Brent Bedford

From: Brent Bedford
Sent Saturday, May 25,2002 9:10 AM
To: 'jmorrall@omb.eop.gov'
Cc: Brent Bedford
Subject: FAMILY MEDICAL LEAVE ACT

John,

I am submitting the attached public nomination for recommended changes in FMLA regulations, and the economic impact it has on businesses. Within the business I support as an HR professional, roughly 25 percent of one employee classification has been approved for FMIA Approximately 98% of these requests are intermittent leave, and a realistically view of actual use includes extending weekends, holidays and/or vacations and depending on weather conditions or work assignment provided - hours/days are requested for a "serious medical condition" of which the employee was previously approved. We have local union leaders instructing union members if they get in trouble with attendance - sign up for FMLA for job protection, while local management is later informed the employee was leaving for a fishing trip, or was still out of town on vacation. Attached are proposed solutions. As an employer, I am requesting your help.

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Part 825.114 and DOL Opinion Letter FMLA-86 (December 12,1996)

Authority: 29 U.S.C. Section 2654

Thank you,

Brent Bedford

FAMILY MEDICAL LEAVE ACT

6 Nominations

Family Medical Leave Act (FMLA):
Definition of Serious Health Condition

Regulating Agency: Department of Labor (DOL)

Citation: *29* C.F.R. Part 825.114 and DOL Opinion Letter FMLA-86 (December 12, 1996)

Authority: *29* U.S.C. Section 2654

Description of the Problem:

Under the Family Medical Leave Act (FMLA), covered employers must provide qualifying employees with twelve weeks of leave in any twelvemonth period. While employees may take leave for various reasons, they most commonly do so because they cannot work due to a serious health condition or need leave in order to care for a family member with a serious health condition.

The plain language of the act, its legislative history, and an early DOL opinion letter all make it quite clear that the term "serious health condition" does not include minor ailments. Despite this *dear* mandate, DOL regulation 29 C.F.R. Part 825.1 *14* and DOL Opinion Letter FMLA-86 (December 12,1996) include minor ailments within definition of the *term* and, by doing so, vastly increase the number of FMLA leaves an employer may experience and, consequently, substantially increase the already significant administrative burdens and *costs* imposed by the FMLA.

Proposed Solution: Rescind DOL Opinion Letter FMLA-86 (December 12,1996) and any similar letters or guidance and revise 29 C.F.R. Part 825.114 so that it explicitly excludes minor ailments from the definition of serious health condition.

Economic Impact: Making the aforementioned changes will return the scope of the FMLA to its original intent, greatly reducing *the* burdens and *costs* imposed *on* employers.

Family Medical Leave Act (FMLA): Intermittent Leave

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Pam 825.203, 825.302(f) & 825.303 and DOL Opinion Letter FMLA-101 (January 15, 1999)

Authority: 29 U.S.C. Section 2654

Description of the Problem:

The statute permits employees to take leave on an intermittent basis or work on a reduced schedule when medically necessary. According to *recent* DOL study, almost one fifth of all FMLA leave is taken on an intermittent basis.

Tracking

The FMLA is silent on whether an employer may limit the increment of time an employee takes as intermittent leave to a minimum number of days, hours or minutes. During the notice and comment period for the regulation, many urged the DOL to limit intermittent leave increments to a half-day minimum, expressing concern that smaller increments would prove over-burdensome for employers. Despite these warnings, DOL regulation 29 C.F.R. Parts 825.203 requires that employers permit employees to take FMLA leave increments as small as the "shortest period of time the employer's payroll system uses to account for absences of leave, provided it is one hour or less." Employers, many of which have payroll systems capable of tracking time in periods as small as *six* minutes, find tracking leave in such small increments extremely burdensome. This is particularly problematic with respect to employees who are exempt from the Fair Labor Standard Act's (FLSA) overtime requirements. Exempt employees are paid on a *salary* basis and employers axe not required to – and normally do not - track their time.

Notice

Scheduling around intermittent leave can be difficult if not impossible for employers because the regulations do not require the employee to provide advanced notice of specific instances of intermittent leave. DOL Opinion Letter FMLA-101 (January 15,1999) exacerbates the problem by permitting employees to notify the employer of the need for leave up to two days following the absence.

