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FACSIMILE TRANSMITTAL

TO: John Morrall	**DATE:** May 29, 2002
COMPANY: OMB	FROM: Harold P. Coxson
FAX NUMBER: (202) 395-6974	PHONE CODE:
PHONE NUMBER:	CLIENT MATTER NO.:
TOTAL PAGES 38	DIRECT DIAL:

Dear Mr. Morrall: Attached is a faxed version of the "Public Nominations" regulations e-mailed to you yesterday by Mr. Coxson. I received a return message *on* my e-mail *that* you *were* out of the office. Please check your e-mails because Mr. Coxson's comments were submitted to you in a timely fashion.

We also fared the attached yesterday afternoon. We made several attempts, but to no avail. This is another attempt to fax the Public Nominations to you.

Sincerely,

Lallie Small
Secretary to Mr. Corson

Ogletree Deakins
ATTORNEYS AT LAW

Mr. John Morrall
May 28, 2002
Page Two

The attached regulations are only the "tip of the iceberg" and represent merely a representative sample of the most commonly cited regulations by our clients. We would welcome the opportunity to supplement the record, recognizing, however, that not every issue can be addressed. For example, other areas for your review include pension, immigration and environmental regulations. We hope that your review of the attached "public nominations" of federal workplace regulations will result in improvements, clarification where appropriate, and true regulatory reforms. We at Ogletree, Deakins stand ready to provide additional information or assistance as you undertake your important work.

Very truly yours,

Harold P. Coxson

Attachment

FAMILY MEDICAL LEAVE ACT

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"),** its legislative history, **and an early DOL** opinion letter **it** is clear **that** the term **"serious** health condition" for **which** employers must provide qualifying employees **with** up to twelve **weeks'** leave in **any** 12-**month period,** 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** examples of minor ailments **within the** definition of the term **and,** by **doing** so, vastly increase the number of **FMLA** leaves an employer **must** grant. The effect **is** a **substantial** increase in the already significant administrative **burdens** and costs imposed by the FMLA.

Proposed Regulatory Reform; 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, and the cost of litigation for **both** employers **and the** government.

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 Family and Medical Leave Act ("FMLA") permits employees to take leave on an intermittent basis or work on a reduced schedule when medically necessary. The statute does not define "intermittent" leave. This poses several problems. According to recent DOL study, almost one *fifth* of all FMLA leave is taken on an intermittent basis.

1. 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. 29 C.F.R. Part 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 salaried "white collar" employees who are exempt from the Fair Labor Standard Act's (FLSA) overtime requirements. Although such exempt employees are paid on a salary basis and employers are not required to – and normally do not - track their time, except for full or half-day absences, the effect of the FMLA "intermittent leave" regulation is to require such tracking as if they were non-exempt employees.

2. Advance 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. In fact, 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 Regulatory Reform: 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** 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** recordkeeping **burdens** associated **with** intermittent leave, **as** well **as discouraging** employee abuse. **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 Family **and** Medical Leave Act **("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 medical certification by **a** health care provider of the **serious** health condition. However, **FMLA** regulations needlessly over-burden employers in seeking such medical certification.

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 medical certification for **FMAL** leave. **Also,** 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 the employer 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 medical 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 recertification **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 Regulatory Reform: 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.Parts** 825.208 & 825.302(c)

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

Description **of the Problem:**

Under existing **Family** and Medical Leave Act ("FMLA") regulations, **an** employee requesting leave is not required to expressly refer to the **FMLA** for the leave to qualify under the Act. Rather, the employee need only request 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 leave request has been made, the employer only has two **days** to determine whether the leave is **FMLA** qualifying and **then** notify the employee whether or not the leave qualifies **and** will be counted against the employee's FMLA leave entitlement.

Whether to take FMLA leave is within **the** employee's discretion **and, as** such, it should be the employee's responsibility to designate requested leave **as** such. 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 difficult for employers to contact the employee's or family **member's** health care provider to obtain clarification or authentication of medical certifications.

Proposed Regulatory **Reform:** 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 Family and Medical Leave Act ("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 restrictions on light **duty.**

Proposed Regulatory Reform; 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 one 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 Family and Medical Leave Act ("FMLA") provides that FMLA leave "shall not result in the loss of any employment benefits accrued prior to the date on which the leave commenced."

The FMLA regulations include bonuses for perfect attendance among the protected benefits. 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 Regulatory Reform: 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
1 Nomination

Birth and Adoption Leave and Unemployment Insurance

Regulating Agency: Department of Labor (DOL)

Citation: *29* C.F.R. Parts 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 *states* 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. Parts 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

Fair Labor Standards Act (FLSA) Part 541
"White Collar" Exemptions and Salary Basis Test

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:

The Fair Labor Standards Act **("FLSA")** establishes exemptions from overtime pay for salaried "white collar" employees **"any** employee employed in **a** bona fide executive, administrative or professional capacity." Congress did not define these terms within the Act, leaving that task *to* **DOL.**

Such regulations **have** not been substantially revised since 1954. The current regulatory definition of "white collar" employee is frequently inconsistently **applied and** out-of-touch **with modern** workplace practices, causing **much** confusion and litigation. **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,** by jeopardizing the employees' exempt status.

