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Facsimile Transmittal

To: Mr. Morall Fax: 202-395-6974

From: Nancy L. Asbill Fax: 650-813-3920

Re: Family Medical Leave Act Pages: 18

CC: Date: 5/28/02

☐ Urgent ☑ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

IF YOU ENCOUNTER PROBLEMS WITH THIS TRANSMISSION, PLEASE CALL BETH PERNEREWSKI AT: 650-813-5317

Notes:

Pernerewski, Beth A

From: Asbill, Nancy - CNF
Sent: Tuesday, May 28, 2002 9:10 AM
To: Pemerewski, Beth A
Subject: FW: FAMILY MEDICAL LEAVE ACT

Beth: can you fax this email and the attached document to OM6 at (202)395-6974. Thanks.

Nancy L. Asbill
Senior Attorney
CNF, Inc.

-----Original Message-----
From: Asbill, Nancy - CNF
sent: Thursday, May 23, 2002 12:22 PM
To: 'jmorrall@omb.eop.gov'
Subject: FAMILY MEDICAL LEAVE ACT

Reg
Nominations.doc

'Mr Morall:

In response to the OMB's request for commment on problem regulations and guidance documents in need of reform, attached is an analysis of regulations that CNF Inc. sees as problematic and would like to see addressed and modified, if possible, as part of the Office's *efforts.*

Thank you for your efforts. If you *have* any questions, I can be reached at (650) 813-5359.

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REGULATIONS NOMINATED FOR ANALYSIS AND REVISION

by CNF, Inc.
3240 Hillview Avenue
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FAMILY MEDICAL LEAVE ACT

7 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 map 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. Despire this dear 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 employer may limit the increment of rime 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 ltavc 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 leavc, 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 arc 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 nor - 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 35,1999) 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 (January15,1999) 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 nonce 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. Requiring employees to provide reasonable notice of absences will reduce employer costs a d burdens incurred because of unpredictable employee absences.

Famiiy 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 cart** for **a** family member with **a serious health** condition, provide certification **by a health** care provider of the serious health **condition.**

Clarification and Authcnticauon

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 **authenticace** the **certification. Even with** the employee's permission, **the** employer.may **not** directly contact **the** employee's health care provider, **bur** must **have a health *cafe*** provide 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. Pan 825.308, an** employer **can** require **an** employee to provide initial certification of need for intermittent **leave, bur 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 certificationfor** 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. 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 rhe rime 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 arc 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 bc particularly difficultand 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 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 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.

Family Medical Leave Act (FMLA): Attendance Awards

Regulating *Agency:* Department of Labor (DOL)

Citation: 29 C.F.R. Sections 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.

Family Medical Leave Act ("FMLA")
Temporary agency workers

Regulating Agency:	Department of Labor **(DOL)**
Citation:	**29 C.F.R. Parts** 825.104; 825.106 (d); **Opinion** letter FMLA 37
Authority:	**29** U.S.C. **Section 2611** (2)(A)

Description of *the* Problem:

The FMLA defines **a** "covered **employee" as having worked a** minimum **of 12 months and** performed **a minimum of 1250** hours **of** service **for his or her employer during the previous 12-month** period. Parts 825.104 **and** 106 **of** the regulations **direct** that temporary agency **workers shall be counted** toward **the 50-employee threshold** for **employer coverage. However, they do not specifically address whether** time **worked** performing **services for a covered** employer **by a** temporary **agency worker, who is subsequently hired by** that **employer, must be counted** toward **the hours worked and** minimum **service** requirements for FMLA eligibility. **DOL Opinion** letter FMLA-37 interprets **these** regulations ***to*** require **that an employee's** time **worked** for **a** temporary agency **be counted toward** both **the** 1250 **work** hour **and 12** months **of service thresholds. This** interpretation, **which is not dictated by** either **the statute or the applicable regulations,** creates **a large administrative** burden on employers, **who have no** control **over and no** way **to** verify **the time records of temporary** agency employees. **It also imposes** considerable additional **cost on employers by** expanding **the** definition **of** "covered employee" beyond the original *intent* **of the** FMLA.

Proposed soludon: Rescind DOL Opinion **letter FMLA-37 and any similar** letters **or guidance and revise 29 CFR Part 825.106** and/or **104 so that** they explicitly **excludes** time worked **for a** temporary agency **from the** 1250 hours/12 months **of services** thresholds for FMLA **leave** eligibility.

Economic Impact Clarifying **that** time worked for **a** temporary **agency does not count** toward **the 1250** hour/12 months **of service** requirements for **employee** eligibility **will greatly reduce** the administrative burden on employers, **who do** not **have access to and have no way** to verify **time records of** temporary agency **workers. In addition,** making **these changes** will reduce employer **costs** by limiting FMLA **leaves** to **those employees who have** actually **met the** eligibility requirements **with their** current **employer, which was the** original intent of the FMLA.

FAIR LABOR STANDARDS ACT

1 Nomination

Fair Labor Standards Act (FLU) "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 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.

PENSION AND WELFARE BENEFITS ADMINISTRATION

1 Nomination

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 dearly 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 aforemennoned changes will help reduce costs related to claims procedures by ensuing that costly adjustments to the new regulatory standards only happen once, rather than twice, in the next few years.

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 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 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.

COLLECTION OF EQUAL EMPLOYMENT OPPORTUNITY DATA

1Nomination

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) 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.

B) 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.