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DOL Announces Substantial Changes to Guidance Practices

Law and the Workplace Blog on **August 31, 2020**

On August 28, 2020, the U.S. Department of Labor ("DOL") published in the Federal Register a final rule that substantially revises its practices with respect to guidance documents. The "Promoting Regulatory Openness through Good Guidance Rule," referred to as the "PRO Good Guidance Rule," implements President Trump's Executive Order 13891, which directed federal agencies to curtail and streamline guidance practices. The DOL explained that in issuing the PRO Good Guidance Rule, it sought "to create fairer procedures for the issuance and use of regulatory guidance at the Department of Labor," and in recognition of the fact that "the public often treats guidance from agencies as binding, even if it technically is not."

Of chief significance, under the PRO Good Guidance Rule, all DOL guidance documents going forward will be made publicly available in a searchable database on the DOL's website. Anything not posted in this database will no longer be considered guidance and cannot be relied upon as such. The rule clarifies that many types of documents that parties may have previously utilized as guidance—including DOL legal briefs and court filings, agency adjudications, and opinion letters issued to a particular person in response to a specific inquiry—do not constitute guidance and cannot be relied upon as such, unless that document has been posted to the DOL's guidance database.

The PRO Good Guidance Rule also requires that any future guidance considered "significant" (which would include guidance with an economic impact greater than $100 million, that would create a serious inconsistency with action taken by another federal agency, or that would have certain other noteworthy impacts) will have to go through a formal process requiring notice-and-comment review before being implemented, similar to what is already required for agency rulemaking. Finally, under the PRO Good Guidance Rule, the public will now be afforded the right to petition the DOL to amend or withdraw guidance with which it disagrees.

The DOL also announced that in creating its guidance database, it “undertook a comprehensive review of its own guidance” and had “rescind[ed] nearly 3,200 documents.”

The PRO Good Guidance Rule takes effect on September 27, 2020, after which employers and practitioners should confirm that any DOL guidance on which they intend to rely are posted in the public database.

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