration Day on January 20, 2017. Let's begin with four regulatory actions—the overtime rule, injury and illness recordkeeping rule, construction general permit and nationwide construction permit—which generally impact construction contractors regardless of owner—public or private. Then, this document will address some rules—Fair Pay and Safe Workplaces and Paid Sick Leave Executive Orders—that only impact direct federal construction contractors.<sup>1</sup>

#### **U.S. Department of Labor's Wage & Hour Division Overtime Rule**

##### **Federal Court Temporarily Halts Overtime Rule**

On November 22, 2016, a federal judge issued a nationwide injunction against the U.S. Department of Labor's (DOL) overtime rule, which was scheduled to take effect on December 1, 2016. As a result of this court order, implementation of the rule is effectively halted. However, the injunction is a temporary measure that suspends the regulation until litigation comes to a close. On December 8, 2016, the U.S.

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<sup>1</sup> The Fair Pay and Safe Workplaces and Paid Sick Leave Executive Orders only impact companies that hold prime contracts directly with or subcontracts through federal agencies like the Army Corps, Naval Facilities Engineering Command, Department of Veterans Affairs or U.S. General Services Administration; these executive orders do not impact federally-assisted contracts from state agencies, like state departments of transportation.

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Court of Appeals for the Fifth Circuit granted DOL's request for an expedited appeal of that injunction. However, the final deadline for briefs is January 31, 2017, which means the case is unlikely to be decided until after President-elect Trump is sworn into office. The Texas AFL-CIO filed as an intervener in the case to potentially defend the rule in the event the Trump administration decides not to challenge the injunction.

The most significant change under rule is a doubling of the standard salary threshold for exempt employees – from \$455 per week (\$23,660 per year) to \$913 per week (\$47,476 per year). Many AGC contractors had already taken steps to implement this rule, such as by reducing employee hours or notifying employees of salary increases. Given the uncertain path ahead, those contractors may want to re-evaluate the overall impact of the changes made and either roll-back or keep those implementation efforts in place, considering both the impact on the company's bottom line as well as employee morale.

It is not clear how President Trump will proceed as this is a rule that pits Trump, the populist, against Trump, the businessman. On the campaign trail, he did not clearly oppose or support the rule. It is also unclear as to how the Fifth Circuit will rule. Contractors must bear this uncertainty in the meantime. AGC has and will continue to support legislation and regulatory changes repeal the overtime rule.

For more AGC information on this rule, [click here](#).

### **Occupational Safety and Health Administration Recordkeeping Rule (Drug Testing Position)**

On December 1, 2016, the anti-retaliation provisions of the new OSHA injury and illness recordkeeping rule went into effect. AGC successfully worked with OSHA to recalibrate its stance on broadly banning mandatory post-incident employee drug testing. However, limited drug testing restrictions remain where state workers' compensation laws do not address post-incident drug testing. Portions of the electronic reporting requirements of the rule take hold in July 2017.

President-elect Trump did not speak on point about this rule. However, when it comes to OSHA and other DOL enforcement, Republican administrations traditionally relax enforcement efforts. Nevertheless, the Trump administration is not necessarily a traditional Republican administration. And, while he did call for a moratorium on all new federal regulations, he made an exception for regulations that involve public safety.

AGC will work with the new administration and Congress to address construction industry concerns with this rule. AGC members may access a webinar on this topic, [click here](#). For more AGC information on the OSHA's drug testing position for the rule, [click here](#).

### **Environmental Protection Agency Stormwater Construction General Permits**

AGC expects the U.S. EPA to finalize the 2017 National Pollutant Discharge Elimination System (Stormwater) permits. The most controversial part of U.S. EPA's proposal for these new permits is a possible brand-new requirement that would require construction contractors to publicly and electronically report their construction stormwater pollution prevention plans (SWPPPs). These thousands of site-specific plans would be shared with EPA Headquarters, and the agency would, in turn,

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post them on EPA's Enforcement and Compliance History Online (link is external) (ECHO) website for anyone to view.

President-elect Trump has not commented on this permit. However, he did comment on the campaign trail about the unnecessarily long delays in building projects, thanks in part to environmental reviews and permit requirements.

For AGC information on this proposal [click here](#).

### **Army Corps of Engineers WOTUS/Wetlands Nationwide Permits**

AGC expects the U.S. Army Corps of Engineers to finalize its 2017 nationwide permits, as the current package of permits expires in March 2017. Obtaining these federal "general" permits, which are required for construction activities in "Waters of the United States" (WOTUS), is critical to the completion of the private and public infrastructure and buildings. AGC has urged the Corps to not apply the controversial WOTUS rule definitions in this permit.

