

Lawmakers Pledge Action to Curb Agency Guidance Documents

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Practices

Workplace Safety and Health

Under an exception to the rulemaking process, federal agencies may use legally nonbinding guidance documents to interpret regulations. This has led some U.S. senators not only to issue a broad pledge to restrict the practice when such guidance becomes a rule enforceable against a regulated community, but also to request that the Occupational Safety and Health Administration (OSHA) rescind guidance that newly interprets coverage under a rule aimed at preventing chemical disasters.

“This is the beginning of a journey for us,” said Senator James Lankford (R-Okla.), chairman of the Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, at a [hearing on the regulatory process](#) on September 23. “This is an issue government-wide. We do have to solve this.”

According to *Bloomberg BNA*, senators are examining the ability of agencies to issue new interpretations of old statutes, how the public can access a complete list of agency guidance, the ability of stakeholders to comment on guidance, how often guidance is reviewed, who makes the final decision on guidance, the process for making that decision, and whether a cost-benefit analysis should be required, among other things.

The Administrative Procedure Act (APA) requires rules proposed by federal agencies to undergo public notice and comment, an essential step for an agency to gain feedback from potentially regulated parties and to guarantee transparency and fairness. However, the statute provides an exception from notice and comment, allowing agencies to issue guidance in the form of interpretive rules and general statements of policy. Guidance is helpful for clarifying or defining a point of ambiguity in an existing regulation, Senator Lankford noted.

“But the benefit of guidance — that it bypasses notice and comment — and therefore can be readily issued comes with a catch,” the senator cautioned. While not legally binding, in reality, guidance is used to judge compliance, Senator Lankford and other senators contended. Thus, the problem becomes determining when a document merely provides guidance versus when it alters or defines the intent of a rule to the extent that notice-and-comment rulemaking is required.

Where to draw that line may not be altogether clear in some instances, but Senator Lankford and others contends that OSHA went too far with three guidance documents the agency issued recently aimed at clarifying its enforcement position regarding provisions of OSHA’s process safety management (PSM) standard. Covered chemical facilities must meet the rule as part of efforts to prevent explosions. One of the guidance memos rescinds the exemption for retail employers in the PSM standard, another interprets the rule’s requirements on chemical concentrations, and the third deals with what are termed “recognized and generally accepted good engineering practices.” Industry has objected and has sued the government over all three documents, according to *Inside OSHA Online*.

At the Senate hearing, Senator Lankford described the controversial interpretations as “problematic guidance”, since he said they appear to impose new burdens and, in some cases, expand legal obligations outside of the rulemaking process. Without identifying the particular documents, Senator Lankford told *Inside OSHA Online* his subcommittee soon will formally request that OSHA rescind the guidance documents and reintroduce them through public rulemaking.

Mary Beth Maxwell, the Principal Deputy Assistant Secretary for Policy at the Labor Department and a witness during the hearing, testified that the department follows the APA and the Office of Management and Budget’s bulletin in all determinations regarding notice and comment rulemaking and the issuance of guidance. As a result, she stated, the department is confident in its decision, which came after officials concluded the PSM rule was clear but that the accompanying guidance was not, she

said.

“So there was a need to update that guidance to clarify it,” concluded Principal Deputy Assistant Secretary Maxwell. “We did not think that any of these memos represented any change in the regulation.”

Other senators joined Senator Lankford in his criticism of the PSM memos. Senator Joni Ernst (R-Iowa) singled out OSHA’s July 22 guidance, which ended an exemption for a retailer, such as a gas station, when it derives more than 50% of its income from direct sales of highly hazardous chemicals to an end user. The change will expand coverage under the PSM rule to these retailers who were previously exempted. In an indication that the concern is bipartisan, Senator Heidi Heitkamp (D-N.D.), the ranking member of the subcommittee, said it was “disturbing” for many businesses who thought they were in compliance now to learn they are not. “It seems like the rule changed,” Senator Heitkamp said.

Senator Heitkamp supported the need for public comment when rule changes are made, yet noted the importance of guidance in creating certainty for companies who need to make economic decisions for their businesses. “If we move too far to prohibit guidance or to too narrowly define guidance, we may be in fact be acting against the best interest of the regulated entities who desperately need to have this information,” Senator Heitkamp said.

In another dispute between lawmakers and OSHA, Senator Lamar Alexander (R-Tenn.), chairman of the Senate Health, Education, Labor and Pensions Committee, appeared at the hearing to call attention to a recent draft memo from the Solicitor of Labor’s Office. The intent of the document is to outline the type of information OSHA needs to establish joint liability of franchisers and their franchisees for alleged safety and health violations. (For more information on this, see our article, [Draft DOL Policy Lists ‘Economic Realities’ as Key OSHA Test of Joint Employer Status](#)). Senator Alexander asked if OSHA plans to tell its field investigators to obtain data from employers as a means to establish joint employer status, as the memo recommends. Principal Deputy Assistant Secretary Maxwell responded that the solicitor’s memo was not the type of guidance discussed at the hearing. Rather, she said, it featured a set of questions for investigators to determine who had actual control over safety and health protections at work sites.

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