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Melissa J. Shaffer

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Hey Employer, Did You “Notice” My Text Message?

INTRODUCTION

Missy works as a waitress at a popular local restaurant. Missy has been diagnosed with gout, a medical condition characterized by recurrent attacks of inflammatory arthritis. Attacks are spontaneous, but when an attack occurs, it causes an excruciating pain in her foot, rendering her unable to perform her job as a waitress. Missy was scheduled to work on Saturday afternoon—the restaurant’s busiest night. However, a few hours before her shift started, Missy began experiencing symptoms of her condition—her feet were so swollen that she was unable to walk. From past experience, Missy knew she needed to properly request leave. Under the employee handbook, the restaurant required her to call the Human Resources Director as soon as possible. Missy had a good relationship with her direct supervisor and usually reported ordinary absences to the supervisor. At the start of her shift on Saturday, Missy sent her direct supervisor a text message conveying that her foot was swollen and she could not come into work. The General Manager of the restaurant terminated Missy before the start of her next shift for noncompliance with the employee handbook, stating that Missy failed to give timely notice and provide notice in the correct form. Missy brought a retaliation claim against her employer, alleging that she was actually terminated for taking Family Medical Leave Act (“FMLA”) leave and further that her employer’s justification of noncompliance was a pretext for discrimination.¹

Disputes can and often do arise when employees contact employers using nontraditional forms of communication or informal conversations in an attempt to provide “notice” of unforeseeable leave under the FMLA.² The FMLA allows covered employees to take time off from work for medical reasons and prohibits employers from taking adverse action against the employee for taking such leave.³ Since the 2009 revisions to the FMLA notice provisions, courts have continued to issue inconsistent rulings on what constitutes sufficient notice in cases of unforeseeable

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1. Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2012) [hereinafter FMLA or the Act].

2. Elijah Yip, *Text Me, Maybe? Maybe Not!*, HAW. EMP. L. LETTER, Aug, 2013, at 3.

3. See Kenza Bemis Nelson, *Employer Difficulty in FMLA Implementation: A Look at Eighth Circuit Interpretation of “Serious Health Condition” and Employee Notice Requirements*, 30 J. CORP. L. 609, 611–12 (2005).

leave as well as when termination for noncompliance is justified.⁴ The unclear jurisprudence is especially troublesome in light of modern forms of communication, such as text messaging, permeating the professional realm and being used for employee–employer communication.⁵ The divided jurisprudence is attributable to, among other things, the ambiguous language of the FMLA notice provisions and the courts’ failure to interpret those provisions in accordance with the Act’s purpose.⁶

The inconsistencies regarding the employer’s authority to terminate employees who fail to adhere to call-in procedures and the employee’s ability to disregard policies under certain justifications jeopardize the employer’s ability to conduct normal business operations.⁷ Conversely, the inconsistencies regarding the employee’s ability to disregard policies under certain justifications disadvantage employees who find themselves without a job during times of medical emergencies.⁸ Given the stated purpose of the FMLA—to ensure security for both the employer and the employee⁹—the current notice provisions for unforeseeable leave under the Code of Federal Regulations¹⁰ must be amended to replace the rigid rule of compliance with a two-stage notice procedure. A two-stage notice procedure will guide courts in determining whether the employees should recover under their retaliation claims despite noncompliance with employer policies.

Part I of this Comment provides an overview of the FMLA and corresponding federal regulations, focusing on the purpose of the 2009 revisions and the policy concerns underlying the FMLA. Part II examines the ambiguous language of the FMLA notice provisions and the conflicting jurisprudence in cases of unforeseeable leave, examining each

4. See Kristine Cordier Karnezis, *Adequacy of Notice to Employer of Need for Leave Under Federal Family and Medical Leave Act of 1993*, 184 A.L.R. 171 (2003).