While President-elect Trump did not directly comment on this permit, he did call for the elimination of the WOTUS rule. That rule remains on hold under a nationwide court order.

For AGC information on this proposal, [click here](#). For information on the WOTUS rule and where it generally stands, click [here](#) and [here](#), respectively.

### **Fair Pay and Safe Workplaces (Blacklisting) Executive Order<sup>2</sup>**

On January 1, 2017, the paycheck transparency requirement of the Fair Pay and Safe Workplaces Executive Order went into effect. Although a federal court halted enforcement of the executive order's provisions relating to labor law violation reporting and restricting pre-dispute arbitration, that court action did not put a hold on the paycheck transparency requirement. That requirement requires covered contractors and subcontractors to provide wage statements that contain: 1) hours worked, 2) overtime hours, 3) rate of pay, 4) gross pay, and 5) an itemization of each addition to and deduction from gross pay. If a significant portion of the contractor's workforce is not fluent in English, the wage statement must also be provided in the language(s) other than English in which that portion or those portions of the workforce are fluent.

President-elect Trump has called for repealing all of President Obama's executive orders. However, again, there is no certainty with which that the president-elect will keep his promise with respect to this order. AGC is working with Congress to repeal this executive order and its underlying regulations as a whole. The association is also communicating to the president-elect's transition team about the need for repeal. For AGC's detailed analysis of this executive order, webinars and other resources, [click here](#).

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<sup>2</sup> As noted above, the Fair Pay and Safe Workplaces and Paid Sick Leave Executive Orders only impact companies that hold prime contracts directly with or subcontracts through federal agencies like the Army Corps, Naval Facilities Engineering Command, Department of Veterans Affairs or U.S. General Services Administration; these executive orders do not impact federally-assisted contracts from state agencies, like state departments of transportation.

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### **Paid Sick Leave Executive Order**<sup>3</sup>

On January 1, 2017, the Paid Sick Leave Executive Order went into effect. The order requires federal contractors to provide seven days (56 hours) of paid leave to employees for sickness and other purposes.

The president-elect campaigned for six weeks of paid maternity leave for new mothers whose employers do not guarantee paid leave. There is little information to reflect his position one way or the other on this particular executive order. However, the fact that he supports paid maternity leave could make it difficult for him to oppose this paid sick leave order.

AGC notified Congress about its ability to repeal this executive order and will continue to press for repeal, as it is administratively impracticable in the context of the construction industry. AGC will also work with the transition team on ways to revamp the order, at a minimum. AGC has requested that the Trump administration repeal this executive order and unwind the Federal Acquisition Regulation rule that implements it.

For AGC information on the order, [click here](#).

### ***Other Pending “Midnight Regulations”***

AGC is tracking dozens of pre-final regulatory actions under consideration at federal agencies, including the Department of Labor, the Occupational Safety & Health Administration, the National Labor Relations Board, the Environmental Protection Agency, and others. Some of the more controversial ones, given the possibility of Congressional Review Act repeal and the new administration, may not become final before January 20, if at all. There is little way to know for certain which pending regulatory actions will, in fact, become final. Nevertheless, AGC will continue to closely monitor what comes out of the regulatory agencies.

## **The Regulatory Long-Term**

The regulatory long-term is the period after January 20, 2017, Inauguration Day. There are many things that can, cannot and may not happen in the regulatory sphere. Nevertheless, AGC will be there to fight for construction contractors. Among the first item on the agenda is addressing the current Project Labor Agreement (PLA) Executive Order. AGC will also seek ways to work with Congress to repeal regulations and the new administration to unwind or tweak costly and over burdensome regulations.

### ***Rescind Obama’s PLA Executive Order and Replace it with George W. Bush’s PLA Executive Order***

AGC will work with the Trump administration to rescind the Obama PLA Executive Order and replace it with the George W. Bush PLA Executive Order. The Obama order encourages—but does not require—federal agencies to use project labor agreements on large scale construction projects estimated to cost \$25 million or more. The order is limited to direct federal construction contracts. The Bush PLA order neither encouraged, restricted nor required PLAs on federal and federally-funded construction projects.

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<sup>3</sup> See Footnote 2.

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The Bush order is in line with AGC’s long-held position on leaving the need for PLAs up to contractors to voluntarily decide.

