



AGC
THE CONSTRUCTION
ASSOCIATION

AGC NEW YORK STATE

AUGUST 4, 2023

AGC REPORT



Overview

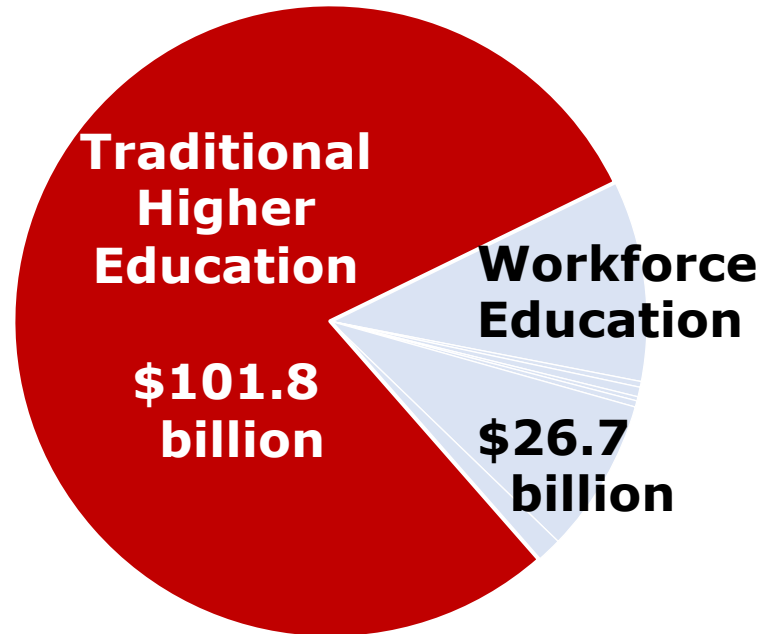
- Legislative
- Regulatory
- Litigation
- Role of the AGC CAF



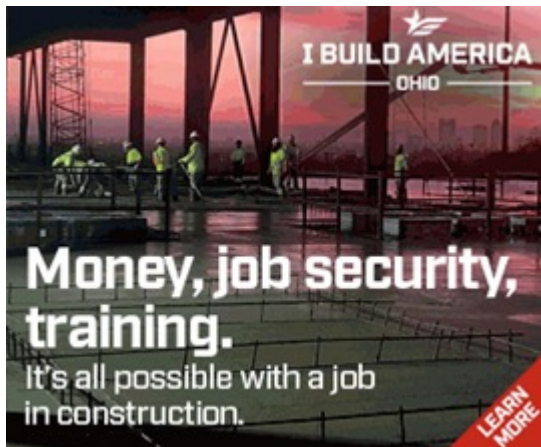
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AGC ADVOCACY: LEGISLATIVE

WORKFORCE DEVELOPMENT



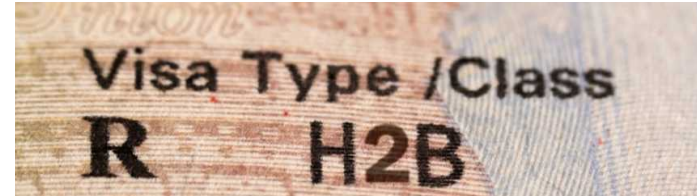
- Pressing for infusions of CTE funding
- Pushing USDOT, Commerce to step up
- **Construction Advocacy Fund-financed** targeted digital ad campaigns with Chapters
- Workforce Summits
 - 2023 Event Nov. 6-8 in Atlanta
 - [2022 Report](#)
 - [2021 Report](#)



IMMIGRATION REFORM



- Blocking [efforts](#) to exclude or limit access to H-2B visas
- Support “Lesser Skilled” [H-2C visa program bill](#)
- Support permanent work authorization for DACA/TPS
- Opportunities for action/engagement?



