

STATEMENT OF
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SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

LEGISLATIVE HEARING ON EXAMINING THE USE OF AGENCY REGULATORY
GUIDANCE

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Mr. Chairman, Ranking Member Heitkamp, and members of the Subcommittee, my name is Mary Beth Maxwell, and I am the Principal Deputy Assistant Secretary and head of the Office of the Assistant Secretary for Policy at the U.S. Department of Labor. I am pleased to testify before you today on the Department's efforts to ensure that we are developing and disseminating accurate, helpful guidance that informs the regulated community and all of our stakeholders of their rights and responsibilities under the numerous laws that we administer and enforce.

Congress has charged the Department with administering and enforcing more than 180 federal laws. We oversee our nation's investment in workforce development, ensuring that federally funded job training programs across the country effectively provide the skills and training American workers need to punch their ticket to the middle class. We also enforce important laws that protect health and safety in the workplace, the security of employee benefit plans, minimum wage and overtime, family and medical leave, and workers' compensation programs. The laws that we administer and enforce cover 10 million employers and 125 million workers.

The Department takes seriously our responsibility to develop regulations that implement these laws in order to effectuate Congress's intent in enacting them. Effective regulations help achieve Congress's objective to invest in human capital to build a skills infrastructure that supports business growth. Our regulations also ensure that employers and workers have the information they need to better understand their rights and responsibilities in order to improve compliance with worker protection laws and achieve the safety and security in the workplace.

In addition to the regulations that the Department develops, consistent with E.O. 12866, E.O. 13563, and the Administrative Procedure Act's notice and comment process, the Department also issues guidance to a wide range of stakeholders who want and need more clarity about how to interpret our regulations. This guidance can include answers to day-to-day questions about how these rules apply to specific circumstances, or sometimes just lists of examples of promising practices for compliance and implementation.

As I will describe today in more detail, we strive to issue guidance that is both responsive and accessible to a broad range of our stakeholders. Unlike notice-and-comment rulemaking, we use guidance to further clarify requirements already set out in statutes and regulations. As a result, we often issue guidance using processes that maintain our flexibility to respond quickly to emerging challenges. We also use technology both to inform our guidance and to disseminate it to the widest range of stakeholders. While we take pride in our efforts to provide guidance, we are always seeking opportunities to improve as well.

Issuing Responsive, Accessible Guidance for a Broad Range of Stakeholders

The Department seeks opportunities to issue guidance that is both responsive and accessible to the broadest range of our stakeholders. Employers, workers, job seekers, and retirees regularly seek guidance, and the Department welcomes opportunities to provide such guidance because everyone is better off when they understand both the laws that affect them and the resources that may be available to assist them.

The Department believes that its stakeholders are best served by the development of broad guidance applicable to a variety of scenarios, not just individual responses to inquiries that are dependent on a particular set of facts. We certainly consider the letters and phone calls that we receive from the public and from Members of Congress to inform what guidance is necessary and useful, and we also utilize advisory committee reports, listening sessions with stakeholders, and the issuance of regular Requests for Information, as appropriate, to plan and draft more generally applicable guidance products.

As a result of these efforts, the Department issues guidance to play a number of different roles, including clarifying regulations, providing information on promising practices, providing assistance on grant administration, responding to specific stakeholder questions that have broad application, providing information on the Department's current priorities and initiatives, and directing stakeholders and the regulated community to the resources that we have available to help them comply with the laws that you have entrusted to us to enforce. Sometimes we combine these efforts to inform a range of stakeholders about broader legislative or regulatory updates. For example, we have developed a range of resources to describe our final rule extending minimum wage and overtime rights to most direct care workers, including fact sheets, frequently asked questions, step-by-step self-assessment tools, and archived webinars explaining various aspects of the rulemaking. Together, these resources address the needs of a variety of audiences, from workers to family-employers to state agencies.

We strive to issue guidance that is clear and accessible to members of the public who are not experts and who should not have to retain a lawyer to understand their rights and responsibilities. Many guidance documents aim to inform employers and workers alike about their rights and responsibilities in plain language, focusing on the most common questions and concerns. For example, the Department's Wage and Hour Division has created a factsheet and handbook about rights and responsibilities under the Family and Medical Leave Act that together lay out the most common types of requests for FMLA leave and the factors that employers must take into account in deciding how to respond to such requests; the Women's Bureau has developed an issue brief

on how to hire women with disabilities, which includes advice on easy to implement recruitment strategies and workplace accommodations; and the Mine Safety and Health Administration has produced best practices pocket cards that provide concrete tips about how miners can stay safe while working around conveyors.

