

OMB, Stakeholders Eye Ways To Expedite OSHA Rulemaking

The White House regulatory affairs shop has begun discussions with OSHA on ways to expedite workplace health and safety rulemaking, an Office of Information and Regulatory Affairs official recently confirmed. The meetings come as stakeholders are floating a variety of proposals to streamline OSHA's regulatory process -- including holding peer reviews concurrently with regulatory comment periods, using information collected by states to demonstrate feasibility, and increasing agency staff levels.

While some stakeholders say OSHA could adjust elements of its current rulemaking procedures to hasten the process, others view OSHA's limited staff devoted to standard-setting as the real hurdle regardless of process reforms. OSHA has pledged to fix what it views as a cumbersome rulemaking process, but hasn't revealed what those fixes might be and has sought stakeholders' advice.

Michael Fitzpatrick, associate administrator of OIRA, said during an OMB Watch event last month that he has met with OSHA and Department of Labor officials and discussed OSHA's rulemaking process, including "how we can make the process run as smoothly as possible." He added that this year will be a "big year at OSHA," based on recent conversations with agency and DOL officials.

The agency sought input on the issue in its questions for the recently held "OSHA Listens" meeting, asking whether there are any policies or procedures that OSHA can take to decrease the time it takes to issue final standards. OSHA is already examining alternatives to its current hazard-by-hazard approach to rulemaking, including control banding, the agency states in its fiscal 2011 budget justification document.

Deputy Assistant Secretary Jordan Barab also said in recent comments that OSHA plans to alter to its rulemaking procedures. "As OSHA moves ahead under new leadership, we're going to be pushing for change in occupational safety and health standards, pushing for change in the cumbersome rulemaking process, and pushing for fundamental changes in how employers and workers think about risk in the workplace," he said at a North American Iron Workers labor-management conference last month.

Some stakeholders point to a lack of resources as the crucial element slowing down OSHA's rulemaking process. OSHA has requested an increase of more than \$4 million for standard-setting in its fiscal 2011 budget -- to almost \$24 million. The budget justification document also notes that an increase of 20 full-time staff in OSHA's fiscal 2010 budget will provide a "significant boost" to the pace of OSHA's regulatory activity.

However, the document adds that "accelerating the pace of rulemaking requires a concomitant increase in contract funds to complement those additional positions

by providing specialized expertise for the technical and scientific analyses that must be developed to meet the statutory and legal requirements for OSHA's rulemakings." As a result, OSHA is requesting \$4 million in contract resources for fiscal 2011, which will "support the analyses necessary for the agency to fulfill a more aggressive and multifaceted regulatory agenda."

Adam Finkel, former director of OSHA's health standards program, said increased resources and staff devoted to standard-setting would help expedite agency rulemaking efforts, and is particularly needed for health regulations. But he added that along with the push to expedite rules at OSHA, there is a need to ensure that no corners are cut in the process and no compromises are made with the science.

Additionally, Jim Tozzi, executive director of the Center for Regulatory Effectiveness, said he thinks a major component to speeding up OSHA's regulatory activity is to increase staff in the area. "I think they could stand some improvement, but I think a huge part of it is that they're lean on staff," he said.

However, he suggested that the agency remain cautious about planning to rely too significantly on contract resources. He noted that he'd rather see the agency devote more full-time staff to standard-setting, as policy decisions can't be contracted out.

A key union official suggested that the rulemaking process could be improved by fulfilling regulatory requirements concurrently. AFL-CIO safety and health director Peg Seminario said at the OMB Watch event that OSHA's current rulemaking process has an enormous number of requirements and there is a need to remove some of the hurdles that were put in place by the Bush administration. "While we have new leadership and we have a very firm commitment by the Obama administration to move forward in these areas, we still have a cumbersome, very slow regulatory process," she said.

Seminario added that the existing mechanism of taking actions sequentially adds to the time it takes OSHA to issue a rule. For example, the peer review component of OSHA's rulemaking could be done after a rule is issued, at the same time as the public comment period, she noted.

Conducting peer reviews at the same time as public hearings was also suggested at the OSHA Listens meeting last week by Matt Shudtz, a policy analyst for the Center for Progressive Reform. Additionally, he recommended that peer-reviewed health assessments by NIOSH or EPA should be considered by OSHA as evidence showing risks to workers.

He also called for the agency to reassess the way it conducts risk analyses. "[W]e do not believe the Supreme Court's *Benzene* decision calls for the hundred-plus page risk analyses that have become typical in recent OSHA rulemakings," he said to OSHA at the meeting. "We urge you to ask the Solicitor of Labor for a new

interpretation of the analytical requirements imposed by that decision.”

Finkel also expressed concerns that the peer review step in the rulemaking process adds to delays. Additionally, he noted that the Obama administration has so far only added to that slow pace with a “recent step in the wrong direction,” by adding a second peer review to its rules.

He noted that OSHA’s peer review agenda shows that current rulemakings on silica and diacetyl have separate peer reviews on the science and the economics. He said he discovered that the agency added this extra process last summer and was surprised by the action. “It seemed like an agency that is trying to get out from under needless hurdles that delay the process, is now imposing them on itself,” he said.

Finkel said a simple way that the agency could start to hasten its regulatory process is to eliminate this extra step altogether, arguing it is duplicative of activities taken during the public hearing. “The idea that, before we can have a public hearing in front of a judge where people question the risk assessment, we need to have a separate peer review before that in a way is sort of mind-boggling,” he said.

Additionally, Seminario recommended that OSHA use findings by other agencies and state efforts to provide information on risk and feasibility. She told *Inside OSHA* that efforts by state programs could be used as a demonstration of feasibility in areas that federal OSHA is interested in a rulemaking. For example, she noted that Cal/OSHA is currently working to update permissible exposure limits, which is also an activity that OSHA has indicated it is interested in pursuing.

However, other stakeholders suggested caution be exercised in relying too much on data collected by states. An industry attorney said OSHA needs to look at the underlying rationale of a state program’s rule, as well as the science behind the state’s actions, and put that information into the record for public comment. “Simply because a state has done it, doesn’t mean you can just proceed with the bottom line of what a state has done,” he said.

Additionally, Seminario questioned during the OMB Watch event whether too much analysis is currently needed to issue a rule. “Analysis for the sake of analysis has gotten people away from some common sense,” she said. She added that there is value in applying best practices more broadly and not requiring high levels of analysis to get them implemented.

She noted that she has concerns that the Obama administration will not have enough time to address all of the regulations on its agenda, particularly those that have recently been initiated, due to OSHA’s lengthy rulemaking process. She added that she doesn’t want to see the Obama administration end up in a position

during the end of its run where previously introduced OSHA rules are subsequently scrapped, as has occurred in previous Democratic administrations.

As a result, she said she thinks staff at OIRA and the Office of Management and Budget (OMB) should focus on results and “getting things done.”-- *Sara Ditta* (sditta@iwppnews.com)

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