



2023 Minnesota Construction Summit

January 17, 2023

Federal Legislative & Regulatory Update

1



Overview



- Implementing Status of Major Laws
- Congress & Legislative Advocacy
- The Regulatory Onslaught
- Litigation

2 |

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2




3

AMERICAN RESCUE PLAN ACT

[State, Local, Territorial Funding Use through September 30, 2022](#)

Category	Funds Budgeted	Projects
Infrastructure: Water, Sewer, Broadband	\$21.0B	6,669
Housing: Emergency Aid, Affordable Housing, Homelessness	\$14.2B	1,827
COVID-19 Public Health Response	\$11.4B	4,992
Worker Support Unemployment Aid, Job Training, Public Workforce, Essential Worker Premium Pay	\$10.3B	3,281
Small Business Assistance	\$4.0B	964
Child Care Early Learning	\$759.2M	290



- \$1.9T COVID-Relief Law
- \$350B for state, local, territorial govts
- [Federal affirmative action reporting requirements attach to these dollars](#)

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ARPA: DOT Funding



State	Budgeted	Reason	Project
FL	\$1,226,105,503	Revenue Replacement	Funding is for state highway system projects in the Department of Transportation's Work Program that were deferred or deleted under Executive Order 20-275 issued on 10/23/20 due to the pandemic.
LA	\$563,000,000	Revenue Replacement	A critical need in the state is roads and bridges infrastructure. With the decreases in revenue caused by the pandemic, less state funding was available for allocation to these infrastructure projects.
SC	\$453,000,000	N/A	A one-time investment of \$360 million to the interstate program could accelerate the I-26 program by six years. A one-time investment of \$200 million to the interstate program could accelerate the I-95 program by two to three years. A one-time investment of \$300 million could build Phase 1 of I-73.

5

ARPA: Inflation



State	State/Local	Funding	Reason	Project
NM	Las Cruces	\$4,128,725	Revenue Replacement	Supplemental funding for GO Bond projects due to product and labor cost increases as a result of the pandemic and supply chain issues.
MT	State of Montana	\$15,000,000	Negative Economic Impacts	Provide critical gap financing for projects experiencing significant development cost increases due to COVID 19
MN	Clay	\$1,000,000	Revenue Replacement	Clay Township began the process to build a Town Hall and then Covid inflation of materials costs created expenses above the original bid. The original bid for the project was \$140,934. The final cost for the project ended up being \$148,434 due to increased cost of materials. The ARPA funding was used to offset that increase in materials cost.

6

INFRASTRUCTURE INVESTMENT & JOBS ACT Transportation & Utility Infrastructure



- Highway
 - \$72B/\$273B – Formula to states
 - \$14B/\$37B - Bridges
 - \$2B/\$5B - National Electric Vehicle Infrastructure Program
- Transit - \$27B/\$108B
- Airports - \$3.89B/\$20B
- U.S. DOT Discretionary Grants
 - \$2.2B – RAISE Grants
 - \$1.5B – INFRA Grants
 - \$1B – Mega Grants
 - \$300M – Rural Grants
- CWSRF and DWSRF - \$7.1B
- Broadband – Eventually \$42B

7 |

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8

BALANCE OF POWER IN THE HOUSE



Previous		New	
222	213	213	222
DEM	GOP	DEM	GOP

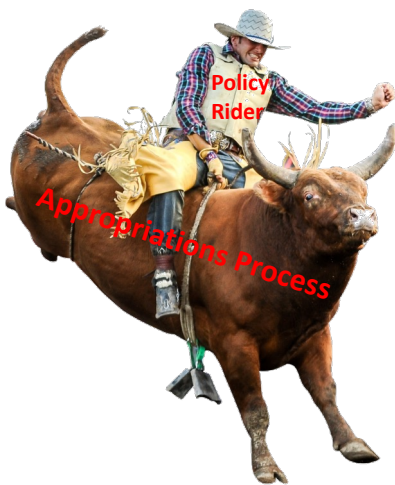


9

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CHECKING REGULATORY OVERREACH?