Proposed Solution: Amend *29* C.F.R. Part 825.203 so that it permits employers to require that employees take intermittent leave in a minimum of half-day increments. *Also,* rescind DOL Opinion *Letter* FMLA-101 (January 15,1999) as well as any similar letters and amend 29 C.F.R. Parts 825.302 and 825.303 so they require that employees provide at least one week advanced notice of the need for intermittent leave except in cases of emergency, in which case they must provide nodce on the day of the absence, unless they can show it was impossible to do so.

Economic Impact: Permitting employers to limit leave to a minimum of half-day increments will greatly reduce the recordkeeping burdens associated with intermittent leave. Requiring employees to provide reasonable notice of absences will reduce employer costs and burdens incurred because of unpredictable employee absences.

Family Medical Leave Act (FMLA): Medical Certification

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Parts 825.307 & 825.308

Authority 29 U.S.C. Section 2654

Description of the Problem:

Under the FMLA, an employer may require that an employee who requests leave due to a serious health condition or in order to care for a family member with a serious health condition, provide certification by a health care provider of the serious health condition.

Clarification and Auth

Regulation 29 C.F.R. Part 825.307 prohibits an employer from contacting the health care provider of the employee or the employee's family member without the employee's permission, even in order to clarify or authenticate the certification. Even with the employee's permission, the employer may not directly contact the employee's health care provider, but must have a health care provider it has hired contact the employee's health care provider to get the information. As a result, it is very difficult, cosdy and time-consuming for employers to obtain clarification or authentication of certifications.

Intermittent Leave

The statute permits employees to take leave on an intermittent basis or work on a reduced schedule when medically necessary. Under regulation 29 C.F.R. Part 825.308, an employer can require an employee to provide initial certification of need for intermittent leave, but may not require the employee to provide certification for each absence. In fact, the regulation only permits the employer to request re-certification every thirty days. Thus, an employee with certification for intermittent leave can claim that any absence is FMLA qualifying without having to provide medical certification substantiating the claim. This invites abuse.

Proposed Solution: Amend 29 C.F.R. Part 825.307 so that employers may directly contact employee's health care providers in order to authenticate or clarify medical certification. Also, amend 29 C.F.R. Part 825.308 so that employers may require employees to provide certification for each absence.

Economic Impact: Making the aforementioned changes will help ensure that only those leave requests that actually meet the statute's criteria are designated as FMLA leave, thus reducing FMLA-related costs.

Family Medical Leave Act (FMLA):
Requests for and Designation of Leave

Regulating Agency: Department of Labor (DOL)

Citation: *29* C.F.R. Pam 825.208 & 825.302(c)

Authority: *29* U.S.C. Section 2654

Description *of* the Problem:

Under the existing regulations, an employee requesting leave does not have *to* expressly refer to the FMLA for the leave to qualify under the Act Rather, the employee need only request the time off and provide the employer with a reason for the requested leave. If the employee does not provide enough information for *the* employer to determine whether the leave is FMLA qualifying, the employer must follow up With the employee in order to get the necessary information.

Once the request has been made, the employer only has two days to determine whether the leave is FMLA qualifying and notify the employee whether or not the leave qualifies and will be counted against the employee's FMLA leave entitlement.

Placing the entire burden on employers *to* determine if leave requests are FMLA qualifying is inefficient and unreasonable. First of all, it requires employers to pry unnecessarily into an employee's private matters. Furthermore, under the current regulations and an applicable DOL opinion letter, absences related to almost any employee or family member illness – no matter how minor – may qualify for FMLA leave. Consequently, employers must investigate almost any request for leave. These investigations can be particularly difficult and time consuming because the regulations make it extremely difficultfor employers to contact the employee's *or* family member's health care provider to obtain clarification or authentication of certifications.

Proposed Solution: Amend 29 C.F.R. Parts 825.208 & 825.302(c) so that the employee must request the leave be designated as FMLA leave in order to invoke the protections of the Act.

Economic **Impact:** Requiring the employee to request that leave be designated as FMLA leave in order to invoke the protections of the Act will reduce employer costs as a result of investigations into whether each and every employee leave request is FMLA qualifying.