DACA
Deferred Action for Childhood Arrivals



EWIC Essential Worker Immigration Coalition



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REGULATORY REPORT

The Regulatory Onslaught Continues



U.S. Department of Labor

- **National Emphasis Program on heat**
- **National Emphasis Program on falls**
- Electronic injury and illness reporting
- Infectious disease standard
- PPE fit in Construction
- Healthcare covid-19 rule impacting construction
- OSHA silica standard revisions to medical surveillance provisions
- MSHA silica standard
- Blood lead level for medical removal
- **Expanding scope of Davis Bacon**
- Amendments to cranes and derricks in construction standard
- Independent contractor FLSA definition
- H-2B visa union notification requirement

National Labor Relations Board

- Joint Employer – GC/Sub relationship
- Union election procedures

Environmental Protection Agency

- **Waters of the US (WOTUS)**
- State water quality certification
- Disposal of PVC as hazardous waste
- **PFAS treated as hazardous substance**
- Development/standardization of EPDs
- Fuel economy standards

Department of Interior

- Roll back of Trump Endangered Species Act reforms

Council on Environmental Quality

- Roll back reforms - Streamlining NEPA
- Guide on factoring GHG emissions in NEPA process

Securities & Exchange Commission

- **GHG emissions reporting mandate**

Treasury Department

- IRA prevailing wage & apprenticeship
- Rules and guidance on ARPA
- Beneficial ownership rules

U.S. Department of Transportation

- DBE rules modernization
- GHG performance measure
- Buy Clean & EPDs
- FHWA guidance restricting new highway capacity

Pension Benefit Guaranty Corporation

- Withdrawal liability actuarial interest rate assumptions

Office of Management & Budget

- **Build America, Buy America Act new proposed guidance**
- Social cost of carbon in reg, permit & policy

Federal Acquisition Regulation Council

- **Govt-mandated project labor agreements**
- GHG/climate financial risk disclosure
- Social cost of carbon in procurement
- Standardizing cybersec. requirements

Regulatory Advocacy In Action



OSHA on Falls, Heat, and Mental Health

- **Falls:** New National Emphasis Program (NEP): Targeting construction; allows compliance officers to inspect sites if see workers at heights; state plan states must follow suit
- **Heat:** Continued Engagement on NEP: Poses enforcement threat w/o clear understanding of contractors' responsibility; AGC submitted draft FAQs seeking clarification – undergoing agency review
- **Mental Health:** Widespread Outreach & Education: Advised USDOL on AGC's mental health and suicide in construction efforts ([new webpage](#)); urged add of elective to OSHA 10/30 hr. training; new DOL Mental Health at Work [initiative](#)
- **Advisory Committee Construction S&H**
AGC will continue to advise USDOL on OSHA standards ([Federal Register notice](#))



Regulatory Advocacy in Action



EPA/Corps Definition of WOTUS

- **Biden's 2023 WOTUS Rule:** **Effectively struck down** by SCOTUS majority opinion in *Sackett* case (decided [5-25-2023](#))
 - AGC-backed lawsuits had already blocked rule in [27 states](#)
- **AGC Position--OPPOSE:** AGC opposed federal overreach and lack of clarity
- **AGC Action:** Comment letters, mtgs w/ White House + regulators, Action Alert (support of Congressional disapproval), coalition, amicus brief in SCOTUS case, litigation in fed courts
- **Outlook:** Need agency guidance or regs to implement *Sackett* ruling
 - Significant nexus test is gone
 - Wetlands only covered WOTUS if “indistinguishable” from adjacent jurisdictional waters
 - No fed authority over dry (ephemeral) features



Regulatory Advocacy In Action



SEC Greenhouse Gas Disclosure



Securities and
Exchange
Commission



- **Proposed Rule:** Would require public companies to measure and disclose GHG emissions & climate risks, including emissions of privately held construction companies that build for them
- **AGC Position--OPPOSE:** AGC opposes unfeasible gov't mandates for GHG emissions reporting
- **AGC Action:**
 - Filed extensive comments opposing the proposal
 - Surveyed members to find that vast majority do not currently track emissions
 - Met with key congressional leaders
- **Outlook:** AGC would consider litigation if proposed rule goes final without significant change

