Void
Where Prohibited
Revisited

The Trickle-Down Effect of OSHA's At-Will Bathroom-Break Regulation

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Is OSHA’s Interpretation Valid as a Matter of Administrative Law?

SHRM [Society of Human Resource Management]’s Lawrence lamented that something as basic as bathroom use needs to be federally regulated. “It’s a little sad we even need to have guidance on that.”

The reason that OSHA did not consider issuing its April 6, 1998 Memorandum, which it insists is merely an interpretation of its pre-existing toilet regulation, as a standard in its own right, that is, as a so-called legislative regulation with the force of law, was the desire to avoid inordinate delay. As Helen Rogers, a safety specialist in OSHA’s Directorate of Compliance Programs who had been involved in the drafting process and was listed as the contact person in the Memorandum, observed four years later: if OSHA had gone through the notice-and-comment process under the Administrative Procedure Act (APA), which requires agencies to give both general notice of proposed rule making in the \textit{Federal Register} and an opportunity to interested parties “to participate in the rule making through submission of written data, views, or arguments,” the standard would still not be in place today. In an interview, John Miles, who as the


\footnote{25 USC sect. 553(b) and (c) (2000). The Occupational Safety and Health Act itself contains a similar provision requiring the agency to “publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and...afford interested persons a period of thirty days after publication to submit written data or comments.” 29 USC sect. 655(b)(2) (2000).}

\footnote{Telephone interview with Helen Rogers, Washington, D.C. (Sept. 19, 2002). Rogers peremptorily refused to discuss changes that the Memorandum had undergone during the year it was being drafted on the grounds that the government does not discuss such internal policy formulation matters.}
Director of OSHA’s Directorate of Compliance Programs had been the official responsible for issuing the Memorandum, estimated that rulemaking would have taken eight to ten years.4 And, as the Director of Legal Support at Virginia OSHA added, Federal OSHA does such “quick and dirty” interpretations both because promulgating legislative regulations takes so many years and the process often entails considerable litigation.5

As the federal courts have ruled repeatedly: “It is well-established that an agency may not escape the notice and comment requirements...by labeling a major substantive legal addition to a rule a mere interpretation.”6 If an employer challenges the validity of such a label, judges have to determine whether the putative interpretation “spells out a duty fairly encompassed within the regulation that the interpretation purports to construe”7 or whether it significantly expand[s] the scope” of that regulation.8

Thus it is clear that OSHA cannot lawfully circumvent that process merely by dressing up what in fact is a legislative regulation as a mere interpretation. Yet it has some discretion in this area by virtue of the federal judiciary’s repeated complaints that the distinction between legislative and interpretive regulations is “‘enshrouded in considerable smog,’” “‘fuzzy,’” “‘tenuous,’” “‘blurred,’” and “‘baffling.’”9 This “quite troublesome”10 ambiguity derives, according to the leading administrative law treatise, from the real-world fact that “legislative rules often require many years and many thousands of staff hours to issue. ... It would be impossible for any agency to use the long and expensive process of issuing legislative rules to address definitively and in detail every issue that arises in the process of implementing a regulatory...program.”11 The question here, then, is whether OSHA’s declaration that “this standard requires employers to make toilet facilities available so that employees can use them when they need to do so” properly fits within the “many thousands of pages of policy statements and interpretative rules that address myriad details that are not explicitly resolved by its

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4Telephone interview with John Miles, OSHA Regional Administrator, Dallas Region (Nov. 12, 2002).
5Telephone interview with Jay Withrow, Director of Legal Support, Virginia OSHA (Oct. 31, 2002).
8Appalachian Power Co. v. Environmental Protection Agency, 208 F.3d at 1024.
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legislative rules,” or whether what OSHA calls a mere interpretation is in fact one of the “legislative rules that describe the basic contours of the regulatory pro­gram” administered by OSHA.12

In a prominent decision from 1996, Richard Posner, the federal judiciary’s most unconventional thinker, while admitting that distinguishing between interpretive and legislative regulations “is often very difficult,”13 tried to avoid traditional pitfalls by offering a new approach.

When a statute does not impose a duty on the persons subject to it but instead authorizes...an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency. Provided that a rule promulgated pursuant to such a delegation is intended to bind, and not merely to be a tentative statement of the agency’s view, which would make it just a policy statement, and not a rule at all, the rule would be the clearest possible example of a legislative rule, as to which the notice and comment procedure not here followed is mandatory, as distinct from an interpretive rule; for there would be nothing to interpret. [U]nless a statute or regulation is of crystalline transparency, the agency enforcing it cannot avoid interpreting it, and the agency would be stymied in its enforcement duties if every time it brought a case on a new theory it had to pause for a bout, possibly lasting several years, of notice and comment rulemaking. Besides being unavoidably continuous, statutory interpretation normally proceeds without the aid of elaborate factual inquiries. When it is an executive or administrative agency that is doing the interpreting it brings to the task a greater knowledge of the regulated activity than the judicial or legislative branches have, and this knowledge is to some extent a substitute for formal fact-gathering.

