



DOL Clarifies Notice Requirements Under the Family and Medical Leave Act

The DOL recently released an opinion letter clarifying employee notice requirements under the Family and Medical Leave Act of 1993. The DOL formally retracted an earlier opinion that allowed employees two business days after learning of the need for unforeseen leave to notify their employers in favor of a rule that generally allows employers to require their employees to follow established call-in procedures.

Background

The federal Family and Medical Leave Act (FMLA) provides employees with job-protected leave for their own medical reasons, for the birth or adoption of a child, for the care of a family member with a serious health condition, and for military family leave. It generally requires employees to give their employers at least 30 days' advance notice of foreseeable FMLA leave, and "such notice as is practicable" for leave that is unforeseen.

The 1995 FMLA regulations said that it would ordinarily be practicable for an employee to notify the employer within one or two business days of learning of the need for FMLA-covered leave that was not foreseeable thirty days in advance. A 1999 Wage and Hour opinion letter ([FMLA-101](#)) later interpreted the regulations to provide a flat two-business-day notification window, regardless of whether the employee reasonably could have provided notice sooner.

Earlier this year, the first significant revisions to the FMLA regulations took effect. (See our January 15, 2009 [For Your Information](#).) Among other things, the new [regulations](#) sought to clarify the obligations of employees to notify their employers of the need for FMLA leave.

Employee Notice Requirements Under Current Regulations

Under current regulations, employees must still provide at least 30 days' advance notice of foreseeable leave. When the need for FMLA leave arises less than 30 days in advance, the regulations say that employees generally should be able to give the employer notice on the same or next business day but recognize that what is practicable will depend on individual facts and circumstances. In both foreseeable and unforeseeable leave situations, employees must generally follow the employer's customary procedures for requesting leave, unless unusual circumstances prevent them from complying.

The DOL Opinion

In [FMLA2009-1-A](#), the DOL clarifies how much notice of an employee's need for foreseeable and unforeseeable leave an employer may require under FMLA. This opinion, which supersedes the 1999 letter discussed above, expressly rescinds the flat two-day rule and harmonizes the DOL position with current regulations.

Consistent with the regulations, the opinion confirms that employers may require employees to comply with the employer's usual and customary notice policies and procedures for requesting FMLA-qualifying leave, unless the call-in procedures are more stringent than FMLA allows. Because FMLA regulations no longer require a one- or two-day notice, an employer may require lesser notice when it is practicable for the employee to provide it. Absent unusual circumstances, the employee will face normal disciplinary measures for failing to comply with reasonable employer call-in procedures and the employer may generally delay or deny FMLA leave until the employee complies. Even if unusual circumstances exist, the employee must still call in as soon as is practicable.

BUCK COMMENT. *On April 29, 2009, Representative Carol Shea-Porter (D-NH) introduced the Family and Medical Leave Restoration Act ([H.R. 2161](#)). Among other things, the bill seeks to prohibit an employer from approving or denying FMLA leave based on compliance or non-compliance with employer leave request policies.*

Conclusion

The DOL opinion confirming that employers can put in place and enforce reasonable leave request policies and notice procedures for FMLA-covered absences is welcome. Employers should review their current leave practices, and associated disciplinary policies, to ensure that they are reasonable and clearly communicated to employees. Buck's consultants are available to help you ensure that your attendance policies, absence management programs and employee communications reflect the latest guidance from the DOL.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.