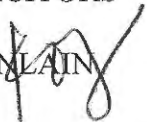


August 10, 2018

MEMORANDUM FOR: DEPUTY SOLICITORS
REGIONAL SOLICITORS
ASSOCIATE SOLICITORS

FROM: KATE S. O'SCANLAIN 
Solicitor of Labor

SUBJECT: Principles Regarding Enforcement Decisions and
Related Matters

The U.S. Department of Labor's purpose and mission is to protect one of the United States' greatest resources: our workforce. The Department seeks to enforce safe and healthy workplaces; to ensure increased employment opportunities for hardworking Americans; to promulgate only those regulations "required by law, . . . necessary to interpret the law, or . . . made necessary by compelling need" (Executive Order No. 12866, *Regulatory Planning and Review* (1993)); to manage regulatory costs by identifying "at least two prior regulations . . . for elimination" for "every one new regulation issued" (Executive Order No. 13771, *Reducing Regulation and Controlling Regulatory Costs* (2017)); and to promote accountability to the people by only taking actions consistent with statutory authority, due process, and fair notice.

Since joining the Department in mid-January, I have seen firsthand how committed the agency's employees are to the Department's mission and to forceful and fair enforcement of the law. I share your commitment. But, as I stated in my Senate confirmation testimony, we must also be mindful that "[o]ur laws should not be a game of 'gotcha' or involve gamesmanship using novel legal theories." We must always confirm our actions are consistent with Congressional authority and, where doubt exists, always seek "to preserve individual freedom" (*Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting)).

In that spirit, this memorandum provides direction to attorneys in the Office of the Solicitor (SOL) on principles to be considered regarding enforcement decisions or related matters. These principles are intended to ensure that the Department's broad independent litigating authority is used in a manner that promotes transparency, consistency, and the rule of law. They are also intended to further open lines of communication with SOL's front office leadership and to guard against surprises. By complying with the general principles described above and the specific ones described below, SOL will better serve the Department's mission, the Administration's policies, and the American workforce.

Principles Regarding Enforcement Decisions and Related Matters

First, as part of the Executive Branch, the Department of Labor must take actions consistent with federal law and Administration policy. Attorneys in SOL must therefore ensure that they interpret and enforce the law accordingly.

Second, SOL attorneys should familiarize themselves with the principles described in the Attorney General's memorandum on the proper use of guidance documents, *Prohibition of Improper Guidance Documents* (Nov. 16, 2017), available at <https://www.justice.gov/opa/press-release/file/1012271/download>. Attorneys are reminded that guidance documents should be used to *guide*: providing explanation or paraphrase of statutory or regulatory requirements, among other things.

Third, SOL's front office leadership should be informed of proposed enforcement actions involving significant legal issues at least one week before any filing or other pertinent deadline. Significant legal issues may include:

- New, novel, or potentially controversial legal theories, including where the case could set an important precedent or where the Department has not previously taken a position;
- Issues that are or are likely to be the subject of circuit splits;
- Issues that reflect positions taken in withdrawn subregulatory guidance or invalidated regulations, such as unpaid interns, classification of independent contractors, or joint employment;
- Issues that may implicate or impinge religious freedom; or
- Any other issues that the Associate Solicitor of Labor (ASOL) or the Regional Solicitor of Labor (RSOL) believes may be of interest or importance to the Solicitor.

Relatedly, SOL's front office leadership should also be informed of proposed enforcement actions where the Department would litigate on behalf of an employee(s) who has agreed to arbitrate employment disputes with his or her employer.

To inform SOL leadership of a proposed action, ASOLs and RSOLs may use existing reporting mechanisms, such as the weekly significant activity report or the monthly operating report. Please include sufficient information to fairly describe the matter's significance. Of course, many actions described here already come to the Solicitor's attention through these reporting mechanisms. To the extent the mechanisms may be insufficient to address a particular matter, the submission may be by email to the Solicitor and Deputy Solicitors, as appropriate.

Fourth, consistent with current practice, recommendations to file an *amicus* brief should be submitted to the Solicitor at least seven days in advance of the deadline for submitting to the Solicitor General. In addition, recommendations should include clear, detailed statements explaining the Secretary's interest in filing an *amicus* brief.

Fifth, with respect to settlements, the ASOL or RSOL should promptly submit to the Solicitor for review and approval any proposed settlements that contain new, novel, or potentially controversial provisions, or that may be of significance. The Solicitor expects that the vast majority of settlements will not need to be submitted for review.

To submit a draft settlement agreement for review, attorneys should email the Solicitor and Deputy Solicitors, as appropriate, and also attach the draft agreement.