At the other extreme from what might be called normal or routine interpretation is the making of reasonable but arbitrary (not in the “arbitrary or capricious” sense) rules that are consistent with the statute or regulation under which the rules are promulgated but not derived from it, because they represent an arbitrary choice among methods of implementation. A rule that turns on a number is likely to be arbitrary in this sense. ... Legislators have the democratic legitimacy to make choices among value judgments, choices based on hunch or guesswork or even the toss of a coin, and other arbitrary choices. When agencies base rules on arbitrary choices they are legislating, and so these rules are legislative or substantive and require notice and comment rulemaking, a procedure that is analogous to the procedure employed by legislatures in making statutes. The notice of proposed rulemaking corresponds to the bill and the reception of written comments to the hearing on the bill.14

The question within the framework limned by Posner then becomes whether there is any “process of cloistered, appellate-court type reasoning by which”

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12Pierce, Administrative Law Treatise 1:305.
13Hoctor v. U.S. Dept, of Agriculture, 82 F.3d 165, 167 (7th Cir. 1996).
OSHA "could have excogitated" the rule that employers have to let workers go to the bathroom when they need to go from the standard requiring employers to provide a certain number of toilets per certain number of workers: "The rule is arbitrary in the sense that it could well be different without significant impairment of any regulatory purpose."\(^1\)

Employers' lawyers would argue that because the real point of OSHA's action was not merely to interpret the toilet standard, but to change it by imposing new obligations on employers and conferring new rights on employees, OSHA lacked the power to achieve this result by means of a mere interpretive regulation. Instead, it was required to comply with the APA's notice and comment procedures before publishing a legislative regulation\(^1\) that would be binding on the public and courts.\(^2\) To be sure, employers would be constrained to concede that OSHA had met one threshold prerequisite because it could show that the legislative regulation section 1910.141(c)(1)(i) does contain an ambiguous term ("provided") that requires interpreting.\(^3\) But employers would argue that even if it were reasonable for OSHA to state that a standard requiring employers to provide toilets must also mean that employers must let workers use them, the interpretation that they have to let workers go whenever workers say they need to void (in contrast with, for example, at the beginning and end of the workday and during scheduled breaks, every two hours, or at whatever intervals a urologist hired by the company says it is normal to void) was not obviously implicit in, and therefore could not be merely an interpretation of, section 1910.141(c)(1)(i).

Therefore, in this view, OSHA should have been required to solicit comment from the public before promulgating a new, stricter standard.

To be sure, the substance of the toilet standard itself imposes some constraints on logical interpretations. For example, it would be inappropriate to permit employers to designate a specific time interval such as 10 a.m. to 10:15 a.m. as the only bathroom break for all employees because 15 workers would not all be able to void with one toilet within a 15-minute period, especially if walking from the work station to the toilet and back and/or doffing and donning protective equipment absorbed some of time.

Rob Swain, OSHA Counsel in the Solicitor's Office of the Department of Labor, speculated that some judges might invalidate the Memorandum on the grounds that it was a legislative regulation in its own right and should have been subjected to notice and comment pursuant to the APA, whereas others would

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\(^1\)Doctor v. U.S. Dept. of Agriculture, 82 F.3d at 171.
\(^2\)5 USC sect. 553.
\(^3\)Telephone interview with Baruch Fellner, attorney, Gibson, Dunn & Crutcher, Washington, D.C. (Sept. 17, 2002).
\(^4\)Phillips Petroleum Co. v. Johnson, 22 F.3d 616, 619 (5th Cir. 1994).
uphold it as a mere interpretation. Nevertheless, when asked whether, if OSHA had an opportunity to repeat the process, it would (abstracting from the issue of the long delay) prefer to promulgate the rule as a legislative regulation, Swain unhesitatingly said no because, if OSHA had to go through that lengthy process for every minor development in each of its standards, the agency would never have time to do anything else but notice and comment proceedings.19

Although OSHA asserted in the Memorandum that the access "requirement is implicit in the language of the standard," if it is also true, as demonstrated in Void Where Prohibited,20 that prior to 1998 OSHA had in fact taken the position that the standard did not require employers to let workers use the toilet, it would be difficult to deny that the Memorandum enlarged employers' obligations. Even if OSHA could plausibly argue that prior to 1998 it had never taken that enforcement position in refusing to issue a citation, but only in conversation with the author, it could still not refute the claim that in its first 27 years of existence it had never issued a citation for failure to make toilets available when workers needed to use them. In that sense the Memorandum could be viewed as having enlarged employers' obligations.

