



January 6, 2009

FMLA2009-1-A

Dear *Name* *:

This is in response to your request for clarification of employee notification procedures under the Family and Medical Leave Act (FMLA) as discussed in Wage and Hour Opinion Letter [FMLA-101](#) (January 15, 1999).¹ You state that employers believe that opinion letter FMLA-101 prevents them from applying internal call-in policies, disciplining employees under no call/no show policies, or disciplining employees who call in late, as long as the employees provide notice within two business days that the leave was FMLA-qualifying, regardless of whether they could have practicably provided notice sooner. You believe that this interpretation of the FMLA employee notification requirements “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.”

The FMLA requires employees to provide notice of the need for leave due to the birth or placement of a child, or for their own serious health condition or to care for a covered family member with a serious health condition, 30 days before the leave is to begin where possible. See 29 U.S.C. § 2612(e). Where it is not possible to provide 30 days notice of the need for such leave, employees must provide “such notice as is practicable.” *Id.* The Department of Labor’s 1995 FMLA regulations required that when leave is foreseeable less than 30 days in advance, notice must be provided “as soon as practicable,” which the regulations clarified “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.” 29 C.F.R. § 825.302(b).² Opinion letter FMLA-101 interpreted this language to bar an employer’s attendance policy that required employees taking intermittent FMLA leave to report within one hour after the start of their shift unless they were unable to report due to circumstances beyond their control. The letter stated that “[t]he company’s attendance policy imposes more stringent notification requirements than those of FMLA and assigns points to an employee who fails to provide such ‘timely’ notice of the need for FMLA intermittent leave.” Wage and Hour Opinion Letter FMLA-101.

On February 11, 2008, the Department published a Notice of Proposed Rulemaking (NPRM) inviting public comment on proposed changes to the 1995 FMLA regulations. 73 Fed. Reg. 7876. In the NPRM, the Department discussed opinion letter FMLA-101 and the “two-day rule” for FMLA notice at length. The Department stated that it proposed to delete the regulatory language in § 825.302(a) of the 1995 FMLA regulations, which defined “as soon as practicable” as “ordinarily * * * within one or two business days of when the need for leave becomes known to the employee,” because “[w]hile the ‘one to two business days’ timeframe was intended as an illustrative outer limit, Wage and Hour Opinion Letter FMLA-101 (Jan. 15, 1999), in effect, mistakenly read the regulation as allowing employees two business days from learning of their need for leave to provide notice to their employers, regardless of whether it would have been practicable to provide notice more quickly.” *Id.* at 7907. The NPRM went on to state that:

Absent emergency situations, where an employee becomes aware of a need for FMLA leave less than 30 days in advance, the Department expects that it will be practicable for the employee to provide notice of the need for leave either the same day (if the employee becomes aware of the need for leave during work hours) or the next business day (if the employee becomes aware of the need for leave after work hours).

¹ Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

² The 1995 regulations similarly provide that when the need for leave is unforeseeable, “[i]t is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible.” 29 C.F.R. § 825.303(a).



Id. at 7908. The Department proposed that “absent unusual circumstances, employees may be required to follow established call-in procedures (except one that imposes a more stringent timing requirement than the regulations provide), and failure to properly notify employers of absences may cause a delay or denial of FMLA protections.” *Id.* at 7909.

In addressing employee notice of unforeseeable FMLA leave, the NPRM noted that employer comments received in response to the Department’s December 2006 Request for Information indicated that “the ‘two day rule’ interpreted in Wage and Hour Opinion Letter FMLA–101 . . . is even more unworkable in the context of unforeseen FMLA leave because the employee is not required to report the absence prior to the start of his/her shift even where it is practicable to do so.” *Id.* at 7910. Accordingly, the Department proposed that when providing notice of the need for unforeseeable FMLA leave “an employee must comply with the employer’s usual procedures for calling in and requesting unforeseeable leave, except when extraordinary circumstances exist (or the procedure imposes a more stringent timing requirement than the regulations provide), such as when the employee or a family member needs emergency medical treatment.” *Id.* at 7911. The NPRM clarified that, in the absence of extraordinary circumstances, if the employee failed to comply with the normal procedures for reporting an absence “then the employee is subject to whatever discipline the employer’s rules provide for such a failure and the employer may delay FMLA coverage until the employee complies with the rules.” *Id.*

The Department published final FMLA regulations (Final Rule) on November 17, 2008, which will become effective on January 16, 2009. 73 Fed. Reg. 67934 (Nov. 17, 2008). In the Final Rule, the Department adopted the proposed revisions regarding the timing of employee notice of the need for FMLA leave with some minor modifications. The Department again noted that the “one to two business days” time frame set forth in the 1995 regulations had been misinterpreted as permitting “employees two business days from learning of their need for leave to provide notice to their employers regardless of whether it would have been practicable to provide notice more quickly.” 73 Fed. Reg. 68003. In discussing the proposed changes to § 825.302, the Department stressed that “both current and proposed § 825.302(b) defined ‘as soon as practicable’ as ‘as soon as both possible and practical, taking into account all the facts and circumstances of the individual case.’ The deletion of the ‘two-day rule’ does not change the fact that whether notice is given as soon as practicable will be determined based upon the particular facts and circumstances of the employee’s situation.” 73 Fed. Reg. 68003. Thus, final § 825.302(b) states 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. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.” 73 Fed. Reg. 68098. Final § 825.303(a), which addresses the timing of notice for unforeseeable FMLA leave, similarly states that an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. Specifically, “[i]t generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer’s usual and customary notice requirements applicable to such leave.” 73 Fed. Reg. 68099. In both situations, employees must comply with their employers’ usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. See 73 Fed. Reg. 68099 (setting forth section § 825.302(d) (“Complying with employer policy”) of the Final Rule); 73 Fed. Reg. 68100 (setting forth section § 825.303(c) (“Complying with employer policy”) of the Final Rule). As the Preamble notes:

The Department recognizes that call-in procedures are routinely enforced in the workplace and are critical to an employer’s ability to ensure appropriate staffing levels. Such procedures frequently specify both when and to whom an employee is required to report an absence. The Department believes that 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 In that situation, the employer may not enforce the more stringent timing requirement of its internal policy. Additionally, where unusual circumstances prevent an employee seeking FMLA-protected leave from complying with the procedures, the employee will be entitled to FMLA-protected leave so long as the employee complies with the policy as soon as he or she can practicably do so.



73 Fed. Reg. 68006; see 73 Fed. Reg. 68009 (“[T]he final rule replaces the statement that employees will be expected to give notice to their employers ‘promptly’ with the statement that it generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer’s usual and customary notice requirements applicable to such leave.”).

Accordingly, as stated in the final rule, where an employer’s usual and customary notice and procedural requirements for requesting leave are consistent with what is practicable given the particular circumstances of the employee’s need for leave, the employer’s notice requirements can be enforced. To the degree that Wage and Hour Opinion Letter FMLA-101 has been interpreted to create a flat “two-day rule,” the Department is hereby rescinding it. Thus, in the example you cite in your letter of an employer policy requiring employees to call in one hour prior to their shift to report absences and an employee who is absent on Tuesday and Wednesday, but does not call in on either day and instead provides notice of his need for FMLA leave when he returns to work on Thursday, it is our opinion that unless unusual circumstances prevented the employee from providing notice consistent with the employer’s policy, the employer may deny FMLA leave for the absence.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Alexander Passantino
Acting Administrator

** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*