5. *Id.* (“A friend who managed a local restaurant once complained to me about the questionable work habits of his young employees. ‘They don’t call in to say they’ll be late to a shift. They text me!’ My friend can now say that a court shares his sentiment, at least when it comes to exercising rights under the Family and Medical Leave Act (FMLA).”).

6. See Nelson, *supra* note 3, at 613.

7. Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information, 72 Fed. Reg. 35,550, 35,552 (proposed June 28, 2007) (codified at 29 C.F.R. 825 (2016)).

8. *Id.* at 35,557.

9. 29 U.S.C. § 2601 (2012).

10. *Id.* § 2654 (“The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I of this chapter and this subchapter not later than 120 days after February 5, 1993.”); 29 C.F.R. §§ 825.300–825.313.

element of notice—timing, content, and form. Part III analyzes the implications of the current state of the law on employers and employees. Part IV argues that Congress should amend the Code of Federal Regulations to include a two-step notice process in cases of unforeseeable leave to clarify the law and provide employers and employees with more consistency and security.

I. AN OVERVIEW OF THE FMLA

The National Partnership for Women and Families drafted the FMLA, which was signed into law on February 5, 1993.¹¹ The FMLA was the first and only national law aimed at helping working men and women balance the conflicting demands of work and family.¹² The law allows eligible employees¹³ of covered employers¹⁴ to take up to 12 workweeks of unpaid,

11. *Celebrating 20 Years of Job-Protected Leave—and Working to Help Even More Families*, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/issues/work-family/fmla.html> [https://perma.cc/4B5T-D7XU] (last visited Oct. 10, 2016). *See also About Us*, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES <http://www.nationalpartnership.org/about-us> [https://perma.cc/Z2A8-LQ95] (last visited Oct. 10, 2016) (“The National Partnership for Women & Families is a nonprofit, nonpartisan 501(c)3 organization located in Washington, D.C. [F]or four decades, [they] have fought for every major policy advance that has helped women and families.”).

12. *Id.*

13. 29 U.S.C. § 2611(2) (defining “eligible employee” as “an employee who has been employed—(i) for at least 12 months by the employer with respect to whom leave is requested under section 2616 of this title; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period”; eligible employee “does not include—(i) any Federal officer or employee covered under subchapter V of chapter 63 of Title 5; or (ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50”).

14. *Id.* § 2611(4)(A)(i) (defining “employer” as “any person who is engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year; (ii) includes—(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and (II) any successor of interest of an employer; (iii) includes any ‘public agency’, as defined in section 203(x) of this title; and (iv) includes the Government Accountability Office and the Library of Congress. (B) Public Agency, for purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.”).

job-protected¹⁵ leave per year for medical reasons such as the birth or adoption of a child, care of a spouse, child, or parent with a “serious health condition,” or the employee’s own “serious health condition” that makes the employee “unable to perform the functions of the employee’s job.”¹⁶

Congress enacted the FMLA to prevent employment discrimination against employees with serious health conditions, to allow pregnancy leave for women, and to allow men and women to participate in early child-rearing stages without compromising job security.¹⁷ Specifically, in section 2601 of the Act, Congress stated that there is inadequate job security for employees who have “serious health conditions that prevent them from working for temporary periods.”¹⁸ This section also states that the primary responsibility of caring for family falls on women more than men and interferes with women’s work to the extent that it encourages employers to discriminate against them in employment decisions.¹⁹ Based upon these findings, Congress enacted the FMLA to promote the stability and economic security of families in a way that also accommodates the legitimate interests of employers.²⁰

A. Employees Must Give “Notice” of the Need for Leave

Although the FMLA provides employees with job security during medically related leave, this protection is conditional. The Act requires employees to take such leave in a manner that “accommodates the legitimate interest of employers.”²¹ This requires, among other things, that employees give employers notice of the need to take leave.²² In determining whether an employee’s notice for unforeseeable leave was sufficient under the

15. *Id.* § 2614(a)(1). Job protection stems from the employee’s right: “(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or (B) to be restored to an equivalent position with the equivalent employment benefits, pay, and other terms and conditions of employment.” *Id.*

16. *Id.* § 2612.