Members Since 2017

- Andy Biggs (R-AZ)
- Ken Buck (R-CO)
- Warren Davidson (R-OH)
- Jeff Duncan (R-SC)
- Matt Gaetz (R-FL)
- Paul Gosar (R-AZ)
- Mike Johnson (R-LA)
- Jim Jordan (R-OH)
- Thomas Massie (R-KY)
- Scott Perry (R-PA)
- David Schweikert (R-AZ)

Newer Members

- Lauren Boebert (R-CO)
- Marjorie Taylor Green (R-GA)
- Chip Roy (R-TX)

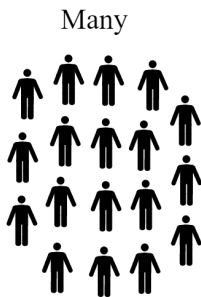


10

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NOVEL APPROACH TO LEGISLATING?



The Discharge Petition

- A “grassroots” legislative tool
- Challenge to House Leadership
- Need at least 218 signatures
- House vote not guaranteed

11


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BALANCE OF POWER IN THE SENATE



Previous		New	
50	50	51	49
DEM	GOP	DEM	GOP



12

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12

A PREVIEW OF THE 118TH CONGRESS



Democratic Agenda

- Climate action
- DACA protection (pending SCOTUS)
- Confirm Biden judges, agency appointees
- Protections for abortion, voting rights



Republican Agenda

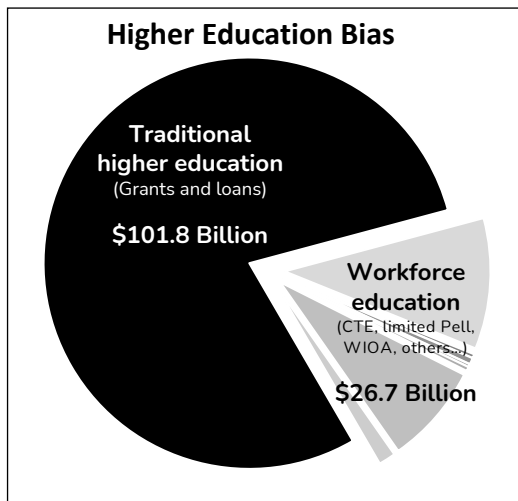
- Oversight
- Securing the border
- Disband Jan. 6 committee
- Investigations into Afghanistan, COVID-19 DOJ, FBI, Hunter Biden, southern border
- Defund parts of the Inflation Reduction Act & Infrastructure Investment and Jobs Act

13

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WORKFORCE VS EDUCATION FUNDING



BACKGROUND

- 91% of contractors have difficulty finding workers, candidates lack skills
- 21% of federal postsecondary spending goes towards workforce education
- Education public policy limits access to some construction programs

THE “ASKS”

- Reverse the higher education bias in federal funding. Increase Perkins CTE & workforce funding for FY 2024
- Support JOBS Act to expand Federal Pell Grant eligibility to training programs

14 |

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IMMIGRATION VISA REFORM



U.S. Citizenship and
Immigration Services

BACKGROUND

- Immigration system broken
- Reform efforts elusive
- Need for action can't be ignored

THE "ASKS"

- Extend DACA and TPS work authorizations
- Oppose bans on construction industry for any existing guestworker visa programs
- Establish guestworker visa program for construction

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MARIJUANA OPPORTUNITY REINVESTMENT & EXPUNGEMENT (MORE) ACT



- Removes marijuana from federally controlled substances list
- Criminal justice reforms: e.g., expungement of marijuana convictions
- **No** consideration for an employer's right to maintain a safe and drugfree workplace
- [AGC Constructor Cast](#)

16

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PERMITTING REFORM



- Sen. Manchin (D-WVa) – Energy Independence & Security Act
 - 2 yr energy project NEPA reviews needing EIS; 1 yr for EA
 - **150-day SOL for legal challenges**
 - Lead federal agency for energy projects and concurrent reviews
 - President selects 25 projects for priority permitting review
- Sen. Capito (R-WVa) - START Act (Simplify Timelines and Assure Regulatory Transparency Act)
 - Makes permanent 2020 **WOTUS** definition
 - Prohibits use of interim **social cost of carbon/GHGs**
 - Codifies **One Fed Decision** for energy projects
 - More state auth on hydraulic fracturing
 - Supported by most Rep Senators

