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## **DOL Emphasizes Enforceability of Employer Call-In Procedures for Unforeseeable FMLA Leave**

One of the most burdensome applications of the Family and Medical Leave Act (FMLA) for employers is unscheduled absences due to an employee's unforeseeable need for leave. A change in the law has provided employers with some help in preparing for these last-minute absences. Recently, the U.S. Department of Labor issued an opinion letter clarifying that an employee providing notice of the need for unforeseeable leave under the FMLA must normally follow the company's call-in procedures, and that a flat two-day grace period for requesting FMLA leave no longer exists. Wage and Hour Opinion Letter, FMLA2009-1-A (May 7, 2009).

Under the FMLA, employees must provide 30 days' notice of the need for foreseeable leave, and must provide notice for unforeseeable leave as soon as practicable. The 1995 regulations described "as soon as practicable" to ordinarily require "at least verbal notification to the employer within one or two business days of when the need for the leave becomes known to the employee." 29 C.F.R. § 825.302(b). This language, which was intended to be an illustration of what would normally be practicable, morphed into a flat two-day rule as a result of a 1999 Department of Labor opinion letter.

This two-day grace period for reporting unforeseeable FMLA absences created headaches for employers. Employees taking intermittent FMLA leave were essentially exempt from a company's standard call-in procedures if the policy set forth a shorter reporting period, such as requiring employees to call in one hour before the start of the shift.

The new FMLA regulations that went into effect on January 16, 2009 no longer reference a specific time period, and instead state that providing notice of leave in accordance with the company's usual and customary notice requirements for taking leave should be practicable for employees absent unusual circumstances. 29 C.F.R. §825.303 and 825.304. The opinion letter just released further clarifies that the two-day period for reporting absences has been abandoned by the Department of Labor as the standard of what is normally "practicable." Now, FMLA leave may be denied, and customary attendance policies applied, to employees who fail to comply with the company's call-in procedure unless unusual circumstances prevented the employee from complying.

Managing intermittent FMLA leave continues to be a challenge for employers. However, the ability to uniformly enforce the company's call-in procedure under the new FMLA regulations provides employers with greater protection against misuse of intermittent leave than existed previously. Employers who wish to require adherence to call-in procedures are encouraged to



review their FMLA and attendance policies and ensure the notice requirements have been updated.

Click here to review the full text of the opinion letter:

[http://www.dol.gov/esa/whd/opinion/FMLA/2009/2009\\_01\\_06\\_1A\\_FMLA.htm](http://www.dol.gov/esa/whd/opinion/FMLA/2009/2009_01_06_1A_FMLA.htm).

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