17. *Id.* § 2601.

18. *Id.*

19. *Id.*

20. *Id.* § 2601(b)(1)–(5).

21. *Lichtenstein v. Univ. of Pittsburg Med. Ctr.*, 691 F.3d 294, 300 (3d Cir. 2012) (citing 29 U.S.C. § 2601(b)(3)).

22. 29 U.S.C. § 2612(e)(1).

FMLA, three components are independently evaluated: the timing of the notice,²³ the content of the notice,²⁴ and the form of the notice.²⁵

The federal government revised these provisions in 2009 after conducting two studies and receiving over 15,000 public comments in response to a “Request for Information” published in the Federal Register in December 2006.²⁶ Despite responses that the FMLA was “generally working well,” the employees often wanted a greater leave entitlement, while employers voiced concerns that unscheduled, intermittent leave for chronic health conditions compromised their ability to manage business operations and control attendance.²⁷ The prevalence of employees with chronic health conditions taking unscheduled, intermittent FMLA leave was an unanticipated effect of the Act,²⁸ and it is the most severe area of friction between employers and employees seeking to use FMLA leave.²⁹ Employers complained of scheduling problems caused by employee absences with little or no notice, particularly where employers perceived employee abuse in taking such leave.³⁰ Employers also expressed concerns for loss of management control and the negative impact on employee morale and productivity.³¹ Employees emphasized the significance of intermittent leave in cases of incurable diseases with sporadic episodes and the importance of job security.³² In response to these concerns, the Department of Labor (the “Department”) revised the FMLA regulations in hopes of striking a better balance between the statutory requirements and the congressional intent.³³ The 2009 revisions to employee notice

23. 29 C.F.R. § 825.303(a) (2016).

24. *Id.* § 825.303(b).

25. *Id.* § 825.303(c).

26. *Revised Final Regulations Under the Family and Medical Leave Act*, WAGE & HOUR DIVISION, <http://www.dol.gov/whd/fmla/finalrule.htm> [<https://perma.cc/7VBA-KPE2>] (last visited Sept. 29, 2016).

27. *Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information*, 72 Fed. Reg. 35,550, 35,551 (proposed June 28, 2007) (codified at 29 C.F.R. § 824 (2016)).

28. *Id.* at 35,552.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 35,557 (“A railroad employee of thirty-six years said he uses intermittent leave to care for his wife, who suffers from Multiple Sclerosis (“MS”). Acknowledging the sporadic need for leave, the commenter said, ‘Since MS is an incurable disease without a schedule or any way of knowing when an episode is going to [occur], I cannot always foresee when I am needed at home.’”).

33. *Id.* at 35,552.

requirements for unforeseeable leave imposed several major changes to the timing, content, and form of notice that are still in effect today.

1. *Timing*

First, in responding to employer complaints that employees' abuses of leave left employers with little or no notice, the revisions eliminated the "one to two business days" time frame set forth in the 1995 regulations.³⁴ The Department noted that the two-day rule had been misinterpreted to allow employees an additional two business days after they were aware they needed leave to notify the employer, regardless of whether it would have been practicable for the employee to notify the employer sooner.³⁵ Consistent with the original act, the current provision states that when the need for leave is unforeseeable, the employee must give notice "as soon as practicable under the facts and circumstances of the particular case."³⁶ However, the revisions added that "[i]t generally should be practicable for the employee to provide notice . . . within the time prescribed by the employer's usual and customary notice requirements applicable to such leave."³⁷

2. *Content*

While the revisions to the requirements of timing attempted to alleviate employers' complaints of abuse, the Department also sought to clarify the regulation's standard for sufficient content of notice. Before the revisions, employers and employees found it difficult to meet their responsibilities under the FMLA because neither party knew what information was sufficient to notify an employer that FMLA leave was needed.³⁸ The 1995 regulations stated that an employee "need not expressly assert rights under the FMLA or even mention the FMLA" when

34. Before 2009, the timing requirements for an employee's notice for leave that was not foreseeable provided an employee "to give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case," noting that it 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) (1995).

35. Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. at 35,576.

36. 29 C.F.R. § 825.303(a) (2016).

37. *Id.*

38. Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. at 35,584.

providing notice.³⁹ Rather, depending on whether the employee mentions FMLA in his or her notice, the burden might shift to the employer to inquire more about the circumstances surrounding leave and whether such leave potentially falls under the FMLA.⁴⁰

The Department attempted to address this ambiguity in the revisions by clarifying the exact information needed and to what degree of precision.⁴¹ The provisions state that “[a]n employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request.”⁴² Articulating the degree of precision the employee must use in requesting potential FMLA-qualifying leave, the regulations provide that such information could include that an employee is “unable to perform the functions of the job”⁴³ because of a medical condition, “that the employee is pregnant or has been hospitalized overnight,”⁴⁴ or that the employee or a family member is “under the continuing care of a health provider.”⁴⁵

Additionally, the revisions distinguished between employees who are seeking FMLA-qualified leave for the first time and employees who have previously taken leave for an FMLA-qualified reason.⁴⁶ For employees seeking leave for the first time, the employee “need not expressly assert rights under the FMLA or even mention the FMLA,” but “merely calling in sick” will not be enough to trigger the employer’s obligation under the Act.⁴⁷ However, when an employee seeks leave for a previously qualified reason, the employee “must specifically reference either the qualifying reason for leave or the need for FMLA leave.”⁴⁸ If these requirements are met, the burden then shifts to the employer to obtain any additional information through informal means.⁴⁹

39. 29 C.F.R. § 825.303(b) (1995).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* §§ 825.303(a)–(c), 825.300(b)(1) (“When an employee requests FMLA leave, or when the employer acquires knowledge that an employee’s leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee’s eligibility to take FMLA leave within five business days, absent unusual circumstances.”).

3. Form

In addition to timing and content, employers were also concerned with form—the last element of notice—because the FMLA was unclear as to how it affected the employers’ abilities to enforce their internal notice policies.⁵⁰ The provisions require an employee to “comply with the employer’s usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.”⁵¹ Under the regulations, an employer’s policy may require the employee to contact a specific individual or call a designated number.⁵² Moreover, the regulations provide examples for when unusual circumstances might exist, which justify an employee’s noncompliance with the employer’s policy.⁵³ In the context of unforeseeable leave, unusual circumstances would exist if the employee required emergency medical treatment and could not use a phone or did not have access to a phone.⁵⁴ Currently, the form provisions allow an employee’s spokesperson to give notice if the employee is unable to do so personally.⁵⁵ Absent unusual circumstances, the employer may delay or deny FMLA leave when an employee fails to comply with the employer’s usual notice and procedural requirements.⁵⁶

B. Remedies Available to Employees for Wrongful Denial of Leave or Adverse Action

The FMLA provides employees with two different causes of action when an employer wrongfully denies leave or discriminates against the employee for taking federally protected leave.⁵⁷ Section 2612 of the Act grants covered employees substantive rights to take protected leave⁵⁸ and requires employers to have internal leave policies.⁵⁹ Additionally, section 2615 bars employers from penalizing employees and other individuals for

50. Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information, 72 Fed. Reg. 35,550, 35,571 (proposed June 28, 2007) (codified at 29 C.F.R. § 825 (2016)).

51. 29 C.F.R. § 825.303(c).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* § 825.304.

57. *Norton v. LTCH*, 620 F. App’x 408, 409 (6th Cir. 2015).

58. 29 U.S.C. § 2615 (2012).