Family Medical Leave Act (FMLA):
Inability to work

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Part 825.114

Authority: 29 U.S.C. Section 2654

Description of the Problem:

Under the FMLA, a qualifying employee may take FMLA leave because he or she is "unable to perform the functions" of his or her job. The intent of the provision was to permit employees who could not work because of a severe illness to take leave without fear of losing their job.

The DOL regulation interpreting the provision, however, is overly broad and contrary to the plan language and the intent of the statute. Specifically, it permits leave when the employee cannot perform any one of the essential functions of the job, effectively limiting an employer's ability to reduce costly employee absences by putting employees with medical resmctions on light duty.

Proposed Solution: Amend 29 C.F.R. Part 825.114 so that it limits FMLA leave to situations where the serious health condition prevents the employee from performing the majority of essential functions of his or her position, rather than just m e function.

Economic Impact: Permitting employers to put employees with medical restrictions on "light duty" rather than on leave, when appropriate, will reduce costs associated with employee absences.

Family Medical Leave Act (FMLA):
Attendance Awards

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Parts 825.215(c) & 825.220(c)

Authority: 29 U.S.C. Section 2654

Description of the Problem:

The statute states that leave taken under the FMLA "shall not result in the loss of any employment benefits accrued prior to the date on which the leave commenced."

The regulations include among the protected benefits bonuses for perfect attendance. Thus, under the regulations, even though an employee is absent for up to twelve weeks out of the year on FMLA leave, he or she still is entitled to a perfect attendance award. This essentially renders such awards meaningless, and as a result many employers have abandoned attendance reward programs.

Proposed Solution: Amend 29 C.F.R. Parts 825.215(c) & 825.220(c) so that perfect attendance programs are not considered a protected FMLA benefit

Economic Impact: Unable to ascertain at this time.

BIRTH *AND* ADOPTION LEAVE
AND
UNEMPLOYMENT INSURANCE
1Nomination

Birth and Adoption Leave and Unemployment Insurance

Regulating Agency: Department of Labor (DOL)

Citation: *29* C.F.R. Pam **604.1** *et seq.*

Authority: **42 U.S.C.** Sections 503(a)(2)-(3) and 1302(a); **26 U.S.C.** Sections **3304(a)(1)-(4)** and 3306

Description of the Problem:

The **regulations allow** stares *to pay* unemployment compensation out of the **state's** unemployment insurance **trust funds** to parents who **take leave** following **the** birth or adoption of a child. State unemployment insurance *trust* **funds** *are* **financed** out of employer payroll **taxes.** The **primary** purpose **of** unemployment insurance **is** to provide a safety **net** for workers **who** lose **their jobs** while they **seek** new employment Federal law requires that **state** unemployment **taxes** be used solely for **the** payment of unemployment compensation.

Permitting ***states*** to use unemployment **funds** to **compensate** persons who **are** currently employed- **regardless** of **whether** those **persons** *are* on leave or not- **is** clearly inconsistent **with this** federal requirement **as well the** primary purpose of unemployment **insurance.**

Furthermore, states should **not** be allowed to erode unemployment funds by **using them** to compensate **individuals** who are not unemployed. It jeopardizes the **solvency** of unemployment **funds and** inevitably **will** result in a need for massive tax **increases**

Proposed Solution: Rescind 29 C.F.R. **Pam** 604.1 *et seq.*

Economic Impact: Impact depends **on** how **many** states chose to permit use of unemployment **funds** for **this purpose.**

FAIR LABOR STANDARDS ACT

1 Nomination

Fair Labor Standards Act (FLSA) "541": White Collar Exemptions to Overtime Requirements

Regulating Agency: Department of Labor (DOL)

Citation: *29* C.F.R. Parts 541.1 *et seq.*

Authority: *29* U.S.C. Section 213

Description of the Problem:

In 1938, Congress enacted the FLSA to ensure that employees obtained a fair day's pay for a fair day's work. Among other things, the Act sets a minimum wage and requires employers to pay time and half to employees who work over forty hours a week.

