



STEPHEN E. SANDHERR, Chief Executive Officer

February 24, 2021

The Honorable James Frederick  
Deputy Assistant Secretary of Labor  
Occupational Safety and Health Administration  
200 Constitution Ave, NW  
Washington, DC 20210

Dear Deputy Assistant Secretary Frederick,

The Associated General Contractors of America (AGC) and its member firms place safety and health in the construction industry as a top priority, and the health of its workers during the pandemic is no exception. On that topic, I write to you in response to President Biden's Executive Order on Protecting Worker Health and Safety and its directive to the Occupational Safety and Health Administration (OSHA): (1) to determine whether emergency temporary standards (ETS) on COVID-19 are necessary; and (2) if such standards are necessary, to issue the ETS by March 15, 2021. Under such a regulatory scheme, the agency would then be required to issue a permanent rule, with the basis being any ETS issued within six months. Given this compressed timeline that would establish standards on a permanent basis, AGC strongly recommends that OSHA issue a Notice of Proposed Rulemaking (NPRM) in lieu of an ETS and convene a Small Business Advocacy Review (SBAR) Panel.

AGC represents more than 27,000 firms, including America's leading general contractors and specialty-contracting firms, union and open-shop, who are responsible for constructing and maintaining the nation's infrastructure. AGC and its members share your commitment to ensuring that the men and women working in the construction industry are afforded a workplace free of recognized safety and health hazards, including COVID-19. That is why at the onset of the pandemic, the construction industry immediately responded by adopting and implementing numerous safety and health procedures and protocols to mitigate COVID-19 hazards with great success.

To best inform the standards-making process, OSHA should ensure that it sufficiently compiles and thoroughly reviews a comprehensive record that includes the regulated community among all industry sectors, including construction. The only process that would allow for such informed standards-making is the notice and comment rulemaking process under the Administrative Procedures Act (APA). AGC holds that issuing an NPRM under APA requirements would still honor the administration's commitment both to swiftly respond to all COVID-19 safety and health hazards and to honor well-established legal norms. The issuance of an NPRM would also allow sufficient time for the regulated community to review, analyze and better inform any proposal via comments.

Doing otherwise would give the impression that the APA process was skirted, and due consideration was not given to the views and concerns of all industries and stakeholders. Taking such an approach is especially important given the varied exposure levels in each industry sector. For instance, construction has been generally deemed low to medium risk and should not be regulated at the same level(s) as healthcare, first responders and the like. Even in comparison to other industry sectors, such as manufacturing and retail, the construction environment is quite unique. Construction is not public facing, in most instances, and the project status changes daily, if not by the hour.

Of further concern are some of the new recommendations in the OSHA guidance released on January 29 and their possible inclusion in an ETS. For example, if the ETS contains provisions that mandate employers make available vaccines or vaccination series at no cost to employees, conduct training on the benefits and safety of vaccines or provide

NIOSH-approved respiratory protection, then a six-month timeframe precludes a thorough analysis of the impacts on the regulated community, especially small businesses.

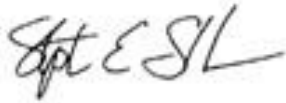
Also, of considerable concern originating from the January 29 guidance is the possibility of an ETS that requires NIOSH-approved respiratory protection. It is our concern that the requirement to use this level of respiratory protection, versus the CDC-recommended face coverings outside of healthcare settings, could potentially strain supplies of such protection for medical workers and first responders as previously experienced. In addition, such a mandate would significantly increase the number of contractors—especially small businesses—who would be required to implement and maintain a formal written respiratory protection program for protections that may not be necessary, such as working within six feet for short, intermittent periods of time where face coverings may be sufficient.

To gain a better understanding of the economic and other effects on these businesses, which comprises approximately 90% of the construction industry, OSHA should consult with the Small Business Administration (SBA) to convene a Small Business Advocacy Review (SBAR) Panel to collect advice from small business representatives. A diverse representation of small businesses will provide the agency with the industry-specific input necessary to promulgate a standard that considers the varying risk exposures, the appropriate abatement measures and ultimately ensures the highest degree of compliance.

Through our nationwide network of 89 chapters and more than 27,000 member firms, AGC offers our assistance to OSHA in its efforts to address COVID-19 in the workplace. AGC remains strongly committed to the safety and health of workers in the construction industry and our valued relationship with OSHA.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Sgt E SL".

Stephen E. Sandherr