



Goodbye, Guidance? Feds Limit Power Of Agency Guidance Documents

NEW JUSTICE DEPARTMENT POLICY COULD AID EMPLOYERS DEFENDING AGAINST FEDERAL CLAIMS

Insights

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A short policy memorandum quietly issued by the U.S. Department of Justice's No. 3 official late last month could end up having positive implications for employers defending claims brought by the federal government. The [January 25 memo](#) introduces new stringent limits on the use of guidance documents by Department of Justice officials in civil actions against businesses, including employment claims. By limiting the effectiveness of such guidance documents—and in some cases, eradicating them altogether—the Trump administration may have handed employers a gift that could pay off in the long run.

Background: What Are “Guidance” Documents?

Federal agencies often produce publications intended to assist in the interpretation of the laws they are charged with overseeing. They can include enforcement guidance memoranda, interpretative guidance documents, compliance manuals, management directives, and agency guidelines, among others. Employers often encounter such guidance from the Equal Employment Opportunity Commission (EEOC), Department of Labor (USDOL), the Office of Federal Contract Compliance Programs (OFCCP), the Occupational Safety and Health Administration (OSHA), and other similar agencies.

These documents do not have the power of statutes, formally promulgated regulations, or authoritative case law, but are often relied upon by agency investigators and courts during legal proceedings brought against businesses by the federal government. However, because they are not enacted by elected officials, nor are put through the rigorous procedural process required before a regulation can be effective, they can sometimes be controversial. Businesses have often highlighted examples of guidance documents that create obligations or legal standards which seem contradictory to, or go well beyond, existing statutes and regulations.

Enter The “Brand” Memo

Following an order by President Trump to reduce the burden and cost of federal enforcement activity, the Department of Justice (DOJ) issued [a memo late last month](#) authored by Associate Attorney General Rachel L. Brand. It starts with the well-known but oft-forgotten premise that guidance documents “cannot create binding requirements that do not already exist by statute or regulation.” But rather than simply paying this concept lip service, the Brand Memo then states,

unequivocally, that the DOJ can no longer “use noncompliance with guidance documents as basis for proving violations of applicable law” in civil lawsuits alleging violations of federal law.

The memo does not necessarily mean that all guidance documents are immediately worthless. It states that the guidance documents that “simply explain or paraphrase legal mandates from existing statutes and regulations” are still helpful, and could even be used to prove that defendants were aware of a certain legal requirement. However, gone are the days when the DOJ can use an agency guidance document to “create any additional legal obligations.”

This new policy is in effect immediately, and applies to any pending and future civil actions brought by the DOJ that happen to involve a guidance document.

What Does This Mean For Employers?

Although this memo flew somewhat under the radar when it was released, it has the potential to have a significant impact on the business of defending employment claims brought by the DOJ. If you are defending a piece of litigation or enforcement action brought by the Department of Justice and the government is employing an enforcement theory supported by a guidance document, you may be in luck. Unless the federal prosecutors can demonstrate that there is an underlying statute or regulation that specifically supports the position contained in that guidance document, they should be barred from using that document any further.

You should coordinate with your legal counsel to determine whether the Brand Memo can be of use to you in any pending action. Further, to the extent that you are taking (or avoiding) certain steps with your business because of some guidance document that prescribes a course of conduct, you should work with your legal counsel to determine whether an adjustment may be in order. Finally, you may be caught in a situation where a guidance document actually supports your position or business practice; if that is the case, work with your counsel to determine whether further reliance upon that guidance is problematic.

If you have questions about this memo and how it may affect your organization, please contact your regular Fisher Phillips attorney.

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