When it passed the FLSA, Congress recognized that "white collar" employees did not need the protections of the Act, and therefore, exempted "any employee employed in a bona fide executive, administrative or professional capacity" from the Act's minimum wage and overtime requirements. Congress did not define these terms within the Act, leaving that task to DOL.

Unfortunately, DOL has not substantially revised the regulations since 1954. Consequently, the regulatory definition of "white collar" employee is frequently inconsistent with the modern notion of the term, causing much confusion and litigation. Indeed, many highly compensated and highly skilled employees have been classified as "nonexempt" under the regulations, even though classifying them as such is inconsistent with the intent of the statute.

In addition, the regulations impose many restrictions on how employers compensate "exempt" employees (otherwise known as the "*salary* basis test"). Among other things, these restrictions prevent employers from offering employees more flexible work schedules and from using essential disciplinary tools, such as one-day suspensions without pay.

Many of these problems were brought to DOL's attention by a 1999 GAO study.

Proposed Solution: Amend 29 C.F.R. Part 541.1 *et seq.* so the criteria for determining who is "exempt" from overtime requirements is more reflective of the modern workplace. In addition, change the *salary* basis test so it permits employers to deduct pay for partial day absences and grants employers more flexibility to use suspensions without pay as a disciplinary measure.

Economic Impact: The changes should reduce litigation associated with misclassifications and loss of exemptions because of violations of the *salary* basis test. The exact benefit will depend on the specific changes.

PENSION *AND* WELFARE BENEFITS ADMINISTRATION

1Nomination

Employee Retirement Income Security Act:
Claims Procedures

Regulating Agency:	Department of Labor, (DOL) Pension and Welfare Benefits Administration (PWBA)
Citation:	29 C.F.R. Part 2560
Authority:	29 U.S.C. Section 1135

Description of the Problem:

The regulations, which create procedures for claims made under the Employee Retirement Income Security Act (ERISA) plans, went into effect January 20,2001 and require compliance by July 1,2002.

Contrary m the principles of federal preemption and uniformity that are central to both ERISA and President Bush's "Principles for a Patients' Bill of Rights," the regulations, in many instances, permit state laws to govern issues related claims under ERISA plans. The regulations are also problematic in that they prohibit mandatory arbitration, which is clearly allowed under current law. Lastly, both the United States House of Representatives and United States Senate have passed patient's rights legislation that contains vastly different requirements on these same claims procedures. Therefore, the DOL regulations require compliance with the new standard beginning July 1,2002, but should patients' rights legislation become law this year, a wholly different standard would become law shortly thereafter. It would be an incredible waste of resources for employers and plan administrators to make the costly adjustments to the new regulatory standards, only to make second adjustments to completely different standards shortly thereafter in order to comply with the patients' rights legislation.

Proposed Solution: Suspend the current effective dates pending resolution of the patients' rights legislative debate, seek additional comment on these issues, and proceed with new rulemaking.

Economic Impact Making the aforementioned changes will help reduce costs related to claims procedures by ensuring that cosdy adjustments to the new regulatory standards only happen once, rather than twice, in the next few years.

IMMIGRATION
3 Nominations

H-1B LCA

Regulating Agency: Department of Labor (DOL)

Citation: 20 C.F.R. Parts 655 & 656

Authority: 8 U.S.C. Sections 1101 *et. seq.*

Description of the Problem:

The regulation goes significantly beyond the scope of the principal authorizing statutes, the Immigration Act of 1990, the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) and the American Competitiveness in the 21st Century Act (AC21), and ignores legislative history and court precedent. The legislation imposes significant logistical and practical burdens on employers and, in doing so, circumvents the stated intent of the authorizing statutes to streamline the process. Finally, the regulations exhibit an overall disdain to the program the *agency* is charged with regulating.

The regulation is particularly problematic with respect *to* the treatment of traveling employees, increased paperwork requirements, wage and benefit issues, ignorance and interference with normal business practices and legal commercial transactions.

Lastly, the promulgation of the rules violated the Administrative Procedure Act and the Paperwork Reduction Act.

Proposed Solution: Rescind the regulations and issue a new Notice of Proposed Rulemaking in order to create new regulations which better address the aforementioned problems and the volumes of comments received in response to the Interim Final Rule.