17 |

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18

THE REGULATORY ONSLAUGHT CONTINUES



U.S. Department of Labor

- National heat standard
- National Emphasis Program on heat
- 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
- Amendments to cranes and derricks in construction standard
- Expanding scope of Davis Bacon
- 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

- Roll back reforms – WOTUS/water quality cert
- 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 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

19

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FEDERAL HEAT STANDARD

- OSHA issued advanced notice proposed rulemaking Oct. 2021
- **80-degree trigger?**
- OSHA unveiled new enforcement effort in April 2022
- Acclimatation of new or “returning” workers

20

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INFLATION REDUCTION ACT: MAJOR FUNDING LINE ITEMS

Funding	Objective	Estimated Cost Over 10 Years
GSA Low Carbon Emissions Construction Materials/Products Sec. 60503	Fund low-embodied carbon materials in construction projects	\$2.15 Billion
Federal Highway Administration Sec. 60506	Fund low-embodied carbon materials in construction projects	\$2 Billion
Environmental Product Declaration Sec. 60112	Funds to EPA to develop and carry out a program to support the development, enhanced standardization and transparency, and reporting criteria for environmental product declarations	\$250 Million
Low Embodied Carbon Labeling for Construction Materials Sec. 60116	EPA—in consultation with GSA and FHWA—to identify and label construction materials and products that have substantially lower levels of embodied carbon	\$100 Million

21

"BUY CLEAN" CONSTRUCTION MATERIALS



Concerns

- New, Untested formulas/methods/specs
- New Contract + Legal + Insurance risks
- EPA Hijacking EPD process
- Backdoor Approach GHG reporting

The "Asks"

- \$ Incentivize Materials' Markets (ensure performance)
- Transition Time
- Sensible Waiver Process
- Keep Industry Involved

22 |

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SEC GREENHOUSE GAS DISCLOSURE



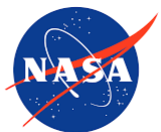
- SEC proposed rule
- Public companies - disclose GHG emissions & climate risks
- Private construction co's prepare for ripple effect
- AGC weighed in with [comments](#) in May 2022

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FEDERAL CONTRACTOR GREENHOUSE GAS DISCLOSURE



- **Proposed Rule:** Requires direct federal contractors to disclose climate risks, report GHG emissions—including from their supply chain—and set emissions reduction targets
 - \$7.5M up to \$50M: Significant Contractor
 - \$50M and over: Major Contractor
- **AGC Position--OPPOSE:** Oppose efforts to require disclosure of unfeasible GHG emissions reporting
 - Inclusion of Scope 3 (supply chain emissions) is too expansive; unrealistic timelines; definitions of significant/major contractor unworkable
- **AGC Action:** Gathering feedback from AGC members/industry partners and preparing comments
- **Outlook:** Comments are due Feb. 13; No clear outlook for when a final rule will be issued

24

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FHWA GREENHOUSE GAS PERFORMANCE MEASURE



FHWA

- **Proposed Rule:** require State DOTs and MPOs to establish declining targets that reduce GHG emissions generated by on-road vehicles
 - Would delay or halt certain road and bridge projects - including the construction of new roads and highways – to instead focus only on GHG.
- **AGC Position--OPPOSE:** Empower non-federal partners and the construction industry with the flexibility to best utilize resources to address their specific transportation and climate needs while avoiding one-size-fits-all mandates
 - FHWA lacks statutory authority; will limit a state's flexibility to make its own transportation decisions
- **AGC Action:** Submitted [comments](#) on Oct. 13
- **Outlook:** Date of issuance for final rule unclear; No OMB review yet

25

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FHWA IJA IMPLEMENTATION “MEMO”