59. *Id.* § 2612(a)(1).

exercising their rights under the Act.⁶⁰ These provisions create two types of claims available to employees when employers violate section 2612 or 2615.⁶¹ The first is an “interference claim,” in which an employee asserts that his or her employer denied or otherwise interfered with his or her substantive rights under the FMLA.⁶² The second is a “retaliation claim,” in which an employee asserts that his employer retaliated against him because he engaged in activity protected by the FMLA.⁶³

The employee carries the burden of proof for each cause of action. To make a prima facie showing of interference, employees must show the following: first, that they were entitled to FMLA leave; second, that some adverse action by the employer interfered with their right to take FMLA leave; and third, that the employer’s action was related to the exercise or attempted exercise of the employees’ FMLA rights.⁶⁴ To prevail in a retaliation claim under the FMLA, plaintiffs must prove the following: first, that they invoked their right to FMLA-qualifying leave; second, that they suffered an adverse employment decision; and third, that the adverse action was causally related to their invocation of rights.⁶⁵

In cases of unforeseeable leave, employees frequently bring retaliation claims against their employer⁶⁶ rather than interference claims because these cases involve employees who did in fact take the leave, but were terminated during the leave or upon returning to work.⁶⁷ Because retaliation claims require an employer to have acted with a discriminatory intent, employers often argue that the termination was not retaliation for the employee taking FMLA leave.⁶⁸ Rather, the employers argue that termination was a result of the employee providing insufficient notice of

60. *Campbell v. Gambro Healthcare, Inc.*, 447 F. Supp. 2d 1205, 1217 (D. Kan. 2006).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Lichtenstein v. Univ. of Pittsburg Med. Ctr.*, 691 F.3d 294, 301–02 (3d Cir. 2012).

66. Although employees often try to bring both interference and retaliation claims, thus blending the two together, courts consistently separate them and find that retaliation claims are more appropriate under the facts that generally arise in terminations following unforeseeable leave requests. *See Campbell*, 447 F. Supp. 2d at 1220 (“In this circumstance, plaintiff’s claims are more properly analyzed as a single retaliation claim—not as separate interference and retaliation claims.”).

67. *See Campbell*, 447 F. Supp. 2d at 1220.

68. *See, e.g., Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 861, 866 (8th Cir. 2015).

the need for leave.⁶⁹ The post-2009 provisions specifically provide that an employer can “take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave.”⁷⁰ Employers argue that they had no knowledge of the employee’s FMLA leave because the employee reported it to the wrong person or left a message on the answering machine instead of speaking with the employer directly, and therefore the employee was terminated for failing to comply with the employer’s internal notice procedures.⁷¹

Retaliation claims are important because these claims implicate the notice provisions of the FMLA and the employers’ call-in policies.⁷² In these cases, courts consider whether the employee provided sufficient notice under the FMLA and under the employer’s internal procedures.⁷³ Because the federal circuits have not issued bright-line rules for what constitutes “sufficient notice” or “unusual circumstances,” both employees and employers are left uncertain as to when FMLA leave is justified.⁷⁴

II. COURTS STRUGGLE TO INTERPRET AMBIGUOUS NOTICE REQUIREMENTS FOR UNFORESEEABLE LEAVE

In cases of foreseeable leave, sufficiency of notice is a much less troublesome issue because an employee can give his or her initial notice in advance, which gives the employer additional time to decide if the leave is FMLA-qualified and the employee time to correct any deficiencies.⁷⁵ Under the unforeseeable leave scenarios, determining what constitutes sufficient timing, content, and form of an employee’s notice is much more difficult because the provisions governing unforeseeable leave are ambiguous and fail to make necessary distinctions between emergency and non-emergency situations.⁷⁶

Notice is timely if it is given “as soon as practicable under the facts and circumstances of the particular case,” but the law provides no clear guidance on when the giving of notice becomes “practicable” and the

69. *Id.*

70. 29 C.F.R. § 825.304(e) (2016).

71. *See, e.g., Hudson*, 787 F.3d at 866.

