Statement of

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to the

U.S. House of Representatives

Committee on Small Business Subcommittees on Investigations, Oversight, and Regulations and Contracting and Workforce

For a hearing on

"The Cumulative Burden of President Obama's Executive Orders on Small Contractors"

September 13, 2016

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

The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 26,000 firms, including America's leading general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

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Subcommittees on Investigations, Oversight, and Regulations and Contracting and Workforce
Committee on Small Business
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Chairmen Hanna and Hardy, Ranking Member Adams and members of the committee, thank you for inviting AGC to testify on these important topics concerning small business contractors. My name is Jimmy Christianson. I am regulatory counsel for the Associated General Contractors of America ("AGC"), where I focus on analyzing executive agency actions and informing construction contractors on how they may comply with those actions.

In this testimony, I will discuss:

I. The construction industry, its small business construction contractors and regulatory compliance in general;
II. Recent executive actions and their impact on small business construction contractors; and
III. The cumulative impacts of new regulatory mandates on small business construction contractors.

I. THE CONSTRUCTION INDUSTRY, ITS SMALL BUSINESS CONSTRUCTION CONTRACTORS & REGULATORY COMPLIANCE IN GENERAL

A. Small Businesses Represent the Vast Majority of Construction Firms

The construction industry has historically supported and provided opportunities for small businesses, as it accounts for nearly five percent of total nonfarm payroll employment and more than 660,000 firms throughout the United States, of which 93 percent have fewer than 20 employees.[1] As such, federal agencies generally rely heavily upon the construction industry to meet their annual small business prime contracting and subcontracting goals.

B. Small Businesses are an Essential Component of Construction Projects

Construction is usually accomplished under the leadership of a general, or prime, contractor. It is the job of the general contractor to integrate the work of the numerous trade and specialty contractors—acting as subcontractors—to complete the project. A significant construction project (like a $50 million office building) may have anywhere from 20 to 50—and in some instances more—trade and specialty contractors. These subcontractors are organized within the project delivery team in tiers so that each subcontractor can deliver its services in a highly integrated process. Small business subcontractors, operating at the appropriate tiers, are critical and essential to the success of construction projects and the construction industry as a whole. The subcontractors typically perform 60 to 90 percent of the work on a

[1] Most recent year of available data online at http://www.census.gov/econ/susb/?eml=gd&utm_medium=email&utm_source=govdelivery.

construction project.[2] As such, the industry cannot succeed without a large pool of qualified small business trade and specialty subcontractors.

C. Small Business Construction Contractors Have Limited Resources

Like any small business, small business construction contractors have limited resources. To be successful, they must manage those precious resources in an effective and efficient manner. The most valuable and expensive resources for small business construction companies are their employees.

As noted above, the vast majority of construction companies across the industry have fewer than 20 employees. Generally speaking, those employees may include cost estimators, proposal managers, project managers/superintendents, skilled (craft) labor, laborers, equipment operators, and other staff. When it comes to compliance issues, many small businesses may have one or two employees that handle the safety, labor, human resources and environmental compliance for the entire company. In many companies, the safety director is also the environmental compliance director and the human resources director is also an accountant and general office manager. The reality is that these small business employees are often working "double duty."

Small business construction contracting companies—which generally include prime contractors with $36.5 million or less in gross annual revenues and subcontractors with $15 million or less in gross annual revenues—do not have in-house counsel. They do not have teams of attorneys on staff. In fact, AGC is unaware of any construction contracting company—small business or otherwise—with gross annual revenues below $100 million that has in-house legal counsel or staff. As a result, these small businesses pay outside counsel or other compliance experts in the range of about $400 an hour or more to establish and audit company compliance programs; to routinely train their employees; and to rectify compliance issues as they arise.

D. Regulatory Compliance is Part of the Cost of Operating a Small Construction Contracting Business, But Regulatory Compliance Does Not Grow that Business.

Small construction contractor businesses seek federal construction contracts—building levees to protect our cities from floods, hospitals and clinics for our veterans, and barracks for the troops and schools of their children—in an effort to grow their companies, and even as a means to serve their nation. Building infrastructure and facilities is the lifeblood of their business. And, ultimately, building that infrastructure and those facilities is why federal agencies awarded them the contracts.

Abiding by laws and regulations is part of the cost of doing business. However, the requirements those statutes and regulations impose can also represent barriers to entry for emerging small businesses and barriers to growth for existing ones. Laws and regulations are necessary to help maintain a level, competitive playing field, among other things. Nevertheless, not all laws are necessarily good laws, and, similarly, not all regulations are necessarily good regulations. Laws and regulations enacted and finalized, even with the best intentions, can have unintended and deleterious consequences or duplicate other statutory and regulatory measures It is with that point in mind that, that I now turn to a number of executive orders and presidential memoranda put forth by the current administration.

