



**AGC**  
THE CONSTRUCTION  
ASSOCIATION

Preparing for the OSHA COVID-19 Vaccine Testing  
Mandate Webinar Series

**November 11, 2021**

# **OSHA COVID-19 Vaccine/Testing Mandate: Contractual and Legal Considerations (We will begin in a moment)**

# PANELISTS



**Lori Lange:** Partner, Peckar & Abramson

**Howard Mavity:** Partner, Fisher Phillips

**Doug Tabeling:** General Counsel, Carroll Daniel Construction

**Moderator:** Brian Perlberg, AGC of America Senior Counsel

# Webinar Overview



- What the new law requires
- How OSHA will enforce it
- Impact existing contracts and new contracts
- Considerations for change orders and subcontract flow down issues

# NEW OSHA ETS: WHAT DOES IT REQUIRE? WHO DOES IT APPLY TO?



- Private and Some Public Employers
- 100 or More Total Employees
- Employer Can Select Job or Test
- Medical and Religious Accommodations
- Exempt Employees

# OSHA ETS



- Standard for OSHA to issue an ETS
  - What is Grave Danger?
- How often does OSHA issue emergency standards?
- Enforcement and Penalties

# OSHA ETS



- Testing
  - Which tests are acceptable
  - Who pays for the testing
- Time off
  - Time for getting the vaccine
  - Time for recovering from possible side effects
  - Time for testing

# OSHA ETS



- Relationship Between OSHA ETS and Federal Contractor Vaccine Mandate (Executive Order 14042)
- OSHA State Level Action vs Federal Action

# WE TALKIN BOUT CONTRACTS!?!?! HOW'S THIS GONNA WORK FOR EXISTING CONTRACTS?



- Potential Impacts on Existing Contracts
  - Cost impacts
  - Schedule delay
- Delay Claims in Construction Contracts Generally
- Private Owners' and General Contractors' View
- Public Owners' View

# IS THE ETS A FORCE MAJEURE EVENT?



- Can contractors and subcontractors get an equitable adjustment?
  - Public Owners' View
  - Private Owners' View
- ConsensusDocs mentions adverse government action



# IS THE ETS A CHANGE OF LAW?

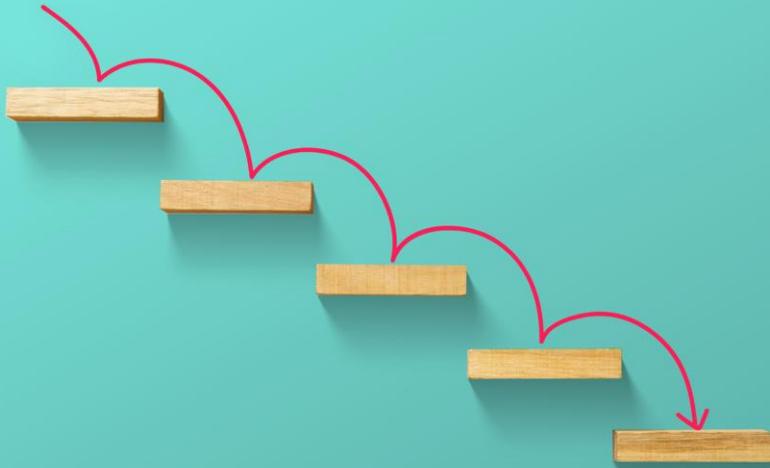


The Contract Price or Contract Time shall be equitably adjusted by Change Order for additional costs or time needed resulting from any change in Law, including increased taxes, enacted after the date of this Agreement.



ConsensusDocs 3.21.1

# SUBCONTRACT FLOWDOWN



- Is this just another safety compliance issue?
- What if a GC has actual knowledge of subcontractor non-compliance?
- New Contracts: Should GCs Prequalify subcontractors based on vaccination rates?

# CURRENT STATUS OF THE OSHA ETS AND WHAT LIES AHEAD



- On Saturday, November 6<sup>th</sup>, the U.S. Court of Appeals for the Fifth Circuit in Louisiana issued a stay
- Business and religious groups, advocacy organizations and several states, including Louisiana and Texas, filed a petition with the court
- Attorneys general in 11 states also filed lawsuits challenging the ETS
- Arguments focus on the purpose of the OSH Act which is protecting workplace safety and not addressing public health emergencies
- Currently, it is unclear what impact the suits ultimately will have on the ETS
- AGC is monitoring the situation and exploring options/opportunities to engage in similar efforts



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# Questions?



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