72. *See id.*

73. *See id.*

74. *See Nelson, supra* note 3, at 613.

75. 29 C.F.R. § 825.302.

76. *Id.* § 825.303(a).

regulations do not distinguish between emergency and non-emergency situations.⁷⁷ The employee must give enough information to put the employer on notice that he or she is taking leave that may qualify as FMLA leave; however, depending on the circumstances, what constitutes sufficient information in one case may not be sufficient in another.⁷⁸ Last, the employee must provide notice in the form proscribed by the employer's "usual and customary . . . procedural requirements for requesting leave, absent unusual circumstances," but there is no definitive criteria to determine if an unusual circumstance exists that would justify noncompliance.⁷⁹ The federal circuits differ in their conclusions of whether an employee's notice was sufficient in time, content, and form despite the factual similarities between cases.⁸⁰ This is problematic because employers and employees are uncertain whether an employee's notice is timely, provides enough information, and was given in the proper form to invoke the protection of the Act.⁸¹

A. Sufficient Timing Under the FMLA

For unforeseeable leave, the regulations state that an employee must give notice "as soon as practicable."⁸² Moreover, the regulations note that it generally should be practicable to comply with the employer's timing requirements applicable to such leave.⁸³ However, this requirement is circular because most employer policies mimic the language provided in the regulations by saying an employee should give notice "as soon as possible" in cases of unforeseeable leave.⁸⁴

Notice "as soon as practicable" will differ depending on the facts of each case because unforeseeable leave encompasses a wide variety of

77. *Id.*

78. *Id.* § 825.304(b).

79. *Id.* § 825.304(c).

80. Compare *Lichtenstein v. Univ. of Pittsburg Med. Ctr.*, 691 F.3d 294 (3d Cir. 2012), with *Lanier v. Univ. of Tex. Sw. Med. Ctr.*, 527 F. App'x. 312 (5th Cir. 2013); see *supra* Part II.B.

81. Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35,550, 35,584 (proposed June 28, 2007) (codified at 29 C.F.R. § 825).

82. 29 C.F.R. § 825.303(a).

83. *Id.*

84. See *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 160 (2d Cir. 2011) ("Metro-North's internal leave policy provides, in relevant part, '[i]f the need for FMLA leave is not foreseeable, employees must give notice to their supervisor as soon as possible.'"); see also *Strouder v. Dana Light Axle Mfg., LLC*, 725 F.3d 608, 612 (6th Cir. 2013) ("If the leave was not foreseeable, the policy required 'as much notice as possible.'").

circumstances.⁸⁵ For example, an employee who has been diagnosed with recurring migraines could likely still give the employer notice of the need for leave despite having a migraine, whereas it may not be practicable to require an employee who has been rushed to the emergency room for a seizure to call the employer before the start of the shift. Litigation continues to center around the issue of whether notice was given “as soon as practicable.”⁸⁶

In *Lichtenstein v. University of Pittsburgh Medical Center*, a discharged employee brought a retaliation claim against her former employer alleging that she was terminated in violation of the FMLA when she took leave to care for her seriously ill mother.⁸⁷ To justify her termination, the employer cited chronic tardiness and absenteeism in violation of its internal policies, as well as failure to give advance notice of leave.⁸⁸ The employee’s scheduled shift was to begin at 3:00 p.m.⁸⁹ Early that morning her mother was rushed to the hospital after collapsing from unexpected and excruciating leg pain.⁹⁰ The employee called her supervisor before noon to say she could not make her shift.⁹¹ The district court granted summary judgment in the employer’s favor and the employee appealed.⁹² The U.S. Court of Appeals for the Third Circuit found that the failure to follow employer policies was “belied by the unforeseeable nature of the emergency” and the employer’s previous admissions that she had followed proper procedure by calling her supervisor soon after arriving at the emergency room.⁹³ Therefore, the court found in favor of the employee and held that the facts presented were sufficient to establish a genuine dispute about whether the employee notified the employer as soon as practicable.⁹⁴ The court in *Lichtenstein* emphasized that a reasonable jury could have found that notice was given “as soon as [was] practicable.”⁹⁵

In contrast, the court in *Norton v. LTCH* was not willing to excuse an employee’s failure to notify her employer, despite the unforeseeable

85. 29 C.F.R. §825.303(a).