The Department of labor currently **has** the **Part 541** regulations under review.

Proposed Regulatory Reform: 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 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 the costs of government litigation associated with employers' misapplication **and** misclassifications of exempt employee **status, and loss** of exemptions **because** of **violations** of the **salary basis** test.

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 to 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 costly 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-IB 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. Sections 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 rcal-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 arc 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 Justice, 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)

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. Reports of substantial inaccuracies in wage reports relied upon by the DOL in making prevailing wage determinations for certain construction projects are well documented. Resulting criminal proceedings have helped raise the issue of inaccurate wage determinations to the national level. Subsequent General Accounting Office (GAO) investigations and reports revealed substantial deficiencies in the DOL procedures used to determine DBA prevailing wages.

DOL has undertaken significant changes to the entire wage determination process. Those changes include 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. Implementation of such changes was halted in May 1999 when the GAO noted in another 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 Regulatory Reform: 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

OSHA Recordkeeping

Regulating Agency: Department of Labor (DOL), Occupational Safety a 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:

The definition of "musculoskeletal disorder" (MSD) under OSHA's recordkeeping regulations must account for the work relatedness, the disorder, or lack thereof. 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.

While employers are responsible for maintaining a workplace free from recognized safety hazards, for purposes of regulatory enforcement they should not be responsible for injuries or physical conditions which are caused outside the workplace. The result is over-reporting of MSD injuries in the workplace when, in fact, many such disorders are pre-existing and *are* not derived from workplace conditions.

Proposed Regulatory Reform:

Include in the definition of "musculoskeletal disorder" the likelihood that the injury may have been caused in whole or significant part, and/or significantly exacerbated, by factors unrelated to the 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:

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-relatedness, and feasible means of preventing or correcting them. 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 outmoded 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 - FAIR CREDIT REPORTING ACT

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 opinion letters, FTC staff opine that organizations which regularly investigate workplace misconduct for employers, such **as** private investigators, consultants or law **firms, are** "consumer reporting agencies" under the Fair Credit Reporting Acct ("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.

The FTC's interpretation is out-of-touch with the nature and purpose of modern workplace investigations, and conflicts directly **with** federal employment discrimination laws and federal court decisions which encourage prompt and effective workplace investigations **as** a means of promptly resolving workplace disputes **and** reducing employer liability. Further, such impediments imposed by the FTC on workplace investigation of employee misconduct **may** substantially interfere with workplace security measures being **undertaken** by employers due to threats of **workplace violence** and concerns for terrorist acts since September 11. It is virtually impossible to conduct an investigation **while** complying **with** the FTC's requirements. Because employers and investigators **face** unlimited liability (including punitive damages) for any compliance mistakes, the **FTC** 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 advice of courts **and** administrative agencies, **both** of which have strongly encouraged employers to use experienced outside organizations to **perform** workplace investigations,

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

Proposed Regulatory Reform: 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 consideration 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

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:

In the past, federal contractors have been permitted by DOL's Office of Federal Compliance Programs ("OFCCP") to develop affirmative action programs (AAPs) consistent with the contractor's *management* system, often including multiple physical establishments under one AAP. The 2000 revisions, 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 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, arduous and sometimes futile process.

Also, OFCCP's recent Equal Opportunity Survey was 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 to 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.

Proposed Regulatory Reforms:

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

Eliminate, or greatly simplify and shorten the survey.

Estimate of Economic Impact: Unable to determine at this time, but cost savings for reduced regulatory paperwork, and the collection and review of surveys, should be substantial for both federal contractors and the government.

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**, 000e-12; **44** U.S.C. section 3501 ***et seq.;*** **42 U.S.C.** Section **1211**7

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 file annually **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 **would** 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 Regulatory Reform: Carefully review the proposed EEO-1 Report **to ensure that any** additional information solicited **is** essential **and does** not increase employer burdens.

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

Service Contract **Act Regulations Pertaining** to **Wage Increases** and Benefit **Improvements During the Term of the** Government Contract

Regulatory Agency:	Department of Labor
Citation:	**29 C.F.R Parts 4.53-4.56**
Authority:	**41 U.S.C** Sections **351-358**

Description of the Problem:

Under the McNamara-O'Hara Service Contract Act **("SCA")** every federal service contract or subcontract in excess of $2,500 requires wages **and** fringe benefits determined by the Secretary of Labor to be "prevailing" in the locality where the services are to be performed, The **SCA** provides that **as an** alternative to 'prevailing wage" determinations, wages and benefits may be established by a collective bargaining agreement ("cba") which covers such service employees, "including prospective wage increases provided for in such agreement as a result of arm's-length negotiations." **41** U.S.C. Section **351(a)(1). A** similar provision applies to prospective improvements **in** fringe benefits established by **a** collective bargaining agreement. Changing the dubious policy of setting "prcvailing" wages **and** benefits in accordance **with** the **terms** of a particular collective bargaining agreement would necessitate **a** legislative solution. However, federal regulations have unfairly expanded this dubious practice by establishing disparate standards for nonunion employers, not signatory to a collective bargaining agreement, **who** desire to **grant** wage increases **and** benefit improvements over the period of **a** government contract.

