

FMLA LEAVE OPINION LETTER ISSUED BY DOL

An employee who must notify an employer of an unforeseen need for leave is permitted by the Family and Medical Leave Act (FMLA) to give “such notice as is practicable,” but a Department of Labor (DOL) opinion letter says the employee is not guaranteed an allowance of a particular number of days within which to provide the notice. The DOL regulations adopted in 1995 provided that giving notice as soon as practicable “ordinarily” would mean notification within one or two business days, but the FMLA regulation that became final in January 2009 does not contain such an allowance, and the opinion letter says that an employer may lawfully require earlier notice when it is practicable for an employee to give it.

The DOL says its letter was addressed to a “request for clarification” concerning employee notification procedures under the FMLA. The request stated that employers believed that a 1999 opinion by the Wage and Hour Division’s Office of Enforcement Policy (Wage and Hour Opinion Letter, FMLA-101, January 15, 1999) prevented them from applying internal call-in policies, or disciplining employees for failing to call in or show up for work, as long as the employees provided notice within two business days of a FMLA-qualifying absence. The request said that such an interpretation of the FMLA “places an untenable burden on employers who are attempting to reasonably schedule their workforce based on foreseeable availabilities of employees and to apply uniform rules on call in to all employees.”

Responding to the request, the DOL says the FMLA, 29 U.S.C. §2612(e), requires an employee to provide notice of the need for leave 30 days before the leave is to commence, if such advance notice is possible. When it is not possible to provide 30 days of notice, the employee must provide “such notice as is practicable.”

The department’s 1995 FMLA regulation interpreted the act to require that when the need for leave became foreseeable less than 30 days before it was to commence, notice was to be given by the employee “as soon as practicable,” which the regulation said “ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.” Another provision in the 1995 regulation provided that when an employee’s need for leave was unforeseeable, the employee was expected to give notice to the employer “within no more than one of two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible.”

The revised FMLA regulation became final on January 16, 2009, and the provision on leave that is foreseeable less than 30 days in advance now says that “[w]hen an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day.” The regulation also provides that “[i]n all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.” The FMLA regulation on an unforeseeable need for leave, 29 C.F.R. §825.303(a), is similarly worded.

Alexander J. Passantino, who served as acting administrator of the Wage and Hour Division until shortly before the inauguration of President Obama, says the new regulation provides that in requesting leave to address foreseeable and unforeseeable needs, “employees must comply with their employers’ usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.” The opinion letter notes that in the preamble to the 2009 regulation, “employers should be able to enforce non-discriminatory call-in procedures, except where an employer’s call-in procedures are more stringent than the timing for FMLA notice.” The DOL says that to the extent opinion letter FMLA-101 had been interpreted to create a “flat” two-day rule concerning employee notification, “the Department is hereby rescinding it.”

The opinion letter is available at <http://op.bna.com/dlrcases.nsf/r?Open=ldue-7rsljp>.

(Source: *Wage and Hour Opinion Letter*, FMLA2009-1-A, January 9, 2009, as reported in BNA, *Daily Labor Report*, No. 86, May 7, 2009, pp. A1-A2, E18-E19.)