Regulatory Advocacy In Action



EPA on Regulating PFAS under Superfund Regs



- **Proposed Rule:** Uses CERCLA to regulate two PFAS (PFOA/PFOS) which would trigger reporting requirements and cleanups of contaminated sites (including Superfund liability)
- **AGC Position--OPPOSE:** Support provisions that protect contractors who may have interacted with any of the growing number of products with an emerging chemical of concern—such as PFAS—on projects during demolition, earthmoving or dewatering activities that could be at risk for liability
 - Urged agencies to provide more flexibility to address potential concerns with PFOA/PFOS without the extremes in liability found in the Superfund program
 - Innocent contractors need protection from liability on projects where they may have unknowingly interacted with the chemicals in soil or groundwater
- **AGC Action:**
 - Expressed liability concerns with EPA as far back as the prior administration
 - Raised awareness in Congress opposing a one-size-fits-all approach to PFAS
 - Opposed the CERCLA proposal in AGC construction-specific comments 11/7/22
 - [Spoke](#) during 3/23/23 EPA listening session and submitted follow-up [response](#).
- **Outlook:** Other actions are ongoing at the agency through its PFAS Action Plan

REGULATING PVC AS HAZARDOUS WASTE



- **Proposed Settlement:** Center for Biological Diversity sued EPA to regulate discarded PVC as hazardous waste
- **AGC Position--OPPOSE:** Ensure that rules for hazardous substances make sense for construction
- **AGC Action:**
 - AGC filed comments opposing the unfounded effort on 6/3/22
 - AGC helped organize and joined a business coalition effort opposing such a rulemaking on 12/23/22
- **Outlook:** The EPA recently announced that it was “temporarily” denying petition to engage in rulemaking

Regulatory Advocacy In Action

Build America, Buy America Act Implementation



- **Proposed Guidance:** OMB expands 4/18/22 guidance to include more construction materials and more manufacturing processes to be domestically produced/undertaken
- **AGC Position--OPPOSE:** AGC supports intent of Buy America, but opposes unrealistic implementation
- **AGC Action:**
 - **Filed dozens of comments** to federal agencies and OMB seeking reasonable waivers from unrealistic requirements
 - In 2022, AGC **met three times with White House** Made in America Office and hosts of times with other agencies like DOT
 - Has met with **congressional leaders** and **testified** multiple times
 - Conducted **legal research** to force reasonable implementation
 - Organized coalition **undertaking administrative action** to press for phased implementation with transparent waiver process
- **Outlook:** AGC will file administrative action