First, **SCA** regulations require that the wage and fiinge benefit provisions of **a** predecessor's cba must be maintained under successorship determinations, without regard **to** current economic conditions or whether the successor contractor is otherwise bound to **a** cba. 29 **C.F.R. Part 4.53.** Since most of today's employers are **nonunion,** this regulation **has** the effect of artificially "locking in" union wage and benefit terms which **may** not accurately reflect the "prevailing" wages and benefits in the locality. The regulation discourages nonunion successors from investments in and reorganization of union contractors, and succeeding to federal **service** contracts, which thereby deprives union contractors of a potential purchaser **and** artificially drives **up** the cost of government contracts.

Secondly, **SCA** regulations provide that prevailing wage rate and fringe benefit determinations may be reviewed "periodically" but that such terms will **be** revised automatically where collective bargaining agreements specify wage increases effective on certain specified dates. 29 **C.F.R.** Part **4.55,** The effect of such regulations is to encourage union **and** union contractors to negotiate wage increases and fringe benefit improvements to be applied without regard to "prevailing" conditions **over** the term of the federal contact, **while** nonunion contractors are unable to grant wage and benefit improvements over the term of the federal contract without petitioning for a variance

from the Secretary of Labor through cumbersome, expensive, time consuming, and often futile procedures. 29 C.F.R. Parts 4.56 et seq. Thus, while SCA regulations provide for discretionary review of wage determinations, and appeals of the Secretary's decision to the Administrative Review Board and federal court, especially for "extended term" or "multi-year" federal service contracts, the reality of the bias favoring union contracts is to undercut the ability of nonunion contractors from granting wage and benefit improvements over the term of the federal service contract and to delay such improvements in wages and benefits for their service employees. This pro-union bias, which undercuts the federal government's neutrality in labor relations matters, is frequently fully exploited by union organizers who threaten service employees that unless they join a union and their employer signs a union contract they may be unable to receive wage and benefit improvements for the entire duration of the government contract.

Proposed Regulatory Reform: Consistent with the purpose of the Service Contract Act to protect area wage standards, the SCA regulations should be revised to equalize treatment of union and nonunion contractors with respect to implementation of wage and benefit improvements to service employees during the term of the federal service contract. Further, the regulations should be revised to eliminate the automatic extension of collective bargaining terms to successor contractors, and should require a new determination of the actual "prevailing" wages and fringe benefits in the locality. The result of such changes: (1) will remove the current bias against nonunion contractors and their service employees; (2) will allow proper and timely adjustment of wages and benefits without discrimination based on collective bargaining status; (3) will ultimately reduce costs of federal service contracts for the government and taxpayers by eliminating the incentive for artificially higher collectively bargained wages and benefits to be passed on over the life of a federal service contract; thus (4) helping to better ensure more accurate "prevailing" rates on federal service contracts.

OFCCP: AAPs AND EO SURVEYS

Regulating Agency: U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP)

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

Authority: Executive Order 11246

Description of the Problem:

The OFCCP requires contractors to track and identify the gender, race and ethnicity of each applicant, where possible. 41 C.F.R. § 60-1.12(c). The OFCCP has issued the following guidance on the meaning of the term "applicant":

The precise definition of the term applicant' depends upon [a contractor's] recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the [contractor's] practice.

Question and Answer No. 15, Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures (44 FR 11996,11998 (March 2, 1979)). See *also* 165 Fed. Reg. 68022,68023 (Nov. 13, 2000); 62 Fed. Reg. 44174 (Aug. 19, 1997). In 1997, when the OFCCP issued its Final Rule revising some of its recordkeeping requirements, further stated that it was "studying the range of ways contractors are utilizing electronic media in their employee selection processes and intends to issue guidance responding to questions most frequently asked by contractors regarding this issue." 62 Fed. Reg. at 44178. In 2000, when the OFCCP again revised its recordkeeping requirements, the OFCCP did not address this issue despite the numerous comments submitted during the notice and comment period. See 165 Fed. Reg. at 68023. Thus, the OFCCP's definition requires contractors to track as "applicants" those who submit unsolicited applications and/or resumes for positions which may not be available and who lack the minimum qualifications for an open position. With the use of electronic media, a contractor may receive hundreds of unsolicited resumes via email. Tracking such unsolicited resumes via electronic means may impact a contractor's adverse impact analysis, which may lead to investigatory actions by the OFCCP which are unwarranted and unjustified with respect to the contractor's actual selection process.

Proposed Regulatory Reform: The OFCCP should issue a regulation clarifying the definition of "applicant" in order to limit the impact unsolicited applications. A definition which excludes unsolicited applications for positions which are not open and individuals who lack the minimum qualifications for an open position will reduce the administrative burden on contractors and decrease the statistical impact of unsolicited applications on a contractor's adverse impact analysis.