Economic **Impact:** Approximately 200,000 H-1B petitions are filed annually by employers seeking to initially hire H-1B nonimmigrants or extend or change the status of existing H-1B employees. Addressing the aforementioned concerns would greatly reduce costs associate with the process.

Permanent Labor Certification

Regulating Agency: Department of Labor (DOL)

Citation: Proposed Rule, 67 Fed. Reg. *30466* (May 6,2002), RIN 1205-AA66, amending 20 C.F.R. Parts *655* & **656**

Authority: 8 **U.S.C.** Secnons 1101 *et. seq.*

Description of the Problem:

Since the conception of the "attestation-type" reengineering of the program, DOL has been informed that any reengineering that does not address the underlying assumptions and concepts of individual recruitment as a labor market test, the issues of prevailing wage determinations, and that ignores the real-world recruitment practices of the business community would be problematic. The proposed rule, while creating a new, streamlined attestation-based certification system, does not adequately address those *other* concerns. .

Proposed Solution: Promulgate final regulations that use a broader approach *to* the issue of certifying the unavailability of U.S. workers for positions for which foreign nationals are sponsored, including integrating concepts such as those outlined in the Labor Market Information Pilot Program enacted in the Immigration Act of 1990 but never implemented by DOL. The Department could improve the current proposed rule also by incorporating practices it accepts in the current Reduction in Recruitment program that has been operating successfully for several years, and recognizing legitimate employer recruitment efforts as a baseline.

Economic Impact: Unable to determine at this time.

Admission Period For B-1/B-2 Visitors

Regulating Agency: Department of Jusdce, Immigration and Naturalization Service (INS)

Citation: Proposed Rule, 67 Fed. Reg. 18065 (April 12, 2002), RIN 1115-AG43, 8 C.F.R. Parts 214,235 & 248

Authority: 8 U.S.C. Sections 1101 *et seq.*

Description of the Problem:

The proposed rule will have a significant adverse impact on business, particularly on the travel and tourism industries. The rules will provide extreme latitude for immigration inspectors to determine the period of stay for visitors, and will limit the ability of visitors to apply for extension of stay, except in cases of "unforeseen circumstances." The uncertainty of whether a longer than 30-day period of stay will be granted will deter some travelers from venturing to the U.S., and will limit the plans of others to the 30 day period – resulting in potentially millions of dollars in lost tourist revenue. The rule also will negatively impact the adult children and parents of temporary workers in the U.S., who have been historically permitted to use the B-2 category to accompany a temporary worker to the U.S.

Proposed Solution: The final rule should clarify the circumstances under which individuals may be admitted for periods longer than 30 days and provide an opportunity *to* appeal the admission decisions of the immigration inspectors. 'The final rule should *also* recognize the circumstances of other categories of long-term visitors including family members of temporary workers.

Economic Impact: One estimate from the Department of Commerce is that visitors who stay longer than 30 days spend an average of $4 billion annually in the U.S.

Davis-Bacon (Prevailing Wages)

1Nomination

Davis-Bacon Wage Surveys

Regulating Agency: Department of Labor (DOL)

Citation: 29 C.F.R. Parts 5.1, *et seq.*

Authority: 40 U.S.C. Section 276a

Description of the Problem:

The Davis-Bacon Act (DBA) requires employers on federal construction projects to pay wages at or above the wage rate DOL determines is the prevailing wage in the geographic area of the project. In January 1995, federal and state labor officials in Oklahoma received reports of substantial inaccuracies in wage reports relied upon by the DOL in determining the prevailing wage for certain construction projects in the Oklahoma City area. Resulting criminal proceedings helped raise the issue of inaccurate wage determinations to the national level and subsequent General Accounting Office (GAO) investigations and reports revealed substantial deficiencies in the DOL procedures used to determine DBA prevailing wages.

