**Items Required to be Contained in Regulation**

A common question that arises as part of the rulemaking process is whether a particular requirement needs to be spelled out in regulation or whether it can be contained in agency policy, manual, directive, contract, or another vehicle short of formal regulation. Agencies frequently want to maintain maximum flexibility and are concerned that the formal rulemaking process does not provide them the ability to address dynamic and evolving challenges under their jurisdiction. Balanced against this desire for flexibility is the statutory requirement that anything which constitutes an agency “rule” must be contained in regulation. While there are many permutations and nuances to what constitutes a “rule,” essentially the test is whether an agency standard carries the effect of law, in other words, “when it prescribes binding standards of conduct for persons subject to agency authority.”

I*. What is a Rule*

The Administrative Rules and Procedures Act (ARPA) governs agency rulemaking, Ind. Code Art. 4-22. ARPA applies “to the addition, amendment, or repeal of a rule in every rulemaking action.” Ind. Code § 4–22–2–13(a). ARPA defines a “rule” as:

the whole or any part of an agency statement of general applicability that:

(1) has or is designed to *have the effect of law*; and

(2) implements, interprets or prescribes:

(A) law or policy; or

(B) the organization, procedure, or practice requirements of an agency.

IC § 4–22–2–3(b) (emphasis added). The procedural requirements of ARPA, however, do not apply to “[a] resolution or directive of any agency that relates solely to internal policy, internal agency organization, or internal procedure and does *not have the effect of law*.” IC § 4–22–2–13(c)(1) (emphasis added).

Case law has similarly defined an administrative rule as having the following four elements:

(1) “an agency statement of general applicability to a class;”

(2) that is “applied prospectively to the class;”

(3) that is “applied as though it *has the* *effect of law*;” and

(4) that “affect[s] the substantive rights of the class.”

*Villegas v. Silverman*, 832 N.E.2d 598, 609 (Ind. Ct. App. 2005) (emphasis added) (citing *Blinzinger v. Americana Healthcare Corp.*, 466 N.E.2d 1371, 1375 (Ind. Ct. App. 1984)).

Thus, whether an agency requirement carries the “effect of law” is a key question in determining whether the requirement must be contained in regulation, and subject to the formal rulemaking process in ARPA, or may merely be contained in an internal policy or procedure and exempt from the formal rulemaking process. The Indiana Supreme Court has explained the “effect of law” standard as follows:

Weaving together this federal and state precedent, we observe a common thread—a rule carrying the effect of law primarily affects individual rights and obligations by setting binding standards of conduct for persons subject to its authority. This ‘effect of law’ concept manifests in everyday situations where Hoosiers must conform their conduct to meet agency standards. To be sure, when an agency standard requires citizens to alter their behavior—i.e., when it regulates their conduct—it necessarily affects the citizens’ rights or obligations because it compels them to do something they would not do otherwise or face legal consequences for noncompliance. And so that agency standard carries the effect of law. We therefore settle on the following summation of the phrase ‘effect of law’ for Indiana jurisprudence: **An agency regulation carries the effect of law when it prescribes binding standards of conduct for persons subject to agency authority**.

*Ward v. Carter*, 90 N.E.3d 660, 665 (Ind.), *cert. denied*, 139 S. Ct. 240, 202 L. Ed. 2d 161 (2018) (*emphasis added*).

Case law has established several helpful guidelines for determining whether a particular type of agency standard carries the effect of law:

II. *Internal Agency Policy vs. Regulation*

In *Ward*, the Plaintiff challenged a change by the Department of Corrections to the lethal injection protocol. Specifically, DOC changed the three-drug combination used for executions. The Indiana Supreme Court determined that various challenged agency policies did not need to be contained in regulation because they only governed internal agency procedures and did not impose requirements on individuals:

In our view, none of these exhibits primarily affect an offender’s rights or obligations. No exhibit prescribes binding standards of conduct that condemned offenders, like Ward, must follow to vindicate a substantive right. Unlike the *Villegas* plaintiffs or the *American Trucking* companies, Ward is not required to alter his conduct in any way. He is not faced with a choice of conforming his conduct to Department standards or foregoing a substantive right—his fate remains unaltered. Rather, the exhibits outline what Department personnel must do. They relate to the Department's internal policies and procedures that bind Department personnel and no one else. We therefore conclude that the Department's lethal injection protocol, as evidenced by these exhibits, does not carry the effect of law. Consequently, we hold the Department's lethal injection procedures do not constitute rules under Section 4–22–2–3(b) and are exempt from ARPA’s rulemaking strictures.