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[2] http://www.gao.gov/products/GAO-15-230

II. RECENT EXECUTIVE ACTIONS & THEIR IMPACTS ON SMALL BUSINESS CONSTRUCTION CONTRACTORS

During his tenure in office, President Obama has issued more than 240 executive orders and over 200 presidential memoranda.[3] Of these various executive actions, AGC identified 22 that impact, directly or indirectly, the construction contracting industry. Some of these 22 executive orders and presidential memoranda help coordinate government responses to and resources for rebuilding after Hurricane Sandy and the Deepwater Horizon oil spill; and others seek to improve federal permitting and review of infrastructure projects. AGC generally supports the president's taking such actions within the confines of his constitutionally enumerated powers to coordinate the federal government response to disasters and streamline bureaucratic processes across federal agencies. However, AGC is deeply troubled by the executive actions this administration has taken that go beyond simply managing federal agencies' responses to disasters and reducing their internal review processes.

For the purpose of this testimony today, AGC identified and will discuss its concerns with just three executive orders and only two presidential memorandum, which include the:

A. Fair Pay and Safe Workplaces Executive Order 13673
B. Use of Project Labor Agreements for Federal Construction Projects 13502
C. Establishing Paid Sick Leave for Federal Contractors Executive Order 13706
D. Updating and Modernizing Overtime Regulations Presidential Memorandum
E. Advancing Pay Equality Through Compensation Data Collection Presidential Memorandum

These executive actions individually and cumulatively will expose small business construction contractors to significant costs, legal liabilities and other risks that can serve as deterrents to small business entry into the construction marketplace and impediments to small business growth.

A. Fair Pay and Safe Workplaces Executive Order 13673

On July 31, 2014, President Obama issued Executive Order 13673, entitled Fair Pay and Safe Workplaces, under which federal prime and subcontractors must report violations of 14 federal labor laws before contract award and again every six months after contract award on federal contracts exceeding $500,000. Prime contractors would also be responsible for evaluating the labor law violations of subcontractors at all tiers. On August 25, 2016, the Federal Acquisition Regulation (FAR) Council and U.S. Department of Labor issued more than 850 pages of text for the final rule and guidance implementing the executive order.

AGC submitted extensive comments outlining its concerns with this unfounded, unnecessary, unworkable and unlawful executive action.[4] The association supports provisions in the House and Senate versions of the National Defense Authorization Act for Fiscal Year 2017 (NDAA), H.R. 4909 and S. 2943, which limit the applicability of the executive order and its implementing regulations. As such, we urge members of this committee to encourage conferees of the NDAA bill to include the strongest possible language prohibiting implementation or enforcement of this executive order. AGC also supports legislative efforts to prohibit funding to carry out the executive order through the appropriations process.

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[3] https://cei.org/10KC/Chapter-3

[4] https://www.agc.org/news/2015/08/28/agc-submits-comments-opposing-blacklisting-executive-order

i. The Executive Order and Implementing Regulations Will Drive Up Risk to Small Business, Ultimately Leading Some Small Businesses (And Large Businesses as Well) to Leave the Federal Marketplace

The executive order and its regulations impose significant risks for small business contractors in the form of new legal liabilities. Under this executive order, small business contractors will:

- Make responsibility determinations for their subcontractors;
- Subject themselves to the possibility of suspension and debarment;
- Subject themselves to the possibility of "negotiating" labor law compliance agreements with enforcement agencies; and
- Subject themselves to making public disclosures of their labor law violations.

There is no level of certainty concerning the possible recourse a subcontractor would have when a prime contractor denies the subcontractor a potential subcontract based on the subcontractor's record of labor law compliance. When the contracting officer denies the prime contractor the ability to compete for a prime contract based on similar circumstances, a prime contractor's ability to seriously challenge that decision is very limited. The legal threshold for overturning a contracting officer's responsibility determination is high. However, when the prime contractor takes the contracting officer's role in making such determinations in relation to its subcontractors, there is no legal certainty as to the deference of the prime contractor's evaluation or what legal avenues may be available to the subcontractor.

Just as prime contractors are unclear of the legal ramifications of denying a subcontractor a potential subcontract before contract award under the proposed rule, prime contractors are also uncertain about the legal ramifications for terminating a subcontractor—at the instruction of a contracting officer—during contract performance as a result of its labor record. Arguably, such a termination would provide a greater risk of legal action by the subcontractor, as an actual—not potential—subcontract will have been breached. There is no guidance in the regulations as to whom would be responsible—the government or prime contractor—for the delay and costs associated with subcontractor termination.

