

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

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Chairman Lankford, Ranking Member Heitkamp, and members of the Subcommittee, my name is Patricia Smith, and I am the Solicitor 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, and appropriate guidance that informs workers, unions, employers, training providers, health and pension plans, and all of our stakeholders of their rights and responsibilities under the 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, workplace democracy, and workers' compensation programs. The laws that we administer and enforce cover 10 million employers and over 125 million workers.

The Department takes seriously our responsibility to develop regulations that implement these laws. The Department issues effective regulations to 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 safety and security in the workplace. The Department develops these regulations consistent with Executive Order (E.O.) 12866, E.O. 13563, the Administrative Procedure Act's (APA) notice and comment requirements, and other agency-specific requirements. While the Department strives for full clarity in its regulations, from long experience we know that no regulation can speak to all scenarios in our complex and changing economy and, as with any governmental agency, legitimate practical questions arise for stakeholders seeking guidance on compliance and the Department's interpretations.

The Department therefore issues guidance to its stakeholders to clarify statutory requirements and our regulations. This guidance can include answers to frequently asked questions about how these rules apply to specific circumstances, or examples of best practices for compliance and implementation. The Department strives to issue guidance that is timely, as well as responsive and accessible to a broad range of its stakeholders. As a lawyer with over three decades of

service in both state and federal governments, as well as in private legal aid agencies, I have seen first-hand how well-drafted guidance can increase efficiency and reduce stakeholder confusion and the need for enforcement.

Today, I will briefly discuss how we issue responsive, accessible guidance; how our guidance allows us to maintain important flexibility to deal with emerging challenges; how we go beyond the legal requirements to seek public input on our guidance; how we use technology to disseminate our guidance to the public; and finally, some steps we have taken in the past year to improve our guidance program.

Issuing Responsive, Accessible Guidance for a Broad Range of Stakeholders

The communications the Department of Labor receives from the public and from Members of Congress inform what guidance is necessary and useful. The Department also utilizes advisory committee reports, listening sessions with stakeholders, recommendations from the Government Accountability Office (GAO), 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's guidance products have a number of different purposes. These may include clarifying the application of regulations to particular contexts, providing information on promising practices, providing assistance on grant administration, responding to specific stakeholder questions that may have broad application, providing information on the Department's current priorities and initiatives, and directing stakeholders and the regulated community to the resources available to help them comply with the laws you have entrusted to us to enforce.

Sometimes, we combine these efforts to inform a range of stakeholders. For example, we have developed numerous resources to describe our final rule establishing a minimum wage for federal contractors, including fact sheets, frequently asked questions, and an archived webinar explaining various aspects of the rulemaking. Together, these resources address the needs of a variety of audiences, from federal contractors, to workers, to other federal 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 for workers and responsibilities for employers under the Family and Medical Leave Act that together lay out the most common types of requests for FMLA leave and what the FMLA requires that employers do in response 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 useful tips about how miners can stay safe while working around conveyor belts.

Similarly, we were pleased that following our January 2016 issuance of a Wage and Hour Administrator's Interpretation concerning joint employment under the Fair Labor Standards Act

and the Migrant and Seasonal Agricultural Worker Protection Act, a number of stakeholders acknowledged the clarity provided by the guidance. One human resources firm, for example, described the guidance as providing “clear and helpful explanations, along with examples and scenarios to support those explanations, in an effort to help organizations and leaders have a stronger understanding of the regulations imposed by the DOL”.¹ And one law firm commented that the guidance “does not say anything new,” but rather, “summarizes the regulations and court decisions on which the Department will undoubtedly rely in any Wage and Hour investigation; it therefore can be a helpful self-audit tool for employers assessing their own situations.”²

Maintaining Flexibility to Respond to Emerging Challenges

Another important aspect of the Department’s guidance is that we must be able to provide timely assistance that is responsive to stakeholder questions or other emerging challenges. For example, the Department’s Occupational Safety and Health Administration (OSHA) has been participating in and coordinating continued discussions regarding worker safety and health aspects of the domestic response to the Zika virus. In April of this year, OSHA and the National Institute for Occupational Safety and Health issued interim guidance on protecting workers from occupational exposure to the Zika virus. This guidance was in many respects a follow-on to the Department’s similar efforts in the wake of the 2014 Ebola crisis, where the Department and our partners released 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.

