

Call-In Procedures And Intermittent FMLA

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Intermittent FMLA leave and attendance issues: an employer's nightmare. There are so many different rules that employers must follow, inquiries that can and cannot be made, and potentials for employee abuse. Imagine this scenario: An employee is approved for intermittent FMLA leave to care for a sick child. The employer informs the employee about its process for administering this leave, which includes calling both the organization's attendance line at least 30 minutes prior to missing work. Despite being informed of this process, the employee misses several consecutive days and never calls her supervisor, Human Resources or the attendance line to report her absences. When the employee finally returns to work, she offers no meaningful explanation for failing to notify anyone about her absences and, instead, states she "became overwhelmed." What can the employer do in response to the employee's failure to keep the company informed? Discipline the employee? Terminate the employee? Do nothing for fear of getting sued for FMLA interference or FMLA retaliation? Fortunately, the FMLA regulations and several courts' interpretation of these regulations can answer these challenging questions. The FMLA regulations make clear that an employee must "comply with an employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." 29 C.F.R. 302(d). If the employee does not follow the company's "usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied." *Id.* The scenario described mirrors what occurred in *Ritenour v. Tennessee Dep't of Human Servs.* In *Ritenour*, the court found that the plaintiff was obligated to follow her employer's call-in policy when missing work unless she could demonstrate an "unusual circumstance" prohibited her from calling in her absence. The court determined that the plaintiff was well aware of her obligation to follow the call-in policy and she could not state an unusual circumstance as to why she failed to follow the policy. As a result, the *Ritenour* Court found that the employer was justified in disciplining the plaintiff for violating the call-in policy and did so not in violation of the FMLA. The *Ritenour* case (which has since been followed by several different courts) is a good reminder for employers that it is acceptable and legal to apply their usual and customary call-in policies to all employees, including those on intermittent FMLA leave, absent unusual circumstances and so long as these policies are applied consistently for all absences. Further, employers should consider reviewing their policies and handbooks to make sure the call-in procedures are clearly explained and have employees sign off on these policies. Finally, when administering the intermittent FMLA leave, employers should also consider reviewing this call-in policy with the employee prior to the approved leave and, again, have the employee sign an acknowledgment of understanding this policy.

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