The executive order and its implementing regulations create a significant possibility that a small business contractor with labor law violations may either have to enter into a labor law compliance agreement[5] or face possible suspension or debarment proceedings. While bad actors should not be considered for or awarded federal contracts, AGC is concerned about those contractors that have taken remedial steps to correct their violations that could fall subject to overzealous actors. The issue here rests with the subjectivity of the regulations. While not all labor law violations may be considered serious, pervasive,

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[5] A labor compliance advisor can recommend and a contracting officer can request that a prime contractor enter into "labor compliance agreements" to enable that contractor to be considered for contract award. A contractor may enter into such an agreement with one or more enforcement agencies to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with labor laws, or "other related matters." AGC is very concerned that such nebulous agreements place contractors in a difficult place when negotiating with enforcement agencies—completely disinterested in the procurement or delivery of a federal construction contracts—in order to be considered for contract award. There appears to be no limitation on:

- The duration of such agreements;
- The frequency of such agreements;
- The depth of training, mitigation or remedial action required;
- The frequency or depth of any recordkeeping or reporting they might require;
- The circumstances under which enforcement agencies might require a firm to go so far as to engage a third-party monitor; or
- The "related matters" enforcement agencies might require a firm to address.

repeated or willful that give rise to considerations for either of these options, those considerations will be left up to individual labor compliance advisors to advice contracting officers, who ultimately make such determinations. The reality is that AGC small business contractors already face situations where contracting officers within the same office disagree with one another or take different approaches to interpreting the FAR that can have damaging results. Given the subjective determination framework within this rule and the realistic possibility to encounter overzealous contracting officers, small businesses that may otherwise be responsible may begin to walk away from the federal marketplace for fear of having to enter into one of these agreements, or worse, being recommended for suspension or debarment.

Lastly, no business likes to publicly air its mistakes. Under this executive order, federal contractors will be required to do just that through the Federal Awardee Performance and Integrity Information System for their labor law violations. Small businesses that want to grow in the construction market may avoid or leave the federal market to avoid any potential stigma created by this system. They will be punished over and over for any inadvertent mistakes in the complex world of federal contracting.

ii. The Executive Order and Implementing Regulations Will Drive Up Small Business Costs, Ultimately Leading Some Small Businesses to Leave the Federal Marketplace

As previously noted, small business construction companies do not have in-house lawyers. As such, they often rely on outside counsel and other consultants to assist with their compliance efforts. Unfortunately, the reality is that most small business federal contractors do not yet fully appreciate the magnitude of this rule making. The reality and breadth of this executive order will lead to these small businesses to (1) hire these expensive outside experts; or (2) leave the federal construction market.

A small business construction company would need up to two days of about 15 hours of orientation for understanding these new requirements, the effect on the bidding and contract performance of work and the needed revision to contract forms and the subcontract and purchase order bid procedures. The preparation of this type of program would easily require 50 hours of work including the analysis of the contractor's current bid/subcontracting documents and procedures. An experienced labor attorney would be required to participate in this process. According to a well-respected construction law firm, legal advice from an experienced labor law attorney is likely to run from $350 to $450 per hour. At $400 per hour, the costs of preparation would easily reach $20,000. Additionally, the costs of modifications to forms and procedures would easily cost $10,000 to $15,000 per firm as the change is far more complex than simply adding another certification requirement. The risk of a "quick and simple" revision is too great.

The realistic, ongoing legal cost data involved with maintaining a compliance program for this executive order would also be significant.[6] Given the risks and potential cost associated with an erroneous responsibility determination, experienced counsel will invest at least 15 to 20 hours in reviewing a disclosure from a subcontractor and advising the client on the responsibility determination. The risks involve the effect on the bid price of rejecting an attractive offer or the risks of the government later pressing for a termination of a subcontractor. Using a figure of $400 hourly rate for 15 hours results in a

[6] Under the regulations, subcontractors are required to disclose their labor law violation information to DOL, not the prime contractor, for an assessment of its record. The subcontractor then relates that information to the prime contractor, as the prime contractor must ultimately make the final responsibility determination, not DOL. However, in the event that DOL does not respond to the subcontractor after three business days, the prime contractor must use its business judgment to make a determination based on either publically available records or what the subcontractor is willing to share. AGC is highly skeptical that the DOL will be able to provide timely assessments and notes that—no matter what—the liability for the determination ultimately rests with the prime contractor, not DOL.

cost of at least $6,000 for outside counsel's involvement to comply with this one rule. This does not include the time invested by the contractor.

Furthermore, prospective subcontractors will bid to almost every prime contractor that it can identify. These regulations impose the same obligation on each prospective prime, as well as lower-tier potential subcontractors. As noted above, building construction projects may require the hiring of 50 or more subcontractors on a project. Imagine on a $10 million building project a prime contractor has 10 subcontracts valued at $500,001. If there are six prospective subcontractors per subcontract, this task and its associated costs will be incurred six times per subcontract, this process could cost as much as $360,000 before the prime contractor submits its bid.[7]

Small business contractors do not win every contract on which they bid. And, small business contractors often do not receive any money from the federal government for submitting a proposal that does not win the contract. In an environment where the cost of submitting a proposal dramatically increases and the odds of winning the contract do not, at least some small business construction contractors will seek its work outside the federal construction marketplace.

B. Use of Project Labor Agreements for Federal Construction Projects Executive Order 13502

On February 6, 2009, President Obama issued Executive Order 13502, entitled Use of Project Labor Agreements for Federal Construction Projects, which encourages federal government agencies to use project labor agreements (PLAs) for large-scale federal construction projects where the total cost to the government is $25 million or more. To address these perceived challenges, Executive Order 13502 encourages, but does not mandate, the use of PLAs on large-scale construction projects. Rather, agencies may on a project-by-project basis, require the use of a PLA by a contractor. The Administration issued the final rule in the Federal Register on April 13, 2010, amending the Federal Acquisition Regulation (FAR) to implement the Executive Order.