FHWA

- **“Policy Memo”:** The 12/2021 memo fails to implement IJA environmental streamlining reforms, threatens existing reforms and discourages state DOTs from building new road/highway capacity
- **AGC Action:**
 - First out the gate opposing memo in 1/2022
 - Drummed up support in House and Senate opposing it throughout 2022
- **Major Development:** In 12/2022 GAO declares that the “memo” is a rule under the Congressional Review Act (CRA) and the Administrative Procedures Act; FHWA did not undertake any notice and comment rulemaking procedures in issuing the “memo”
- **Outlook:** Will galvanize industry to call on FHWA to withdraw the rule and work with Congress repeal the rule under CRA

26

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BUILD AMERICA, BUY AMERICA ACT



- Expands Buy America requirements to federally assisted projects all
- Includes iron, steel, manufactured products and construction materials
- Exempts, cementous materials, aggregates and their binders
- Federal/State Agencies' **patchwork of implementation**

27 |

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NEW DEFINITION OF WATERS OF THE UNITED STATES (WOTUS)



- **Final Rule:** Rescinds Trump rule and creates [new definition](#) w/ expanded scope resulting in more projects needing fed. permits
- **AGC Position--OPPOSE:** Support efforts to limit federal jurisdiction to the intent of the Clean Water Act and provide clear guidelines as to what types of waters require permits
 - AGC opposes the rule because SCOTUS is reviewing relevant case; adds new categories of waters; introduces new methods and unclear terms; adds additional joint agency reviews; reduces clarity over ditches; will increase projects needing fed. permit
- **AGC Action:** Provided prelim. feedback to the agencies; opposed in AGC construction-specific and in coalition comments; joined litigation coalition
- **Outlook:** Final rule goes into effect 60 days after publication; May need modification post Supreme Court decision; Agencies have waffled on whether additional steps/rules are coming

28 |

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PFAS – RISKS AND LIABILITY



- **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](#) 11/7/2022
 - Joined onto various coalition letters, when applicable
- **Outlook:** Other actions are ongoing at the agency through its PFAS Action Plan; AGC has invited EPA to speak with Environmental Committee in Feb. on this

29 |

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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:** EPA issued [tentative ruling](#) supporting AGC-position on Jan. 12

30

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Inflation Reduction Act: Major Tax Credits/Deductions

Tax Credit	Objective	Estimated Cost Over 10 Years*
Production Tax Credit & Investment Tax Credit	Incentivize construction of renewables	\$65.024 Billion
Clean Energy Investment Credit	Incentivize net-zero energy production and energy storage advancement	\$50.858 Billion
Advanced Manufacturing Tax Credit	Induce GHG reduction for manufacturing facilities	\$30.622 Billion
Nuclear Production Tax Credit	Aimed at preventing decommissioning of nuclear plants	\$30.001 Billion
Residential Clean Energy Tax Credit	Encourage homeowner purchase of energy efficient systems, products	\$22.022 Billion
EV/Clean Vehicle Tax Credits	Increase purchases of EVs/clean energy vehicles	\$14.209 Billion
Hydrogen Tax Credit	Spur hydrogen cell energy production facilities	\$7.849 Billion
Energy Efficient Commercial Building Deduction (179D)	Ties labor mandates to this deduction used for retrofitting buildings	\$362 Million

31 *Estimated costs derived from [Congressional Budget Office](#)

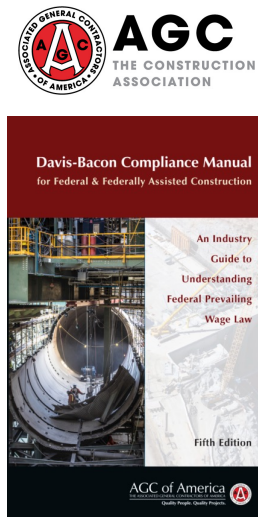
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31

Prevailing Wage Requirements

- Ensure contractors and subs pay prevailing wages during construction (and alteration & repair in some cases)
- Satisfy noncompliance to maintain credit eligibility
 - Provide back pay + plus interest + (\$5,000 fine per worker or \$10,000 if intentional)
 - Penalties differ from Davis-Bacon Act
- Further clarification to follow in [regulatory guidance](#)