Regulatory Advocacy In Action

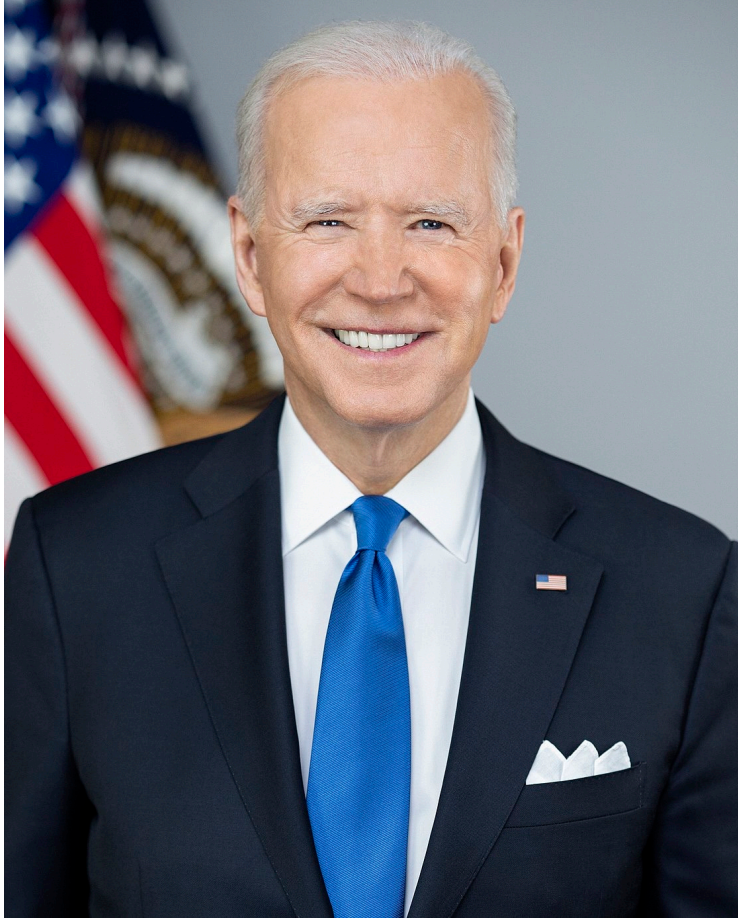
Expansion of and Changes to Davis Bacon



- **Proposed Rule:** Expands “site of work” definition to cover truck drivers, materials suppliers, and prefabrication work; revives pre-1982 method for determining prevailing wage rate
- **AGC Position--OPPOSE:** DOL should honor statutory definition of “site-of-work” requirements; utilize sufficient data to determine rates, not less
- **AGC Action:**
 - Undertook **2017 task force**; reached out to building trades;
 - Hired **former WHD employee** with 20 yrs+ of DB experience to **assist with comments** opposing rule submitted on 5/17/22
 - AGC met with **White House OMB** on 1/9/2023
- **Outlook:** AGC has coalition effort ready to litigate if necessary

Regulatory Advocacy In Action

President Biden's Project Labor Agreements Executive Order



- **Proposed Rule:** Requires PLA on direct federal construction projects of \$35M or more with limited exceptions/September?
- **AGC Position--OPPOSE:** AGC opposes gov't mandates for PLAs; AGC neither; AGC neither supports nor opposes contractors' voluntary use of PLAs.
- **AGC Action:**
 - FOIA litigation uncovering data reflecting that **DOD rejected PLA mandates 99.4%** of the time under Obama-Biden Admin.
 - AGC survey found **nearly three quarters** of federal contractors would not bid on projects with PLA mandates
 - Generated nearly **8,500 member communications** to Congress and FAR Council opposing it
 - Filed **20+ page comments** opposing proposed rule
 - **Prepared for litigation**
- **Outlook:** AGC headed to court when a final rule is issued

AGC LITIGATION



US Supreme Court Delivers Wins

Court sides with AGC -- 3x's in 3 weeks!



1. *Ciminelli v. U.S.*

- Pre-Bid Interactions Between Public Owners and Contractors

2. *Sackett v. Environmental Protection Agency*

- Federal Permitting Authority Over Construction Work in Water, Wetlands

3. *Glacier Nw., Inc. v. Int'l Bhd. Of Teamsters Local Union No. 174*

- NLRA Preemption



PRE-BID INTERACTIONS WITH PUBLIC OWNERS (US Supreme Ct)



- *Ciminelli v. U.S.* No. [21-1170](#)
- Review of 2nd Cir. criminal conviction of contractor for wire fraud → Right to Control (RTC) legal theory.
 - Help an Owner, Go to Jail?
 - Contractor provided RFP input at owner request; won project
 - Prosecution presented NO EVIDENCE alleging financial harm to owner or violation of bid laws
- **AGC amicus [brief](#) argued** against RTC (treats failure to disclose *potentially* valuable economic info as basis for fraud). Prosecution must show loss \$\$ or property. Pre-bid owner/GC interactions = better RFPs and projects.
- **WIN!** SCOTUS unanimously agreed with AGC. 2nd Circuit decision reversed and case remanded.



FED AUTHORITY OVER CONSTRUCTION WORK IN WETLANDS (US Supreme Ct)



Diagram by Pacific Legal Foundation

- *Sackett v. U.S. EPA* No. [21-454](#)
- Review of 9th Cir. decision affirming federal control over private property (separated from nearby lake by row houses and road) as WOTUS based on “significant nexus” test.
- **AGC-supported** [amicus brief](#) **argued** the need for stable/predictable 404 permit process and clarity due to severity of criminal sanctions under CWA.
- **WIN!** SCOTUS unanimously agreed with AGC that CWA doesn’t apply to wetlands on Sacketts’ lot. 9th Circuit decision reversed and case remanded.
 - Outright rejected “significant nexus” test
 - CWA covers only wetlands w/ continuous surface connection to WOTUS (relatively permanent water connected to traditional interstate navigable waters) - difficult to tell where water ends, wetland begins
- Supports AGC’s [ongoing legal challenges](#)

NATIONAL LABOR RELATIONS ACT PREEMPTION (US Supreme Ct)



- *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Local Union No. 174* No. [21-1449](#)
- Review of WA Sup. Court holding that NLRA preempts employer's state tort claim against a union for intentionally destroying co. property during a labor dispute.
- **AGC-supported amicus brief argued** preemption doesn't apply because the union's conduct was not "arguably protected" by the NLRA. Strikers must take "reasonable precautions" to protect employer property from foreseeable, imminent danger.
- **WIN!** SCOTUS agreed with AGC. WA decision reversed and case remanded.