Pressure from the authorizing and appropriations committees in both the United States House of Representatives and the United States Senate, relying in large part on the GAO investigations and reports, led the DOL to undertake significant changes to the entire wage determination process. Those changes included comprehensive surveys, redesigned contractor wage reporting forms, verifications of information reported to DOL, improved technology (hardware and software) for digesting and reporting collected wage information, and reliance on the Bureau of Labor Statistics (BLS) to collect the relevant wage information. The foregoing measures were being implemented in May 1999 when the GAO issued another report on the issue. The GAO noted in the 1999 report that the DOL would have to determine which of the above efforts, or a combination of them, would yield a cost-effective means of establishing the appropriate DBA prevailing wage in a timely and accurate manner before it could amend the DBA regulations.

Proposed Solution: DOL should now have sufficient information on the measures implemented in the late 1990s to issue proposed amendments to the federal regulations governing its prevailing wage determinations. The DOL should be encouraged to do so.

Estimate of Economic Impact: The GAO reports referred to above (GAO/HEHS-96-130, GAO/T-HEHS-96-166, GAO/HEHS-99-21, GAO-HEHS-99-97) describe in detail the economic consequences of promulgating prevailing wage rates based upon inaccurate data. (See especially GAO/T-HEHS-96-166, pp. 7-8.).

OSHA

2 Nominations

OSHA Recordkeeping

Regulating Agency: Department of Labor (DOL), Occupational Safety and Health Administration (OSHA)

Citation: 29 C.F.R. Part 1904

Authority: *29* U.S.C. Section 655(b)(1) - (5)

Description of the Problem:

A) The proposed change to the hearing loss threshold is unreasonable and unrealistic and should not be implemented.

B) The definition of **musculoskeletal** disorder (MSD) must account for the **work** relatedness, or lack thereof, of the disorder. According to the Congressionally-mandated National Academy of Sciences (NAS) report on musculoskeletal disorders: "None of the common musculoskeletal disorders is uniquely caused by **work exposures,**" *Executive Summary* at 1, and "[P]hysical activities outside the workplace, including, for example, those deriving from domestic responsibilities in the home, physical fitness programs, and others are also capable on one hand of inducing musculoskeletal injury and on the other of affecting the course of such injuries incurred at the workplace." *Id* at 1-5.

Proposed Solution:

A) Maintain the current hearing loss thresholds, and definition of "material impairment" because: 1) they are scientifically and medically sound; 2) well-known and understood in the regulated industries; 3) well-known and well-understood by occupational safety and health professionals, and; *4)* ascertainable with current widely-used equipment and testing techniques.

B) Include in the definition of "musculoskeletal disorder" the likelihood that the injury may have been caused in whole or significant part by, and/or significantly exacerbated by, factors unrelated to the afflicted employee's work-related activities. Accordingly, absent a significant and ascertainable degree of work-relatedness, the MSD should nor be recorded as a workplace injury or illness.

Estimate of Economic Impact:

A) The proposed changes to the hearing loss recording criteria are vast and constitute complete revision of OSHA's approach *to* safeguarding employees' hearing. As such, the changes will necessitate extraordinary expenditures to establish and maintain an entirely new approach to measuring hearing loss, even though the current time-honored standard provides ample safeguards against hearing loss.

B) The recendy-announced OSHA ergonomics program includes measures to address the many glaring gaps (acknowledged and identified by the National Academy of Sciences) in the scientific and medical knowledge concerning MSDs, their work-relatedness, and feasible means of preventing or correcting than. Until the knowledge base on ergonomics and MSDs is more reliable, an estimate of the economic *costs,* and feasible means of addressing them, is not possible.

OSHA Sling Standard

Regulating Agency:	Department of Labor (DOL) Occupational Safety and Health Administration (OSHA)
Citation:	29 C.F.R. Part 1910.184
Authority:	29 U.S.C. Section 655(b)(1) - (5)

Description of the Problem:

Companies in the lifting, rigging and load security industry typically use slings made of wire rope to lift objects by crane. The current OSHA standard, nearly 30 years old, is considered by many in the industry to be dangerously outmoded, especially when compared to an applicable consensus standard ("B30.9") promulgated by the American Society of Mechanical Engineers (ASME). OSHA inspectors continue to issue citations to companies for failure to meet the ouunoded OSHA sling standard even though they meet the requirements of the B30.9 standard. Companies in the industry have made numerous requests of OSHA to issue an updated sling standard. OSHA has not honored this request

The companies, through their trade associations (Associated Wire Rope Fabricators (AWRF) and the National Association of Chain Manufacturers (NACM)) have recently asked the United States House of Representatives Science Committee, Subcommittee on Environment, Technology & Standards to conduct an oversight investigation of this matter.