Seeking Public Input For Our Guidance

In developing stakeholder guidance products, the Department’s component agencies regularly consult with me and my colleagues in the Solicitor’s office on compliance with the APA and other laws governing public participation. If the guidance is interpretive – that is, it clarifies the meaning of an ambiguous term in a statute or regulation – or is a general statement of agency policy, the APA generally does not require the Department to engage in notice-and-comment procedures. Public input on these documents is nonetheless valuable, and, where practical, 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.

¹ Kayla Dineen, “What You Need to Know about Joint Employment: a DOL Interpretation Review,” <http://www.helioshr.com/2016/03/dol-interpretation-on-joint-employment-a-review-of-what-you-need-to-know/> (Last accessed May 18, 2016).

² Michael A. Alaimo, Brian Schwartz and Christopher Trebilcock, “DOL Issues an Administrator’s Interpretation Regarding Joint Employment,” January 1, 2016. <http://www.jdsupra.com/legalnews/dol-issues-an-administrator-s-10585/> (last accessed May 18, 2016).

Of course, there are situations in which we more formally seek public comments on a guidance document. We were pleased that the GAO’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.”³

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 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.⁴

While guidance generally is posted by the agency responsible for administering or enforcing a particular law, we know that many website visitors, especially workers and small business owners, 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.⁵ 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. 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.

Continual Steps to Improve

The Department of Labor remains committed to continuously working to improve our approach to guidance. Following helpful recommendations from GAO, over the past year the Department has pursued process improvements for our issuance of guidance. For example, we have adopted procedures to ensure that, in accordance with OMB's Final Bulletin for Agency Good Guidance Practices (M-07-07), the Department’s written procedures for approval of significant guidance are made available to component agency staff. The Department previously provided a copy of those procedures to Committee staff, and one is appended to my testimony today for your convenience. Similarly, we have also shared best practices on the development of non-significant

³ U.S. Government Accountability Office: *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices* (April 2015) (GAO Report) at 33.

⁴ GAO Report at 35-37.

⁵ <http://webapps.dol.gov/elaws/advisors.html>

guidance among our component agencies and have created a checklist document that provides questions based on best practices for agencies to consider when developing guidance. We have developed additional materials to assist agencies in developing internal control procedures for guidance development. Finally, we conducted training and developed best practices and tools to assist agencies in using and interpreting web metrics for guidance documents on component agencies' websites, including ensuring that documents are up to date, relevant, and easy to access on the Department's website.

Conclusion

The Department remains committed to our broad efforts to develop and disseminate accurate, timely, helpful, and lawful guidance that informs our stakeholders of their rights and responsibilities under the laws that we administer and enforce. We look forward to continuing a dialogue with you and with the public to discuss other ideas for improving our process. Meanwhile, the Department will continue to provide timely 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.

Thank you, and I am pleased to answer any questions you may have.

DEPARTMENT OF LABOR CLEARANCE PROCEDURES FOR SIGNIFICANT GUIDANCE DOCUMENTS

Background

In 2007, the Office of Management and Budget (OMB) issued its *Bulletin for Agency Good Guidance Practices* (Bulletin), which sets forth general policies and procedures for developing, issuing and using significant guidance documents.

The Bulletin requires agencies to establish: standard elements for significant guidance documents; a list of significant guidance documents to be posted on agency Web sites along with a means for public comment; written approval procedures for issuing significant guidance; and that agencies designate an office or offices, to receive and address complaints that the agency is not following the Bulletin or is treating the significant guidance as a binding requirement.