Maintaining Flexibility to Respond to Emerging Challenges

Another important aspect of the Department's guidance is that we must maintain the flexibility to be able to provide timely assistance that is responsive to stakeholder questions or other current challenges. For example, since last fall, the Occupational Safety and Health Administration has been participating in and coordinating worker safety and health aspects of the domestic response to the 2014 Ebola outbreak. OSHA and its partners released numerous guidance documents focusing on safer work practices, engineering controls, and personal protective equipment for workers at risk of Ebola virus exposure in healthcare, laboratories, waste management, maintenance, cleaning and environmental services, airline, law enforcement, and other operations.

Guidance documents that do not rise to the level of significant guidance under OMB's 2007 Bulletin on Good Guidance Practices are cleared and reviewed at an appropriate level, depending on the audience, complexity, and impact. In addition, draft guidance documents may be circulated for clearance among other interested component agencies for example, the Women's Bureau or the Office of Disability Employment Policy for guidance documents related to their areas of expertise.

In developing these sorts of guidance products, we are not generally required to utilize notice-and-comment rulemaking procedures. Public input regarding these documents is nonetheless valuable, and we continue to solicit and receive such input from our stakeholders in letters, listening sessions, advisory committees, and otherwise when they seek to weigh in on our guidance.

Of course, there are situations in which we more formally seek public comments on a guidance document because, for example, of its significance. We are pleased that the Government Accountability Office's recent multi-agency audit of guidance practices found that the Department "consistently applied OMB Bulletin requirements for public access and feedback for significant guidance."¹ For example, this past spring, the Department published for public comment our proposed guidance to assist contracting agencies and the contracting community in applying the requirements of President Obama's Fair Pay and Safe Workplaces Executive Order, including evaluating the severity of labor law violations. The proposed guidance was published alongside the Federal Acquisition Regulatory Council's proposed regulations implementing the Executive Order, with concurrent comment periods, providing the regulated community with a full 90 days to assess the two packages together and weigh in on the full implementation picture.

¹ U.S. Government Accountability Office: *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices* (April 2015) (GAO Report) at 33.

As these examples demonstrate, the Department remains committed to developing and maintaining a strong set of policies and practices for providing the public and stakeholders with critical and time-sensitive information through guidance.

Using Technology to Inform and Disseminate Guidance

Each of the Department's agencies maintains a website providing information for their respective regulated communities and other stakeholders about the statutes that they enforce and about guidance that they have issued. As GAO noted in its multi-agency audit, the Department strives to make guidance easily accessible from the home page of each of our component agencies; improve website search functions for individuals seeking particular guidance; highlight new or important guidance on agency home pages; post contact information that allows for questions or feedback from the public; and categorize guidance by type, topic, date, or audience to help users sort through the available products and information.²

While we focus on agency-specific guidance, we know that many visitors, especially workers and small business owners, to our website do not necessarily know when they first arrive at the site which statute or agency is relevant. They are just looking for answers to their questions about what the law requires. Accordingly, another important Department-wide resource is our Employment Laws Assistance for Workers and Small Businesses Program ("elaws"), an interactive website that enables the public, including workers and employers, to find information about their rights and responsibilities. The elaws Advisors are unique web-based interactive tools that provide easy-to-understand information about federal employment laws. Each Advisor simulates the interaction you might have with an employment law expert, asking questions and providing responses. Elaws offers a degree of built-in "intelligence" and supports features for e-mailing and filing DOL forms online. Our elaws Advisors receive over 44,000 visits per day – a remarkable number for a single program – which signals that employers and workers are finding the site and finding it useful.

Pursuing Opportunities to Improve

We are always committed to finding ways to improve. As such, building upon helpful recommendations from GAO, we are reviewing and updating our written procedures for the internal review and approval of significant guidance documents. The Department is also taking steps to strengthen our component agencies' application of internal controls to the issuance of guidance more generally. The Department convened an internal working group comprised of senior policymakers from the Department's component agencies. The working group began sharing best practices to promote more consistent application of internal controls in the Department's guidance production process. We are now compiling a list of leading examples of how our component agencies ensure that guidance is developed and vetted with appropriate feedback and review; the resulting list will be disseminated to the Department's relevant leaders. Finally, the Department is continuing to identify and, where appropriate, implement website improvements and customer satisfaction metrics to help ensure that the public can more easily access and comment on our guidance documents. As a start, we plan to launch a new web portal

² GAO Report at 35-37.

that will help the public find guidance documents published by each of our component agencies. The objective of all of these efforts is to help our stakeholders in understanding and complying with the laws that are relevant to them.

Conclusion

The Department remains committed to our broad efforts to develop and disseminate accurate, timely, and helpful guidance that informs the employers, workers, retirees, the workforce system, and all of our stakeholders of their rights and responsibilities under the numerous laws that we administer and enforce. We look forward to continuing a dialogue with you to discuss other ideas for improving our process. Meanwhile, the Department will continue to provide swift, systematic, and practical answers to questions that arise about these laws through a variety of products, all with an eye toward achieving our broader goal of bringing opportunity, economic security, and healthy and safe workplaces to our Nation's working families, job-seekers, and retirees.