*Ward*, 90 N.E.3d at 666. In distinguishing the policies at issue in *Ward*, the Indiana Supreme Court favorably cited to several decisions that discussed common questions that arise in agency rulemaking.

The *Ward* decision favorably cited the case of *Villegas v. Silverman*, 832 N.E.2d 598 (Ind. Ct. App. 2005), which invalided the “BMV's policy of tightening the requirements to obtain new issuances of Indiana driver licenses, permits, and identification cards.”  *Id.* at 609.  In *Villegas*, as a result of recent increases in identify fraud, the BMV announced that applicants for Indiana driver licenses, permits, and identification cards would have to present certain documentation proving their identity before obtaining such cards. The new identification requirements were different from the standards previously applied by the BMV. *Id.* at 601. The Court of Appeals “determined “[t]he requirements are designed to have the effect of law because if an applicant does not produce the necessary documentation, then he or she cannot obtain a driver license, permit, or identification card.”  *Id.*  In discussing *Villegas*, the Supreme Court in *Ward* explained: “As we see it, the BMV's requirements carried the effect of law not just because they created rights or obligations, but because of who bore those rights or obligations—the individual, not the agency. Per the BMV requirements, the *Villegas* plaintiffs had to alter their conduct (provide certain documents) to receive the substantive benefits the law afforded (driver licenses, ID cards, or permits). And there was no latitude in compliance.”  *Ward*, 90 N.E.3d at 663.

The *Ward* decision also favorably cited the Court of Appeals decision in *Blinzinger v. Americana Healthcare Corp*., 466 N.E.2d 1371 (Ind. Ct. App. 1984).  *Blinzinger* examined whether a directive from the Indiana Department of Public Welfare (a predecessor to FSSA) implementing rate freezes for healthcare providers involved in decertification proceedings was an unpromulgated rule, an administrative adjudication, or an agency decision relating solely to internal policy and procedure. The Court of Appeals held the directive was an unpromulgated rule explaining:

The rate freeze directive possesses qualities which are typical of administrative rules because it is an agency statement of general applicability to a class—i.e., all certified healthcare providers in the State of Indiana who seek increased Medicaid reimbursement rates during the pendency of an administrative decertification proceeding. In addition, the directive is and was applied prospectively, as of August 1, 1980, to all healthcare providers similarly situated. The directive has been applied as though it had the effect of law, and it affects substantive rights of certified Medicaid providers in that it denies, for an indefinite period, the rate increases to which a provider may be otherwise entitled. …

Furthermore, we do not agree with DPW that the directive relates solely to internal policies and procedures. The impact of the directive falls outside the agency upon a class of healthcare providers to deny rate increases to which the providers may otherwise be entitled. The internal impact of the directive, upon the agency, is of less significance. It merely permits the agency to postpone the consideration of a requested rate increase, until such time as the agency has made a final determination regarding decertification which, as the instant case demonstrates, may be delayed for months. During this time, a provider who is otherwise entitled, must labor under increasing costs without an increase in the reimbursement rate. For these reasons, the directive may not be considered an internal policy which is exempt from the rulemaking requirements.

*Id.* at 1375.

III. *Agency Adjudication vs. Regulation*

In *Blinzinger*, the Court of Appeals distinguished the generalized and prospective directive implementing rate freezes for healthcare providers involved in decertification proceedings from a retrospective and particularized agency adjudication: “The rulemaking function is distinguished from the adjudicatory function in that the former embraces an element of generality, operating upon a class of individuals or situations whereas an adjudication operates upon a particular individual or circumstance. In addition, the exercise of administrative rulemaking power looks to the future, whereas an adjudication operates retrospectively upon events which occurred in the past.” *Blinzinger*, 466 N.E.2d at 1375.