AGC submitted comments on the proposed rule and has sent well over 100 letters in response to federal agency inquiries regarding the use of government-mandated PLAs on specific projects.[8] AGC urges Congress and members of this committee to support and pass the Government Neutrality in Contracting Act, H.R. 1671.

i. AGC Opposition to Government-Mandated Project Labor Agreements

AGC neither supports nor opposes contractors' *voluntary* use of PLAs, but strongly opposes any *government mandate* for contractors' use of PLAs. AGC is committed to free and open competition for publicly funded work, and believes that the lawful labor relations policies and practices of private construction contractors should not be a factor in a government agency's selection process. AGC believes that neither a public project owner nor its representative should compel any firm to change its lawful labor policies or practices to compete for or perform public work, as PLAs effectively do. AGC also believes that government mandates for PLAs can restrain competition, drive up costs, cause delays, and lead to jobsite disputes. If a PLA would benefit the construction of a particular project, the contractors otherwise qualified to perform the work would be the first to recognize that fact, and they would be the most qualified to negotiate such an agreement.

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[7] $6,000 per legal review of subcontractor labor law record multiplied by 60 subcontractors (6 per subcontract and 10 total subcontracts).

[8] For AGC's comments, letters and more information, go to https://www.agc.org/industry-priorities/procurement/government-mandated-project-labor-agreements-pla

ii. *The Executive Order Encourages Agencies to Mandate PLAs That will Have the Effect of Limiting Small Business Competition for and Participation on Federal Construction Contracts*

Government mandates for PLAs—even when competition, on its face, is open to all contractors—can have the effect of limiting the number of competitors, including small business construction contractors, on a project, increasing costs to the government and, ultimately, the taxpayers. This is because government mandates for PLAs typically require contractors to make fundamental, often costly changes in the way they do business. For example:

- PLAs typically limit open shop contractors' rights to use their current employees to perform work covered by the agreement. Such PLAs usually permit open shop contractors to use only a small "core" of their current craft workers, while the remaining workers needed on the job must be referred from the appropriate union hiring hall. While such hiring halls are legally required to treat union nonmembers in a nondiscriminatory manner, they may, and typically do, maintain referral procedures and priority standards that operate to the disadvantage of nonmembers.

- PLAs frequently require contractors to change the way they would otherwise assign workers, requiring contractors to make sharp distinctions between crafts based on union jurisdictional boundaries. This imposes significant complications and inefficiencies for open-shop contractors, which typically employ workers competent in more than one skill and perform tasks that cross such boundaries. It can also burden union contractors by requiring them to hire workers from the hiring halls of different unions from their norm and to assign work differently from their norm.

- PLAs typically require contractors to subcontract work only to subcontractors that adopt the PLA. This may prevent a contractor (whether union or open shop) from using on the project highly qualified subcontractors that it normally uses and trusts and that might be the most cost-effective.

- PLAs typically require open-shop contractors to make contributions to union-sponsored fringe benefit funds from which their regular employees will never receive benefits due to time-based vesting and qualification requirements. To continue providing benefits for such employees, such contractors must contribute to both the union benefit funds and to their own benefit plans. This "double contribution" effect significantly increases costs.

- PLAs typically require contractors to pay union-scale wages, which may be higher than the wage rates required by the Secretary of Labor pursuant to the Davis-Bacon Act. They often also require extra pay for overtime work, travel, subsistence, shift work, holidays, "show-up," and various other premiums beyond what is required by law.

Such changes are impractical for many potential small business contractors and subcontractors, particularly those not historically signatory to collective bargaining agreements (CBAs).

iii. *Federal Agencies are not Equipped for Dealing with Construction Labor Negations, Which Could Lead to Inappropriate, Unfair or Unrepresentative Terms in the PLA that Drive Away Small Businesses*

Another way that government mandates for PLAs can drive up costs and create inefficiencies is related to who negotiated the terms of the PLA and when the PLA must be submitted to the agency. With regard to who negotiates the PLA, the FAR Rule implementing executive order allows (but does not require or even encourage) agencies to include in the contract solicitation specific PLA terms and conditions. Exercising that option, though, can lead to added costs, particularly when the agency representatives

selecting the PLA terms lack sufficient experience and expertise in construction-industry collective bargaining.

AGC strongly believes that, if a PLA is to be used, its terms and conditions should be negotiated by the employers that will employ workers covered by the agreement and the labor organizations representing workers covered by the agreement, since those are the parties that form the basis for the employer-employee relationship, that have a vested interest in forging a stable employment relationship and ensuring that the project is complete in an economic and efficient manner, that are authorized to enter into such an agreement under the National Labor Relations Act ("NLRA"), and that typically have the appropriate experience and expertise to conduct such negotiations. Under no circumstances should a contracting agency require contractors to adopt a PLA that was unilaterally written by a labor organization or negotiated by the agency or by a contractor (or group of contractors) not employing covered workers on the project. It do so places small business contractors in a precarious position if they so choose to bid.