Proposed Solution: Promptly commence the rulemaking process to develop a new sling standard, and issue a public enforcement notice citing the ASME B30.9 standard as the sole basis for OSHA citations regarding sling safety until the revised OSHA sling standard is implemented.

Estimate of Economic Impact: The affected companies and their employees will no longer be required to adhere to a dangerously outmoded standard, thus saving noticeable sums in OSHA-inflicted penalties and, more importantly, enhancing the inestimable value of the affected employees' safety.

WORKPLACE INVESTIGATIONS

1 Nomination

Fair Credit Reporting Act (FCRA) & Workplace Investigations

Regulating Agency: Federal Trade Commission (FTC)

Citation: FTC opinion letter from staff attorney, Division of Financial Practices, Christopher W. Keller to Judy Vail, Esq. (April 5, 1999); FTC opinion letter from David Medine, FTC Associate Director, Division of Financial Practices, to Susan R. Meisinger (August 31,1999)

Authority: 15 U.S.C. Sections 1681 *et seq.*

Description of the Problem:

In the two above-referenced letters, FTC staff claim that organizations that regularly investigate workplace misconduct for employers, such as private investigators, consultants or law firms, are "consumer reporting agencies" under FCRA and, therefore, investigations conducted by these organizations must comply with FCRA's notice and disclosure requirements. Those requirements include: notice to the employee of the investigation; the employee's consent prior to the investigation; providing the employee with a description of the nature and scope of the proposed investigation; if the employee requests it, a copy of the full, un-redacted investigative report; and notice to the employee of his or her rights under FCRA prior to taking any adverse employment action.

Because it is virtually impossible to conduct an investigation while complying with these requirements and, because employers and investigators face unlimited liability (including punitive damages) for any compliance mistakes, the letters deter employers from using experienced and objective outside organizations to investigate suspected workplace violence, employment discrimination and harassment, securities violations, theft or other workplace misconduct. This perverse incentive conflicts squarely with the advise of courts and administrative agencies, both of which have strongly encouraged employers to use experienced outside organizations to perform workplace investigations.

While the letters affect all employers, they are particularly damaging *to* small and medium sued companies, which often do not have the in-house resources to conduct their own investigations and, therefore, depend on outside help.

There is no evidence in FCRA's text or legislative history that it was intended to apply to investigations of employee misconduct and the letters misconstrue the Act.

Proposed Solution: Rescind the letters and any similar FTC guidance and letters.

Estimate *of* Economic Impact: The changes would eliminate the potential of unnecessary litigation stemming from the FTC's misinterpretation of FCRA, thus reducing costly litigation. In addition, the letters deter employers from using experienced outside organizations to perform thorough investigations. The information gleaned from such investigations often enables employers to take measures to avoid future problems in the workplace, including harassment, violence and theft, which *can* cause employers, employees and the *general* public loss of life, piece of mind and money.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT

1 Nomination

Waivers Under
Age Discrimination in Employment Act (ADEA)

Regulating Agency:	Equal Employment Opportunity Commission (EEOC)
Citation:	29 C.F.R. Part 1625.23
Authority:	29 U.S.C. *Section* 628

Description *of* the Problem:

Under the Older Workers Benefits Protection Act of 1990 (OWBPA), a waiver of an individual's right to sue under the ADEA is only valid if it meets certain criteria designed to ensure the waiver is knowing and voluntary. The Supreme Court has held that where there is no question that the waiver agreement does not meet the Criteria, an employee may bring action in court challenging a waiver without "tendering back" the consideration that person received in exchange for signing the waiver. The Court did not address whether an employee must tender back the consideration before challenging an agreement that, on its face, meets the OWBPA criteria, *or* whether employers can include provisions within waivers requiring employees to tender back consideration before challenging the waiver.

The regulation, nonetheless, specifically states that a person can never be required to tendered back the considetation before challenging the waiver in court. In addition, the regulation states ADEA waiver agreements may not include provisions that impose any penalties on employees or former employees for breaching the agreement by filing a suit challenging the waiver.