As a refresher, the Bush PLA order preserved open competition and government neutrality towards government contractors’ labor relations. The order allows construction contractors and labor unions to voluntarily institute PLAs on federal and federal-funded construction contracts. Under this order, two things happen: (1) there would be no federal agency mandated/government PLAs on construction contracts; and (2) there would be no state agency/government mandated PLAs on contracts that include federal funds. To the first point, direct federal contractors will not have to respond to sources sought notifications regarding the consideration of PLAs. These sources sought notices<sup>4</sup> will not be necessary and no longer be issued. To the latter point, federal-aid contracts issued from state agencies—like federal-aid highway contracts—could not require PLAs. However, this order could not and would not apply to state construction contracts that only use state funds—i.e., include no federal construction funds. Such an order would likely fail to pass constitutional muster under the Tenth Amendment, which protects states from certain types of federal government actions.

Assuming President Trump takes this course, regulatory action will be required to put the Bush PLA order back into effect. The Federal Acquisition Regulation Council and U.S. Department of Transportation, for example, will have to issue new regulations. This will take time, as proposed rules will have to go through the notice and comment period. This will not happen with the simple stroke of President Trump’s pen. AGC will keep its contractors closely informed about developments on this front.

#### ***Other Obama Executive Orders and Actions***

In addition to the executive orders and actions already discussed, AGC is looking for ways to work with the Trump administration to address such Obama orders like those regarding greenhouse gas emissions and climate change, sustainable federal facilities, and flood risk management, among others. AGC will also suggest ways to streamline the federal permitting processes and expand public-private partnership collaboration through the regulatory process.

#### ***The “Midnight Regulations” for Possible Congressional Repeal***

AGC is working with Congress to repeal a host of unnecessary, costly and burdensome Obama administration regulations under the Congressional Review Act (CRA). The regulations that Congress could possibly roll back under the CRA include: implementing regulations for both the Fair Pay and Safe Workplaces Executive Order and the Paid Sick Leave Executive Order; the Occupational Safety and Health Administration’s Electronic Injury and Illnesses Recordkeeping Rule, and the Equal Employment Opportunity Commission’s revised [EEO-1 Report](#), which would expand pay data reporting requirements.

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<sup>4</sup> Federal agencies generally release what are called “sources sought” notices as a means to solicit and gather market information. Under the existing PLA FAR Rule, federal agencies must make case-by-case determinations as to whether it a government mandated PLA would increase the economy and efficiency of project delivery. These agencies released sources sought notices to help them gather market information, as these notices often included a host of survey questions.

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The CRA enables Congress to overturn a federal agency rule, guidance or general policy statements—with simple majorities in both the House and Senate—issued within 60 legislative days. Historically speaking, such agency actions potentially ripe for CRA repeal for the new Republican Congress and president would have to have been finalized sometime in May 2016. The regulations AGC put forth fit those and other parameters under the CRA. Although the new overtime rule falls within the May 2016 timeline, the CRA specifically excludes rules that address wages from congressional repeal consideration. It should also be noted that the CRA has only been effectively used once since its enactment in 1996.

The CRA is a more powerful and effective tool for, essentially, permanently eliminating these Executive Branch actions than President-elect Trump simply rescinding those executive orders and using the regulatory process to unwind the regulations. Under the CRA, a federal agency cannot reissue the rule that has been repealed unless Congress passes and the president signs into law provisions authorizing the disapproved rule. As a result, a new president and administration cannot merely issue a new rule later.

Because of the procedure set forth under the CRA, any regulation repeal bills would not likely be sent to President Trump's desk until February at the earliest.

#### ***Other Obama Administration Rules, Policy, Guidance & Enforcement***

When it comes to other rules, guidance and policy directives put forth by federal agencies during the Obama administration, federal agencies in the Trump administration may make changes or throw them out entirely. For rules that initially went through the notice and comment process under President Obama's term, the Trump administration can only change or repeal them through notice and comment rulemaking. Again, this takes time. In addition, those who oppose such changes or repeal could delay the process in court.

For agency directives or rules that did not go through the notice and comment rulemaking process, the Trump administration can instantaneously change or repeal them. In addition, the Trump administration, just as the Obama administration can, rather quickly, alter the overall enforcement efforts of agencies.

#### **Regulatory Reform Begins**

Given the executive overreach of the Obama administration, AGC will work with Congress to make significant changes to the regulatory process. AGC will push for reforms that allow Congress to have a greater say in the rulemaking realm and require agency guidance and directives that have the practical impact of law to undergo notice and comment rulemaking.

The association will seek a return to fact-based rulemaking, where regulations undergo thorough economic analysis; are based in sound science and/or substantial empirical data; and are transparent in methods and goals. And, AGC will work to limit pre-construction reviews, studies and reports that often delay construction projects.

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