John Miles noted that casting the interpretation as a Memorandum rather than as an opinion letter to the UFCW—a method chosen because the agency had also received other inquiries on the subject—perhaps gave it "a little more weight," but probably did not lend it any more legal force.21 The legal force of OSHA's Memorandum is thus more circumscribed than that of a legislative regulation, which the Supreme Court has described this way: "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."22

In contrast, a different analysis applies when "the Secretary regularly employs less formal means of interpreting regulations prior to issuing a citation. These include the promulgation of interpretive rules, and the publication of agency enforcement guidelines.... Although not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers, these informal interpretations are still entitled to some weight on judicial

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21Telephone interview with John Miles (Nov. 12, 2002).
review. A reviewing court may certainly consult them to determine whether the Secretary has consistently applied the interpretation embodied in the citation, a factor bearing on the reasonableness of the Secretary’s position.  

As an agency’s interpretation of its own rule, the Memorandum is not binding on employers or courts, but the latter would afford it “substantial deference” as an expression of the agency’s expertise, unless it is “plainly erroneous or inconsistent” with the regulation. As the U.S. Supreme Court explained the force of so-called interpretive rules in a case involving the Wage and Hour Administrator’s interpretation of the Fair Labor Standards Act:

Congress...did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. ... He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it. ...

The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court’s processes, as an authoritative pronouncement of a higher court might do. But the Administrator’s policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator’s policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. ... We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

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By the same token, although the Memorandum is nevertheless the law, or at least a species of law—even before any court has upheld it—until a court invalidates it in an action by an employer that contests a citation based on it, it is unclear whether a court would entertain a declaratory action to invalidate it by an employer that is covered by it (and thus has legal standing to challenge it) but that has not yet been adversely affected by it.\(^{27}\)

OSHA may also have violated the APA by having failed, without explanation, to publish the interpretive Memorandum in the *Federal Register*, in which the APA requires an agency, "for the guidance of the public," to publish "statements of general policy or interpretations of general applicability formulated and adopted by the agency."\(^{28}\) Instead, OSHA published it merely on its website together with its opinion letters addressed to individuals. OSHA Counsel Swain argued that OSHA was not obligated to publish it in the *Federal Register* because "it is not binding on anyone except OSHA," not even on the OSHA Review Commission, which could hold it invalid. To be sure, while noting that the Memorandum originated as a response to a request (from the UFCW) for a clarification of the toilet standard (in light of Iowa OSHA’s declaration in a letter to the author that it could not require employers to let workers use the bathroom), Swain conceded that in form and content it is obviously not an opinion letter, both because it is directed to OSHA officials and instructs them in detail as to how to enforce the standard. Swain also stated that few federal agencies publish analogous materials in the *Federal Register*\(^{29}\).

Swain’s argument that the Memorandum is not controlled by the APA publication requirement because it is not binding on the public is undercut by the fact that it is precisely the hallmark of an interpretive—as opposed to a legisla-

\(^{27}\) Swain doubted whether a court would entertain such a declaratory judgment. Telephone interview with Swain (Oct. 28, 2002).

\(^{28}\) 5 U.S.C. sect. 552(a)(1)(D) (2000). According to one influential statement of the law: "Only the phrases 'of general applicability' and 'of general policy' qualify which interpretations and policy-statements must be published. 5 U.S.C. sect. 552 (a)(1)(D). Congress inserted these qualifiers where it previously had the phrase 'not...addressed to and served upon named persons.' See S.Rep. No. 813, 89th Cong., 1st Sess. 6 (1965). The Senate characterized this change as a 'technical' one, id., suggesting that it considered the phrases equivalent. In an earlier version of the FOIA, Congress distinguished rules of general applicability from those that were particularized in scope, offering rates as an example of the latter. S. Rep. No. 1219, 88th Cong., 2d Sess. 4 (1964). The legislative history thus indicates a rather obvious definition of 'general': that which is neither directed at specified persons nor limited to particular situations." Nguyen v. U.S., 824 F.2d 697, 700 (9th Cir. 1987).

tive—regulation that it is not binding on the public. Nevertheless, the U.S. Department of Labor, for example, has published hundreds of pages of interpretive regulations under the Fair Labor Standards Act in the *Code of Federal Regulations*.

It is unclear whether OSHA failed to publish the Memorandum merely because it systematically follows the APA’s publication mandates only with regard to legislative regulations, as Swain suggested,\(^3\) or whether it was trying, for political reasons, to limit publicity—a rather quixotic hope in light of the massive media attention the Memorandum had unleashed.

\(^3\)Telephone interview with Rob Swain (Oct. 28, 2002).