The regulation eviscerates ADEA waiver agreements by permitting employees and former employees to both sue employers for under the ADEA while simultaneously keeping money they received in exchange for a promise not to file such a suit. Consequently, employers are less likely to use ADEA waiver agreements, thus increasing the probability of costly litigation.

Proposed Solution: Amend *29* C.F.R. Part 1625.23 so that it only permits an employee to bring action in court challenging a waiver without "tendering back" the consideration where the waiver is facially invalid under OWBPA.

Estimate of Economic Impact: The suggested changes would increase the likelihood employers would use waivers and thus reduce the likelihood of costly litigation.

COLLECTION OF EQUAL EMPLOYMENT OPPORTUNITY DATA

2 **Nominations**

OFCCP
AAPs and EO Survey

Regulating Agency: Department of Labor (DOL), Office of Federal Contract Compliance Programs (OFFCP)

Citation: 41 C.F.R. Part 60-2

Authority: Executive Order 11246

Description of the Problem:

A) In the past, contractors have been permitted to develop affirmative action programs (AAPs) consistent with the contractor's management system, often including multiple physical establishments under one AAP. The 2000 revisions of the requirements for federal contractors, however, require AAPs for each physical establishment, unless the contractor reaches agreement providing otherwise with OFCCP. As a result of the revisions, contractors are forced to create, maintain and report on many more AAPs than they had prior to the revisions, unless the contractor comes to an alternative agreement with OFCCP. Unfortunately, negotiating an agreement with the overburdened agency can be a slow and arduous process.

B) OFCCP's Equal Opportunity Survey is sent out to approximately half of the 99,944 federal supply and service contractors. Each contractor receiving the survey has 45 calendar days to complete the form and return it to OFCCP. The survey requires contractors provide general information on *each* establishment's equal employment opportunity and AAP activities. It also requires combined personnel activity information (applications, new hires, terminations, promotions, etc.) for each Employer Information Report EEO-1 (EEO-1) category by gender, race, and ethnicity as well as combined compensation data for *each* EEO-1 category for minorities and non-minorities by gender. There *are* far less burdensome methods of increasing compliance with equal employment requirements.

C) The survey's requirement that employers compile data on applicants has proven particularly burdensome. Applicant, under the *survey,* is any "person who has indicated an interest in being considered for hiring, promotion, or other employment opportunity." The definition *makes* no exceptions for persons who apply, bur are clearly not qualified for the position sought or persons who apply for positions that are already filled. In addition, the survey fails *to take* into account that in the age of the Internet, employers may receive hundreds of unsolicited resumes via e-mail every week.

Proposed Solution:

A) Allow companies *to* report as they always have, by functional groupings. Also develop guidelines for functional AAPs.

B) Eliminate, or greatly simplify and shorten the survey.

C) Define applicant as a person who applies for a specific position and meets the basic qualifications of chat position.

Estimate of Economic Impact: Unable to determine at this time.

Employer Information Report EEO-1

Regulating Agency:	Equal Employment Opportunity Commission (EEOC)
Citation:	*29* C.F.R. Part 1602.7
Authority:	*42* U.S.C. Sections 2000e-8, 2000e-12; 44 U.S.C. section 3501 *et seq.*; 42 U.S.C. Section 12117

Description of the Problem:

The regulation requires every employer subject to Title VII of the Civil Rights *Act* of *1964* that has 100 or more employees, or is a federal government contractor meeting certain Criteria, to annually file an Employer Information Report EEO-1 (EEO-1 Report) with the EEOC. Currently, employers must report employee data in nine occupational categories, subdivided by five racial/ethnicity categories, which *are* further subdivided by gender. The *current* form expires in November 2002. Proposed changes *to* the form wouid expand the occupational and the racial/ethnicity categories, increasing the time and cost associated with filing the EEO-1. While some of these changes may be necessary to ensure the EEO-1 data *is reflective of the workforce, many of them are* unnecessary and over-burdensome.

Proposed Solution: Make as few changes that increase employer burdens to the form as possible.

Estimate of Economic Impact Unable to determine at this time.