DECISIONS PENDING



Environmental Law

- **DEFINITION OF WOTUS IN FED REGULATION:** Is the Biden Admin new WOTUS rule illegal (in violation of the Administrative Procedures Act, Clean Water Act, U.S. Constitution and Supreme Court precedent)?
(TX District Ct. + ND District Ct.)
 - Sackett opinion validates AGC's key legal arguments
 - 2023 WOTUS rule currently on hold in 27 states
 - AGC/Coalition preparing to file summary judgment motions in both courts seeking nationwide vacatur

DECISIONS PENDING



Insurance Law

- **INSURANCE COVERAGE FOR CONSTRUCTION DEFECTS:** Does unexpected/unintended defect in a sub's work amount to "property damage" resulting from an "occurrence" under commercial general liability (CGL) policies sold to GCs and subs across the country policy?
(1st Cir. applying MA law + IL Supreme Court)

Construction Law

- **PUNITIVE DAMAGES FOR CONTRACT BREACH:** Can a sub collect punitive damages from GC for breach of contract beyond contractual remedy, i.e. pursuant to tort law? (TN Supreme Court)

NEW! AMICUS BRIEF 11th Circuit (to be filed)



Insurance Law

- **CGL Insurance Coverage for Construction Defect Claims** (*Liberty Surplus Insurance Corporation v. Kaufman Lynn Construction, Inc. and United Glass Systems Corporation – heading to 11th Cir.*) → **AGCA + FL Chapters amicus brief**
 - (?) Whether a “Course of Construction” exclusion in a CGL policy applies to work that is no longer under construction – it has achieved a certificate of occupancy, exclusive possession has passed to the owner, the statute of repose has begun to run, triggering the policy’s Products-Completed Operations Hazard (“PCOH”) – despite construction continuing on a separate, wholly distinct phase of the project at large?
 - On May 25, AGC Officers approved up to \$10,000 to hire Pat Wielinski of Cokinos Young to draft/file the brief. AGC’s Florida Chapters will contribute an additional \$5,000. NAHB is offering \$10,000 to participate in the effort (for a total of \$25,000).



THE CONSTRUCTION ADVOCACY FUND

CONSTRUCTION ADVOCACY FUND



- Resource for litigation, PR, government relations, workforce issues and more
- 5% of AGC charter fees deposited in CAF (\$500K)
- Additional funding by budget surpluses; member and chapter donations
- Unlike PAC, can receive corporate \$
- Unlike PAC, no disclosure of donors required
- Allows us to engage in every issue that matters

RECENT CAF EXPENDITURES



- “Construction is Essential” social media worker recruitment campaign: **\$250,000 +**
- Biden PLA Executive Order Mandate: **\$300,000** (and we have not yet filed a complaint!)
- OSHA and Federal Contractor VAX mandates: **\$250,000**
- Definition of “Waters of the US” Supreme Court case (in coalition): **\$50,000**
- Digital media strategy to defeat PRO Act: **\$500,000**
- Legal strategy memo on Buy/Build America requirements: **\$30,000**

ANTICIPATED CAF EXPENDITURES



- Legal challenge to Davis-Bacon reforms including covering off-site facilities and delivery drivers
- Legal challenge to OSHA general duty clause citations for heat exposure and illness
- Legal challenge to EPA effort to classify PVC as a hazardous substance
- Legal challenge to EPA effort to regulate ubiquitous chemicals such as PFAS under Superfund statute with strict, joint, and several liability for contractors who encounter PFAS on job sites
- Legal challenge to SEC rule requiring reporting of GHG emissions
- Legal challenges to additional bad ideas emanating from the Administration

Questions?