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LEGAL ALERT



Legal Alert: DOL Opinion Letter Addresses Notice Required from Employees Seeking FMLA Leave

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On May 5, 2009, the Department of Labor (DOL) released a Wage and Hour Opinion Letter clarifying how much advance notice employees must provide when requesting leave under the Family and Medical Leave Act (FMLA). The recently released letter (dated January 6, 2009, but not released until May 5, 2009) clarifies that when it is not possible for an employee to give 30 days advance notice of the need for leave, the employee must comply with the employer's internal policies and procedures for requesting leave, as long as it is practicable to do so. The new opinion letter also rescinds a prior DOL opinion letter to the extent that the earlier letter established a two-business-day rule for notice of employees' need for FMLA leave. See FMLA2009-1-A (1/6/09) (rescinding FMLA-101 (1/15/99)).

The FMLA requires that employees, when possible, provide 30 days advance 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. When it is not possible to give 30 days notice, employees must give notice "as is practicable." The 1995 FMLA regulations provided that as soon "as practicable" ordinarily means that an employee must give verbal notification to the employer within one or two business days of when the employee learns of the need for leave. The prior Wage and Hour Opinion Letter (FMLA-101 (1/15/99)) interpreted the FMLA regulations 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 could not do so because of circumstances beyond their control. The prior opinion letter stated that this policy was barred by the FMLA because it imposed more stringent notification requirements than imposed by the FMLA and assigned "points" to employees who failed to comply with the policy.

The FMLA regulations were revised after the issuance of Opinion Letter FMLA-101 and became effective on January 16, 2009. The current FMLA regulations state "When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case." The regulations further provide "When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or

she has access to, and is able to use, a phone."

The recent opinion letter notes that in the Notice of Proposed Rulemaking (NPR) for the new FMLA regulations, the DOL discussed Opinion Letter FMLA-101 extensively and stated that this opinion letter mistakenly read the "one to two business days" language in the regulations to mean that employees had 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.

Accordingly, the recent opinion letter reiterates the new FMLA regulations, which specifically allow employers to apply and enforce internal call-in policies and procedures for requesting leave, absent unusual circumstances. Further, the DOL has rescinded Opinion Letter FMLA-101 to the degree it had been interpreted as creating a two day notification rule for requesting leave. Wage and Hour Opinion Letter FMLA2009-1-A (1/6/09). In summary, when it is not possible to give 30 days advance notice, employees must comply with their employers' internal policies and procedures for requesting leave, as long as it is practicable to do so.

Employers' Bottom Line:

Although DOL opinion letters do not have the force of law and are limited to the factual circumstances as described by the employer requesting the opinion, this letter is helpful in that it reflects the DOL's position that an employer may require employees to comply with its usual and customary policy and procedures for requesting FMLA-qualifying leave as long as the policy and procedures are consistent with what is practicable under the circumstances. In deciding whether to grant a request for leave, the employer should consider relevant factors affecting the employee's ability to comply with its internal policy and procedures.

If you have any questions regarding the issues discussed in this Alert, please contact the author, Jolina Abrena, jabrena@fordharrison.com, 213-237-2409 or the Ford & Harrison attorney with whom you usually work.