C. Establishing Paid Sick Leave for Federal Contractors Executive Order 13706

On September 7, 2015, President Obama signed Executive Order 13706 that requires federal prime contractors and subcontractors to provide employees up to seven days of paid leave for sickness and other purposes annually. On February 25, 2016, the Wage and Hour Division of the U.S. Department of Labor issued an 81-page notice of proposed rulemaking.

AGC submitted extensive comments on April 12, 2016.[9] A final rule is expected by September 30, 2016. AGC highlights some of its primary concerns below. AGC urges Congress and members of this committee to support legislative efforts to prohibit implementation and application of this executive action.

i. The Scope of Workers Entitled to Paid Leave Under the Executive Order and Proposed Rule Do Not Address the Unique Nature of the Construction Industry

Requiring federal contractors to provide paid leave to employees who are considered "laborers and mechanics" under the Davis-Bacon Act ("DBA") – commonly referred to as construction craft workers – presents significant practical, economic, and legal problems for both contractors and the government. The proposed coverage of construction craft workers is not workable. It threatens to turn practical, long-established compensation practices of the industry upside-down and replace them with impractical, ill-fitting and difficult to manage obligations.

Work in the commercial construction industry is typically project-based, transitory and seasonal. Most craft workers move from project to project and from employer to employer, often within short periods of time. They may earn fluctuating rates of pay due to changes in project type and location, or changes in assigned tasks, that call for different rates of pay under applicable wage determinations or because no wage determination applies (when moving to work not covered by the DBA). They may have days with no work to do, when their skills are not needed on a job at that time or when the daily weather prevents work. Likewise, they may experience longer periods of layoff due to seasonal weather or a downturn in the demand for construction. This is the unique, immutable nature of the work and is well-known to those employed in the industry.

The administrative difficulty for contractors employing transient, intermittently employed craft workers is just too heavy. As one typical contractor told us, "We have hundreds of employees per year who come

[9] https://www.agc.org/sites/default/files/Galleries/labor_member_files/AGC%20Comment%20Letter_1.pdf

and go and may work for us for varying short periods. Keeping track of sick pay eligibility and hours would be a nightmare." Given the nature of the work, craft workers traditionally have been paid only for time actually worked.[10]

ii. The Scope of Workers Entitled to Paid Leave Under the Executive Order and Proposed Rule Exceed and Conflict with the Requirements of the Davis-Bacon Act

The executive order and proposed rule impose compensation mandates that not only exceed the statutory provisions of the DBA, but also conflict with them. First, the statute provides that wages (defined in Section 3141(2)(B) as including the basic hourly rate of pay plus bona fide fringe benefits) shall be paid based on the prevailing rate in the geographic area for the type of project involved. The executive order and proposed rule require contractors to pay wages for sick leave that have absolutely no correlation to prevailing practices in the area, for the type of project involved, or, as discussed above, even in the industry overall. Second, the statute provides that contractors may meet their obligations by making contributions to bona fide fringe benefit trust funds, assuming a commitment to bear the costs of a bona fide fringe benefit plan or program, or doing either or both in combination with paying cash wages. The Executive Order and proposed rule apparently require contractors to pay wages for sick leave in the form of cash with no option for meeting their paid leave obligations through contributions to fringe benefit trust funds or commitments to bear the costs of a fringe benefit plan or program.

iii. The Scope of Workers Entitled to Paid Leave Under the Executive Order and Proposed Rule will Further Burden Small Business Construction Contractors

Coverage of construction "laborers and mechanics" will also lead to serious consequences for small business construction contractors and their federal construction costs and schedules. It will hinder economy and efficiency in federal procurement, rather than promote it as stated in the executive order and proposed rule.

Contractors that do not already provide paid leave benefits will incur substantial costs in compliance with the new mandate. First, they must pay the individual using paid leave for time not worked while, in many cases, also pay a substitute worker for time worked in place of the worker on leave. Those contractors already providing paid leave benefits would see their expenses rise under the rule as proposed as well, since they would no longer be permitted to take credit for the benefit toward meeting prevailing wage obligations and will have to make up that cost through payment in cash or other benefits. All covered contractors – whether they currently offer paid leave benefits or not – will also incur substantial costs in preparing for and administering compliance with the new rule. Numerous AGC member contractors subject to state and local paid leave mandates have told us of the considerable costs that they have incurred in complying with such mandates. These include costs related to:

- Staff time to create a paid leave policy or revise current policy;
- Hiring outside counsel or a consultant to develop, draft, and/or review a new paid leave policy;

[10] Payment specifically for sick time is quite rare and likely only provided by those open shop contractors employing less-transitory workforces. A recent AGC survey of commercial construction contractors indicates that only 32 percent of contractors operating on an open-shop basis outside any state or local mandate to provide paid sick leave actually provide such a benefit. In the union sector, the percentage is much lower. In fact, AGC is unaware of any collective bargaining agreement ("CBA") in the commercial construction industry that specifically provides for paid sick leave. Contractors and organized labor have always negotiated compensation on the assumption that wages must be high to compensate for days when the employee is not needed or cannot come to work and will not be paid. These high wages have carried over into the open-shop sector as well, as market forces call for above-average pay to compensation workers for the inconvenience of irregular work and other challenging conditions.