Sixth, all attorney work product should have a header stating “Draft – Privileged / Attorney Work Product,” or other similar language on each page.

Finally, in any case where a federal court or administrative authority expressly rejects the Department’s interpretation of law (or Constitution) in a dispositive order or opinion, the ASOL or RSOL should email the Solicitor and Deputy Solicitors, as appropriate, a brief summary of the matter within one business day and attach the decision or slip opinion.

* * *

The Solicitor may periodically revise this memorandum. Moreover, this memorandum is an internal Department of Labor policy directed at SOL and its employees. As such, it is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. In addition, in the future, I plan to issue joint memos with agency heads, where appropriate, to provide more specific enforcement guidance.

ASOLs and RSOLs should review and implement these principles immediately, and advise his or her staff as appropriate. Thank you for your hard work, assistance, and cooperation in this matter.

ATTACHMENT



Office of the Attorney General
Washington, D. C. 20530

November 16, 2017

MEMORANDUM FOR ALL COMPONENTS

FROM: THE ATTORNEY GENERAL

SUBJECT: Prohibition on Improper Guidance Documents

The Department of Justice has the duty to uphold the laws of the United States and to ensure the fair and impartial administration of justice. Therefore, when the Department engages in regulatory activity, it should model the lawful exercise of regulatory power.

In promulgating regulations, the Department must abide by constitutional principles and follow the rules imposed by Congress and the President. These principles and rules include the fundamental requirement that agencies regulate only within the authority delegated to them by Congress. They also include the Administrative Procedure Act's requirement to use, in most cases, notice-and-comment rulemaking when purporting to create rights or obligations binding on members of the public or the agency. Not only is notice-and-comment rulemaking generally required by law, but it has the benefit of availing agencies of more complete information about a proposed rule's effects than the agency could ascertain on its own, and therefore results in better decision making by regulators.

Not every agency action is required to undergo notice-and-comment rulemaking. For example, agencies may use guidance and similar documents to educate regulated parties through plain-language restatements of existing legal requirements or provide non-binding advice on technical issues through examples or practices to guide the application or interpretation of statutes and regulations. But guidance may not be used as a substitute for rulemaking and may not be used to impose new requirements on entities outside the Executive Branch. Nor should guidance create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements.

It has come to my attention that the Department has in the past published guidance documents—or similar instruments of future effect by other names, such as letters to regulated entities—that effectively bind private parties without undergoing the rulemaking process.

The Department will no longer engage in this practice. Effective immediately, Department components may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local,

and tribal governments). To avoid circumventing the rulemaking process, Department components should adhere to the following principles when issuing guidance documents:

- Guidance documents should identify themselves as guidance, disclaim any force or effect of law, and avoid language suggesting that the public has obligations that go beyond those set forth in the applicable statutes or legislative rules.
- Guidance documents should clearly state that they are not final agency actions, have no legally binding effect on persons or entities outside the federal government, and may be rescinded or modified in the Department's complete discretion.
- Guidance documents should not be used for the purpose of coercing persons or entities outside the federal government into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or regulation.
- Guidance documents should not use mandatory language such as "shall," "must," "required," or "requirement" to direct parties outside the federal government to take or refrain from taking action, except when restating—with citations to statutes, regulations, or binding judicial precedent—clear mandates contained in a statute or regulation. In all cases, guidance documents should clearly identify the underlying law that they are explaining.
- To the extent guidance documents set out voluntary standards (e.g., recommended practices), they should clearly state that compliance with those standards is voluntary and that noncompliance will not, in itself, result in any enforcement action.

All components shall implement these principles immediately with respect to all future guidance documents, in consultation with the Office of Legal Policy. Components should also implement these principles consistent with policies issued by the Office of Management and Budget, including its Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). Furthermore, I direct the Associate Attorney General, as Chair of the Department's Regulatory Reform Task Force, to work with components to identify existing guidance documents that should be repealed, replaced, or modified in light of these principles.

For purposes of this memorandum, guidance documents include any Department statements of general applicability and future effect, whether styled as guidance or otherwise that are designed to advise parties outside the federal Executive Branch about legal rights and obligations falling within the Department's regulatory or enforcement authority. This memorandum does not apply to adjudicatory actions that do not have the aim or effect of binding anyone beyond the parties involved, and it does not address documents informing the public of the Department's enforcement priorities or factors the Department considers in exercising its prosecutorial discretion. Nor does it address internal directives, memoranda, or training materials for

Department personnel directing them on how to carry out their duties, positions taken by the Department in litigation, or advice provided by the Attorney General or the Office of Legal Counsel. This memorandum is an internal Department of Justice policy directed at Department components and employees. As such, it is not intended to, does not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.