550 15th Street
Denver, Colorado 80202

May 28, 2002

Mr. John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB
Room 10235
625 17th Street N.W.
Washington, DC 20503

Dear Mr. Morrall:

Attached please find Xcel Energy's nominations concerning regulations or guidance documents that need reform The nominations provided are in conjunction with the US Chamber of Commerce. We have provided nominations for:

- Family and Medical Leave Act (4 Nominations)
- Fair Labor Standards Act (1 Nomination)
- OSHA (2 Nominations)
- Fair Credit Reporting Act (1 Nomination)
- Age Discrimination in Employment Act (1 Nomination)

Thank you for your attention to this matter.

Sincerely,

Ed Lutz
Vice President
Workforce Relations & Diversity

FAMILY MEDICAL LEAVE ACT

4 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 twelve-month 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 clear mandate, DOL regulation 29 C.F.R. Part 825.114 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. **Parts 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 cmployer **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 are 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 intennittent leave except in cases of emergency, in which case they must provide notice 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 record keeping 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 **o family member with a serious health condition,** provide certification by a **health care provider** of the **serious health condition.**

Clarification and Authentication

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, costly **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):
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 perfeot attendance programs **are** not considered **a** protected **FMLA** benefit.

Economic Impact:

Unable to ascertain at this time.

FAIR LABOR STANDARDS ACT

1Nomination

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 modem 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. Parts 541.1 *et seq.* so the criteria for determining who is "exempt" from overtime requirements is more reflective of the modem 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.

OSHA

1 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 not 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 recently-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-relatcdness, and feasible means of preventing or correcting them. Until the knowledge base on

economics and MSDs is more reliable, an estimate of the economic costs and feasible