*concurrently the US DOL is updating Davis-Bacon regulations



6th version of AGC DB manual TBD

32

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DAVIS BACON MODERNIZATION



- **Proposed Rule:** Expands “site of work” definition to cover truck drivers, materials suppliers and prefabrication work; uses pre-1982 method for determining prevailing wage rate
- **AGC Position--OPPOSE:** Support revisions to the Davis-Bacon Act and implementing regulations that simplify compliance requirements, yields a more timely and appropriate wage determination process, clearly honors statutory definition of “site-of-work” requirements, and provides additional resources for survey department operations
- **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 that were submitted on 5/17/2022
- **Outlook:** Under OMB review; AGC met OMB on Jan. 9; AGC preparing coalition effort to litigate if necessary

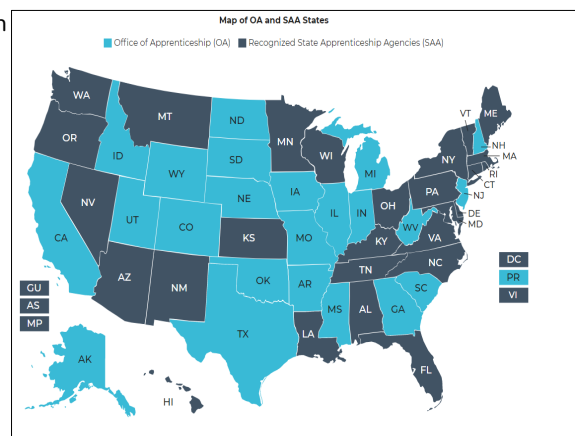
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33

Registered Apprenticeship Requirements



- Apprenticeship utilization requirements:
 - 10% of craft hours in 2022 → 12.5% in 2023 → 15% in 2024 and later
- Must follow apprentice-to-journeyworker ratios set by US DOL or State agency
- Each contractor with 4 or more workers on a project must employ one or more qualified apprentices
- Satisfy noncompliance to maintain credit eligibility
 - Pay \$50 x total labor hours short of requirement (can increase to \$500 if deliberate)
 - Make good faith effort and request denied by Registered Apprenticeship program
- Further clarification to follow in [regulatory guidance](#)



34

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JOINT EMPLOYER



- **Proposed Rule:** Rescind Trump-era rule and loosen standard for deeming a company the joint employer of another company's workers
- **AGC Position--OPPOSE:** Ensure definition of joint employer status is limited to those that exercise direct control over employees' essential terms and conditions of employment
- **AGC Action:**
 - Joined coalition comments arguing the proposal exceeds NLRB's authority
 - Opposed the proposal in [AGC construction-specific comments](#) on 12/7/2022
 - Reviewing avenues for opposition if proposal goes final
- **Outlook:** Final rule is scheduled for release in Aug. 2023

35 |

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AGC ADVOCACY: LITIGATION



36

ONGOING LITIGATION



- **U.S. Supreme Court:**
 - Pre-Bid Interactions Between Public Owners and Contractors
 - NLRA Preemption of Employer's State Tort Claim
 - Federal Permitting Authority Over Construction Work in Water, Wetlands (WOTUS)
- **U.S. Appeals Courts:**
 - Construction Defect NOT Covered by GC's Insurance b/c Defect Stemmed from Sub's Work (First Circuit)
- **U.S. District Courts:**
 - Federal Contractor COVID-19 Vaccine Mandate (Northern District of Texas)
- **State Supreme Courts:**
 - Statute of Repose: Runs When Sub Work Completed or Project Completed (North Carolina)
 - Punitive Damages for Breach of Contract (Tennessee)
 - Verbal vs. Written Authorizations to Modify Contract Specs and Special Defects (Texas)

37

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38



AGC Advocacy Matters

- Ensured that Construction is Essential (2020)
- Secured PPP Loan Forgiveness (2020-2021)
- Enactment of \$1.2 Trillion Bipartisan Infrastructure Law (2021)
- Defeated OSHA COVID-19 Vax Mandate (2022)

39 |

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40

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