IV. *Agency Contracting vs. Regulation*

*Ward* also discussed *Am. Trucking Associations, Inc. v. City of Los Angeles, Cal.*, 569 U.S. 641 (2013), which examined the distinction between “a government’s exercise of regulatory authority and its own contract-based participation in a market.” *Id.* at 649. In *American Trucking*, “the Port required that certain trucking companies enter into ‘concession agreements’ that mandated the companies affix placards on some trucks and submit parking plans for unused trucks. *Id.* at 645, 133 S.Ct. 2096. The Port prescribed penalties for noncompliance. For example, a company's failure to enter into these agreements could result in a “misdemeanor ... punishable by a fine of up to $500 or a prison sentence of up to six months.’ *Id.”* *Ward*, 90 N.E.3d at 664. As explained by the U.S. Supreme Court, these requirements crossed over from “contractual commitments voluntarily undertaken” into “official, government-imposed policies prescribing binding standards of conduct”:

The “force and effect of law” language in § 14501(c)(1) excludes such everyday contractual arrangements from the clause's scope. That phrasing targets the State acting as a State, not as any market actor—or otherwise said, the State acting in a regulatory rather than proprietary mode.

But that statutory reading gets the Port nothing, because it exercised classic regulatory authority—complete with the use of criminal penalties—in imposing the placard and parking requirements at issue here. Consider again how those requirements work. They are, to be sure, contained in contracts between the Port and trucking companies. But those contracts do not stand alone, as the result merely of the parties' voluntary commitments. … [T]he contract here functions as part and parcel of a governmental program wielding coercive power over private parties, backed by the threat of criminal punishment.

That counts as action “having the force and effect of law” if anything does. The Port here has not acted as a private party, contracting in a way that the owner of an ordinary commercial enterprise could mimic. Rather, it has forced terminal operators—and through them, trucking companies—to alter their conduct by implementing a criminal prohibition punishable by time in prison. In some cases, the question whether governmental action has the force of law may pose difficulties; the line between regulatory and proprietary conduct has soft edges. But this case takes us nowhere near those uncertain boundaries. Contractual commitments resulting not from ordinary bargaining (as in *Wolens* ), but instead from the threat of criminal sanctions manifest the government qua government, performing its prototypical regulatory role.

… when the government employs such a coercive mechanism, available to no private party, it acts with the force and effect of law, whether or not it does so to turn a profit. Only if it forgoes the (distinctively governmental) exercise of legal authority may it escape § 14501(c)(1)'s preemptive scope.

*Am. Trucking Associations*, 569 U.S. at 650–52.

V. *Agency Discretionary Powers vs. Regulation*

Many agency enacting statutes have broad language granting the agency discretion to take actions necessary or appropriate to carry out its mission. In *Blinzinger*, the Court of Appeals addressed whether this language allows an agency to undertake action without formal rulemaking:

DPW next argues that the rate freeze directive was issued pursuant to the discretionary power conferred by [I.C. 12–1–2–3(f)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000009&cite=INS12-1-2-3&originatingDoc=I966768d0d38911d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=211183dd26c34cadb6d4577133f7c02d&contextData=(sc.UserEnteredCitation)), which provides:

“IDPW may make such rules and regulations and take such action as may be deemed necessary or desirable to carry out the provisions of this act and which are not inconsistent therewith.”

Our resolution of Issue I is determinative of this issue. Having determined that the rate freeze directive constitutes an unpromulgated rule, and noting that an agency has no power, discretionary or otherwise, to issue rules or regulations except as provided by statute, [Indiana Air Pollution Control Board v. City of Richmond (1983) Ind., 457 N.E.2d 204,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984100149&pubNum=578&originatingDoc=I966768d0d38911d9bf60c1d57ebc853e&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=211183dd26c34cadb6d4577133f7c02d&contextData=(sc.UserEnteredCitation)) we must conclude that the rate freeze directive is not validated as within DPW's discretionary power.

*Blinzinger*, 466 N.E.2d at 1376-77. Similarly, in *Villegas*, the Court of Appeals found that a statute directing “the BMV to issue licenses in a manner the Bureau considers necessary and prudent” did not remove the necessity for rulemaking. The Court explained:

the ARPA requires rules to be adopted in accordance with the requirements of Indiana Code chapter 4–22–2. *See* Ind.Code § 9–15–2–1(3). These requirements dictate, among other things, public input into any proposed rule changes. The duty of the BMV to issue licenses in a manner that it deems prudent does not supercede the mandate to allow the public to participate in the rule-making process.

*Villegas*, 832 N.E.2d at 610 (footnote omitted).