- Training office, managerial, and/or supervisory staff on administering the new policy;
- Educating nonsupervisory employees about the new policy;
- Revising subcontract documents;
- Educating subcontractors about their new obligations;
- Purchase of new hours-tracking, payroll, accounting, and/or other software, or upgrading and implementing current software;
- Revising manual systems for tracking hours, computing payroll, and the like; and
- Ongoing tracking, recordkeeping, and reporting of leave accruals, carryover, and use.

Contractors that work in multiple jurisdictions have also decried the added complexities and costs associated with having to comply with different rules, with varying specifications, in different states and cities.

In addition to the direct costs of compliance with the rule, federal construction costs – and schedules – also will be harmed by the secondary effect of lost productivity. It seems self-evident, and research[11] supports the premise, that the availability of paid leave leads to increased absenteeism. Of course, absenteeism may be a good or a bad thing depending on the circumstances, but increased absenteeism surely encompasses increased abuses of the benefit as well as legitimate uses. In fact, AGC-member contractors working in Massachusetts, where a paid leave mandate took effect last July, report facing mass numbers of employees calling in sick the day before Labor Day weekend for the first time. They have also experienced a noticeable uptick in workers calling in sick as projects wind down and when the construction season wound down before winter's seasonal layoffs.

Increased absenteeism is particularly problematic in the construction industry, where cost and schedule concerns are critical and highly dependent on labor productivity. As researcher Seungjun Ahn put it, "Even today, many tasks in construction have to be manually performed by construction workers on job sites, which is indicated by [sic] that labor costs typically range from 33% to 50% of the total construction cost (Hanna 2001). Therefore, workers' timely attendance and operation at the site is crucial to the success of a construction project."[12]

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[11] See, e.g., Ahn, T. & Yelowitz, A. Paid Sick Leave and Absenteeism: The First Evidence from the U.S, 2016. Retrieved April 11, 2016, from http://ssrn.com/abstract=2740366.

[12] Ahn, Seguin. "Construction Workers' Absence Behavior Under Social Influence." Ph.D diss., University of Michigan, 2014. Retrieved April 11, 2016, from http://ssrn.com/abstract=2740366. Ahn examined the implications of construction worker absenteeism on productivity and construction costs, reporting:

> Researchers have attempted to estimate the cost impact of missed work in construction. Nicholson et al. (2006) have used economic models to estimate that when a carpenter in construction is absent, the cost of the absence is 50% greater than his/her daily wage, and when a laborer in construction is absent, the cost is 9% greater than his/her daily wage. Researchers have also investigated the impact of absenteeism on overall productivity in construction. Hanna et al. (2005) looked at electrical construction projects and revealed that productivity decreased by 24.4% when the absence rate on a job site was between 6% and 10%, whereas productivity increased by 3.8% when the absence rate was between 0% and 5%. They also reported that 9.13% of productivity loss on average was measured in electrical construction projects. These analyses imply that the costs of absenteeism increase nonlinearly in the level of absenteeism. For example, 10% absenteeism is not just a 10% decrease in productivity, and if absenteeism increases from 5% to 10%, the decrease in productivity caused by absenteeism might more than double. The decrease in productivity is one of the main causes of cost overruns in construction projects. Therefore, maintaining a low absence rate is critical to cost-effective construction.

The Business Roundtable reported similar findings when it studied the most quantifiable direct effects of absenteeism in construction, namely: time spent by crew members waiting for replacements; time spent moving

iv. The Executive Order and Proposed Rule Extends Liability to Prime and Upper-Tier Contractors for Subcontractor Violations about Which these Contractors Could not Know

The executive order and proposed rule places liability upon prime and upper-tier contractors for violations by their subcontractors. However, determining whether a subcontractor is abiding by this order is impossible for prime and upper-tier contractors. A prime contractor has no available means to determine whether or not a subcontractor happens to be working for that prime contractor at the time of the paid leave request. Given the carryover provisions of this order, subcontractor violations can occur years after the relationship between subcontractor and prime contractor has ended.

v. The Executive Order and Proposed Rule will Punish Innocent, Compliant Contractors for Violations of Bad Actors

Under the executive order and proposed rule, a federal agency contracting officer can withhold payments to the prime contractor as necessary to pay employees the full amount owed. However, the prime contractor may not be the violator. Rather, a subcontractor could be. So, when a contracting officer withholds payment to a prime contractor for one subcontractor's violation on a project involving 100 subcontractors, the compliant prime contractor and 99 compliant subcontractors will not receive payment for work they completed and their employees may not be paid.

For all of the above reasons, AGC, again, urges Congress and members of this committee to support legislative efforts to prohibit implementation and application of this executive action.

