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Company Office of Management and Budget, NEOB

Attention John Morrall

Fax No. **1-202-395-6974**

From Roger Morris, Vice President of Human Resources
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Date/Time **5/22/2002** 8:33 **AM**

Pages 11 , including this one

Following are my "nominations" of regulations or guidance documents that need reform.

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: nouce KO 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 rhe **employee** requests it, a copy of the full, un-redacted investigative report; and nouice KO the employee of his or her rights under **FCRA** prior KO 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 ourside organizations to perform workplace investigations.

While the letters affect all employers, they are particularly damaging to small **and** medium sized 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 LO 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.*

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 informarion on each establishment's equal employment opportunity and AAP activities. It also requires combined personnel activity informarion (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, but 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 that position.

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

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 rhe hearing loss threshold is unreasonable and unrealistic and should nor 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 definiuon 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-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 nor possible.

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 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 requesred 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 **difficult** for 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 KO **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 restrictions 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 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.

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 rhe birch or adoption of a child. State unemployment insurance trust funds are financed ouK of employer payroll taxes. The primary purpose of unemployment insurance is KO 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 nor- 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 nor 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 co permit use of unemployment funds for this purpose.

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

Regulating Agency: Department of Labor (DOL)

Citation: *29* C.F.R. Pam 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 rhe 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 **nor** define these terms within the Act, leaving that task ko 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** red'). 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 **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 benefir will depend on the specific changes.

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 derermine rhe 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 US., **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.

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 rhe 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 dear that the term "serious health condition" does **not include minor** ailments. **Despise** this *clear* mandate, DOL regulation **29 C.F.RPart 825.114** and DOL Opinion Letter FMLA-86 (December 12,1996) include **minor** ailments within definiuon 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 **thar** it explicitly excludes **minor** ailments from the definiuon of serious health condition.

Economic **Impact: Making** the aforementioned changes will return the scope of the FMLA to its original intent, greatly reducing **she 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 stature permits employees KO take leave on **an** intermittent basis or work on a reduced schedule when medically necessary. According KO 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 nouce 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 employen. Despite these warnings, DOL **regulation** 29 C.F.R. **Parts** 825.203 requires that employers permit employees KO **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** rime 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 KO - and **normally** do **not** - track their time.

Notice

Scheduling **around** intermittent leave can be **difficult** if nor impossible for employers because the regulations do **not** require the employee KO provide advanced nouce 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 rhe need for intermittent leave **except** in cases of emergency, in **which** case they must provide nouce 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 rhe 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.