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CLIENT ALERT

**U.S. Department of Labor Releases Opinion Letter on
Employee Notice of Need for FMLA Leave**

On May 5, 2009 the U.S. Department of Labor (DOL) released an opinion letter clarifying employee notification procedures under the Family and Medical Leave Act (FMLA). Specifically, the opinion letter concludes that where an employer's usual and customary notice and procedural requirements for requesting leave are consistent with what is practicable given the circumstances of the employee's need for leave, the employer's notice requirements can be enforced. The text of the opinion letter is available at http://www.dol.gov/esa/whd/opinion/FMLA/2009/2009_01_06_1A_FMLA.pdf.

The DOL's 1995 Regulation Was Interpreted to Allow Two Days for Notice

The FMLA 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. According to the DOL's 1995 regulation, when the need for FMLA leave became foreseeable less than 30 days before it was to commence, the employee would be required to give notice "as soon as practicable." Similarly, when the need for leave was unforeseeable, the employee was expected to give notice "within no more than one or two working days of learning the need for leave, except in extraordinary circumstances where such notice is not feasible."

Subsequent interpretations of the regulation essentially created a rule that employees were guaranteed 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 do so more quickly.

The DOL Opinion Letter Rejects the “Two-Day” Rule
in Favor of “As Soon As Practicable”

The opinion letter released on May 5, 2009 rejects the flat “two-day” rule, expressly stating that an employee is not guaranteed a particular number of days within which to provide notice. Rather, employers may lawfully require earlier notice when it is practicable for an employee to give it, including internal call-in procedures, so long as the employer’s policy and procedures are not more stringent than the timing for FMLA notice. For example, an employer whose policy requires employees to call in one hour prior to their shift to report absences may deny FMLA leave for an employee who is absent two days, does not call in and instead provides notice of need for FMLA leave only when he returns to work – unless unusual circumstances prevented the employee from providing notice by calling in consistent with the employer’s policy. In addition, an employee who fails to comply with the employer’s normal procedures for reporting absence and need for FMLA leave is subject to whatever discipline the employer’s rules provide for such a failure, including delay of FMLA coverage until the employee complies with the rules.

Of course, if you should have any questions regarding this directive, please contact us.

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