D. Updating and Modernizing Overtime Regulations Presidential Memorandum

On March 13, 2014, President Obama issued a presidential memorandum entitled Updating and Modernizing Overtime Regulations, to implement changes to the Fair Labor Standards Act (FLSA) in regards to employee overtime payment. On May 18, 2016, the U.S. Department of Labor's Wage and Hour Division (WHD) issued a final rule implementing changes to the FLSA overtime regulations, scheduled to go into effect on December 1, 2016. The most significant change is a doubling off the standard salary threshold for exempt employees—from $455 per week ($23,660 per year) to $913 per week ($47,476 per year).

AGC submitted individual comments[13] to WHD on its proposed rule and signed onto joint coalition comments[14] as well. AGC urges Congress and members of this committee to support the Protecting Workplace Advancement and Opportunity Act, H.R. 4773, which would require DOL to perform a deeper analysis of the rule's impact on employer costs, employee flexibility and career advancement before it goes into effect. Congress and members of the committee should also consider supporting the Overtime Reform and Enhancement Act, H.R. 5813, which takes a commonsense approach to raising and implementing the final overtime rule by phasing in the salary threshold over three years. AGC also

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replacements to and from other work locations; and lost time by supervisory personnel in reassignment of work activities and locating replacements. The study team concluded that "each 1% increase in daily absenteeism produces a 1½% increase in labor costs . . . a 15% increase in direct labor cost for 10% absenteeism." "Absenteeism and Turnover," Construction Industry Cost Effectiveness Project (Report C-6), Business Roundtable, 1982 (reprinted 1993).

[13] https://www.agc.org/sites/default/files/Files/Labor%20%26%20HR%20%28public%29/AGC%20Comments%20to%20Overtime%20NPRM%20-%20Final_2.pdf

[14] https://www.agc.org/sites/default/files/Files/Labor%20%26%20HR%20%28public%29/PPWO%20Comments%20Overtime_1.pdf

supports efforts and encourages members to prohibit funds for implementation, administration and enforcement of this effort through the appropriations process.

i. The Presidential Memorandum and its Implementing Regulations will Impose Significant New Costs For Small Businesses to Absorb in Too Short of a Time

WHD's final rule to implement the changes required under the presidential memorandum represents an overtime threshold increase that is too much to absorb all at once. 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.

The final rule increases the minimum weekly salary threshold for white collar exemptions by more than 100 percent. To understand the full impact of this change on the construction industry, AGC surveyed its members. AGC was not surprised to learn that nearly 70 percent of the companies that participated in the survey have employees who are currently and lawfully classified as exempt under the FLSA and earn an annual salary was less than the proposed $50,440. Most of those impacted were in areas where the cost of living and, consequently, wages are lower than in other areas of the country.

While the administration may believe that a simple solution to this problem is to raise the salaries of the impacted workers to the proposed threshold amount, it is in fact not a practical one. Construction contractors operate at a very slim profit margin and cannot afford to increase salaries of all affected employees up to 100 percent overnight.

The impracticality of this solution is reflected in AGC's survey results, which show that an increase in the salary threshold will force construction employers to take drastic measures to maintain the integrity of their compensation budgets. When asked how their companies would comply with a new salary threshold at the proposed level, 74 percent of AGC-surveyed construction contractors responded that they would likely reclassify some or all of the impacted exempt workers to a non-exempt hourly status at their current salaries. The survey results also show that: over 60 percent of respondents expect the rule to result in the institution of policies and practices to ensure that affected employees do not work over 40 hours a week, 40 percent expect affected employees to lose some fringe benefits (like flex time, paid leave, work from home options), 33 percent expect some positions to be eliminated, and 23 percent expect to exchange some fulltime positions for more part-time positions. Furthermore, about 80 percent of respondents expect employee morale to be damaged because employees who are reclassified to hourly, non-exempt status will feel as if they have been demoted despite eligibility for overtime pay.

E. Advancing Pay Equality Through Compensation Data Collection Presidential Memorandum

On April 8, 2014, President Obama issued a presidential memorandum entitled "Advancing Pay Equality through Compensation Data Collection," which requires federal contractors and subcontractors to disclose to the DOL summary data on the compensation paid their employees, including data by sex and race. The U.S. Equal Employment Opportunity Commission (EEOC) issued a proposed rule on February 1, 2016, to incorporate the presidential memorandum's requirements in a revised version of the Employer Information Report (EEO-1). Based on public comments received, the EEOC issued a revised EEO-1 report for public comment on July 14, 2016.

All employers with 100 or more employees would have to submit the revised EEO-1 report. Prime and first-tier subcontractors who perform work directly for the federal government and have 50 or more employees would be required to submit the currently used EEO-1 report that does not include compensation and hours-worked data.