In its April 2015 report, “*Regulatory Guidance Process: Selected Departments Could Strengthen Internal Control and Dissemination Practices*,” the Government Accountability Office recommended that the Department should review and update its written procedures for approval of significant guidance and make them available to appropriate component staff. This document represents the update to our procedures given intervening changes to EO 12866 and to the Department’s structures and newer processes.

Guidance Documents

The Bulletin defines a “guidance document” as an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue and notes that guidance documents are not legally binding but can lead parties to alter their conduct.

DOL agencies produce a variety of materials for the general public, specific stakeholders and the regulated community that could be considered guidance documents, including: interpretive memoranda, policy statements, manuals, circulars, information bulletins, advisories, compliance assistance materials, e-tools, and Frequently Asked Questions documents.

Clearance of Guidance Documents not Deemed Significant

Guidance documents not determined to be significant under this definition would not be cleared through the OASP process unless otherwise directed by the Office of the Secretary. Depending on the nature of specific agency guidance documents and agency-specific procedures, approval or concurrence by other components within the Department may be required.

Significant Guidance Documents

The bulletin defines “significant guidance documents” as a small subset of guidance documents that an agency disseminates to regulated entities or the general public, and that may reasonably be anticipated to:

- (A) Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

- (B) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (C) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or
- (D) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in EO 12866.

Under this definition, information materials that clarify, restate or repackage statutory or regulatory compliance obligations would not be considered “significant.” In these cases, any impacts are not a result of the specific guidance product, but the underlying statutes or rules. Also, materials that simply compile previously disseminated guidance products would not be considered “significant.” These documents are not setting forth new policies with a broad and substantial impact, but clarifying and repackaging previously issued statements.

Letters of Interpretation

Many DOL agencies issue letters of interpretation at the request of employers and employees regarding the applicability of statutory or regulatory requirements to particular places of employment. Letters of interpretation generally are not considered to be guidance documents because they address legal obligations arising from discrete factual situations, and are therefore not statements of “general applicability.” Where a letter states a new policy or legal position that applies more broadly, it may be significant guidance if it meets the definition set forth in the Bulletin.

Significance Determination

An initial significance determination will be made jointly by the issuing agency and its component SOL division, based on the OMB criteria and the facts available. The determination should be made at the earliest practical time during the development of a guidance document. That date may vary depending on the nature of the guidance document involved and the agency’s process for clearing guidance documents. SOL and the agency are encouraged to consult with OASP, as appropriate, if they have questions about the appropriate time for an initial significance determination based on the nature of the guidance.

To ensure awareness, a description of the guidance, its intent, and the significance determination, will be communicated to the Deputy Secretary, in the agency management briefing memorandum. The guidance and determination will be identified in the agency’s management meeting and any concerns raised at that time. If determined to be significant, the significant guidance process will be triggered. Agency leadership is charged with the responsibility to keep the Deputy Secretary, OASP and SOL apprised of any changes that may arise during the guidance development that may impact the initial determination. OASP will engage OMB/OIRA as appropriate.

Clearance of Significant Guidance Documents

The Bulletin requires agencies to ensure that any significant guidance documents are approved by appropriate senior agency officials. The OASP clearance process should be used for all significant guidance documents. Economically significant guidance documents should also be published for notice and comment before such guidance is finalized if required by the Bulletin and OIRA.

The OASP clearance process mirrors the OASP regulatory clearance process and is initiated by the program agency's submission of a decision memo to the Secretary and the significant guidance document to OASP via email. OASP will circulate the documents by email and secure clearance from senior officials in the Office of the Secretary, the Office of the Solicitor, and OASP. Once cleared, OASP will then submit the significant guidance document to the Executive Secretariat for approval by the Secretary of Labor.

Some, but not all, significant guidance documents that go through the OASP clearance process will require OMB/OIRA review. OASP will engage OMB to determine if OIRA review is required just as it does with regulations.