AGC submitted comments to the EEOC on both of its proposals.[15] AGC urges Congress and members of this committee to prohibit funds for implementation, administration and enforcement of this executive action through the appropriations process. In addition, AGC supports and urges members of this committee to consider introducing and passing legislation like the EEOC Reform Act, S. 2693, which would require the EEOC to collect information, consistent with the proposed revisions to the EEO-1 report, from federal agencies and the Executive Branch before the proposed data collection mandates are imposed on private employers.

i. The Presidential Memorandum Initiative and the EEOC's Proposed Revisions are Unnecessary Given Existing Statutes Governing Compensation in Construction and other Commercially Available Compensation Data Reports on the Industry

The EEOC's proposal notes that it and DOL's Office of Federal Contract Compliance Program (OFCCP) plan to "compare the firm's or establishment's data to aggregate industry data or metropolitan-area data." For the construction industry, such collection and analysis of compensation data for benchmarking purposes is not necessary because resources establishing such standards already exist. For example, wage determinations issued by the DOL pursuant to the Davis-Bacon and Service Contract Acts ostensibly manifest the prevailing wages paid for many job classifications in a particular area. The Department's Bureau of Labor Statistics also provides compensation data useful for identifying industry standards.

In addition, various private sector resources offer compensation benchmarking data. For example, in the construction industry, the nonprofit Construction Labor Research Council and consulting firms such as PAS, Inc. and FMI, Inc. publish such data. Many of these resources segment the data by geographic location, company size, industry sector, and other useful factors.

Given all of the compensation data resources already available, AGC believes that it is unnecessary for the EEOC or OFCCP to subject contractors to the proposed new compensation data reporting requirement.

ii. The Collection of Hours-Worked Data is Overly Burdensome for Construction Employers and Should not be Required, Regardless of Worker FLSA Status

According to a survey of AGC members, 88 percent of respondents stated that the reporting of hours-worked data by pay band would be burdensome with nearly 40 percent stating it would be extremely burdensome to track hours-worked for non-exempt employees, particularly due to the unique nature of the construction industry.

As previously mentioned, the construction industry is project based, transitory and often seasonal, which makes it difficult to collect and track hours-worked data in the way the EEOC suggests. Unlike work performed in other industries, once a construction project is complete, workers often relocate to another project for the same or different employer, depending upon labor needs. This alone would make it extremely difficult for construction contractors to track hours-worked data and ensure the accuracy of such data. In addition, construction contractors could collect such data, but the data may significantly change as early as the next day because workers often move around to other projects or when workers are provided by union hiring halls, the workforce itself may change.

[15] https://www.agc.org/sites/default/files/Revised%20EEO-1%20Report%20-%20Final%20Comments.pdf
https://www.agc.org/sites/default/files/Galleries/labor_member_files/OMB%20Review%20of%20Revised%20EEO-1%20Report%20-%20Final_0.pdf

III. THE CUMULATIVE IMPACT OF NEW REGULATORY MANDATES ON SMALL BUSINESS CONSTRUCTION CONTRACTORS

The collective impact of the aforementioned executive orders and presidential memorandum on small business construction contractors will be significant in terms of financial cost, liability, risk and loss of work opportunities. From a cost perspective, at a minimum, these contractors will have to:

- Hire outside counsel and/or consultants to help educate and train existing employees as well as establish new compliance programs for employees to follow;
- Hire outside counsel to adjust contractual documents accordingly;
- Hire outside counsel or consultants to adjust employee staffing arrangements to account for new overtime requirements;
- Consider existing staff resources for implementing and monitoring compliance programs and determine whether additional staff is needed or if existing staff can effectively handle these new burdens; and
- Consider purchasing new or updated compliance software programs as a means for collecting previously unmonitored or documented data.

The costs to small businesses to undertake could easily amount in the tens, if not, hundreds of thousands of dollars in new costs. The initial cost of establishing such new compliance regimes will place a heavy burden on all small business contractors, especially emerging small businesses and those planning on entering the construction market. The routine costs of maintaining these compliance systems and meeting these new mandates will additionally place new, fixed financial constraints on small businesses.

Concerning liabilities, small business construction contractors, particularly in the federal market, will have to consider the liability of:

- Agreeing to undefined mandates included in labor compliance agreements "negotiated" with federal compliance agencies as a means to avert suspension or debarment proceedings;
- Giving the competition their labor compliance records;
- Being deemed "not responsible" based on their labor compliance records;
- Deeming any subcontractors as "not responsible" based on their labor compliance records;
- Publically disclosing labor law violations for which they have paid fines, taken remedial actions and resolved;
- Abiding by federal paid sick leave requirements in addition to other state and local paid sick leave requirements;
- Being shut out of work because the government mandates a project labor agreement; and
- Providing unrepresentative compensation data according to one-size fit all standards that opens them up to increased risks of government audit.

Lastly, small business contractors will have to consider these executive action[16] in context of risk versus reward of participating in the construction market, and again, particularly the federal construction market. Given the overall state of the construction economy today, several small business contractors have expressed to AGC that they are strongly considering or plan to walk away from the federal construction market. The result of these new requirements may, therefore, include reduced competition and, in turn, higher prices to the federal government and taxpayers. Thank you for inviting AGC to participate in this worthwhile hearing.

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[16] In addition to the executive actions discussed, it is important to note that we have not addressed new mandates of the Environmental Protection Agency and Occupational Health and Safety Administration that will also impose new burdens upon small business construction contractors.