86. See Ashley Hawley, *Taking a Step Forward or Backward? The 2009 Revisions to the FMLA Regulations*, 25 WIS. J.L. GENDER & SOC’Y 137, 153 (2010).

87. *Lichtenstein v. Univ. of Pittsburg Med. Ctr.*, 691 F.3d 294 (3d Cir. 2012).

88. *Id.* at 309.

89. *Id.* at 298.

90. *Id.*

91. *Id.*

92. *Id.* at 296.

93. *Id.* at 304 n.15.

94. *Id.* at 304.

95. *Id.*

nature of the emergency.⁹⁶ Kathleen Norton was terminated for a late arrival to her shift following excessive absenteeism, and she brought interference and retaliation claims against her former employer.⁹⁷ Norton worked at McLaren Bay Specialty Care (“MBSC”) as a registered nurse for approximately 17 years.⁹⁸ MBSC approved Norton’s intermittent FMLA leave due to vestibular migraines a month before her termination.⁹⁹ MBSC’s policy required employees who needed to take intermittent leave to “call the Family Leave Call Center at least two hours before their scheduled shift[.]”¹⁰⁰ After Norton was informed that she was eligible for intermittent leave, she arrived two minutes late for her shift and failed to give advance notice as the policy required.¹⁰¹ Norton claimed the two-minute delay was “unavoidable,” stating that she suffered symptoms unexpectedly while driving to work and had to pull her car over for safety, which caused her delay.¹⁰² The court found this argument unconvincing because not only did she fail to give advance notice, but Norton never discussed her tardiness with anyone before her termination, which occurred four days after she arrived late to her shift.¹⁰³ The court granted MBSC’s motion for summary judgment on both claims because Norton knew she needed to alert MBSC every time her qualified condition prevented her from working a shift or arriving on time and she failed to do so.¹⁰⁴

Not only did Norton fail to provide timely notice, but the court also found that Norton failed to fulfill the FMLA requirements for the content of notice.¹⁰⁵ Because Norton had been previously qualified for intermittent FMLA leave, she had a duty to specifically alert MBSC each time her leave was related to the vestibular migraines.¹⁰⁶ Although the timing of an

96. Norton v. LTCH, 620 F. App’x. 408 (6th Cir. 2015).

97. *Id.*

98. *Id.*

99. *Id.* This condition includes “symptoms such as extreme dizziness, vertigo, nausea, vomiting, headaches, and sensitivity to light.” *Id.*

100. *Id.* at 409. Because Norton failed to notify MBSC at any point before bringing her claims against them, the court did not consider her argument that MBSC’s two-hour notice requirement itself violates the FMLA. The court noted that it would need to reach that argument only if Norton failed to comply with her employer’s two-hour deadline, but notified the employer “as soon as practicable.” *Id.* at 411 n.1.

101. *Id.*

102. *Id.*

103. *Id.* at 411.

104. *Id.* at 413.

105. *Id.* at 411.

106. *Id.*

employee's notice is a separate consideration from the content of an employee's notice, the two are closely related in cases of unforeseeable leave.¹⁰⁷ If leave is unforeseeable because of a medical emergency, such as in *Lichtenstein*, the timing and content requirements of notice have a greater degree of flexibility.¹⁰⁸ However, where the unforeseeable leave is for a previously FMLA-qualified reason, such as in *Norton*, employees are held to a higher standard for the notice to be timely and sufficient in content because they are already familiar with their obligations under the FMLA and can likely fulfill them.¹⁰⁹

B. Sufficient Content Under the FMLA

Another significant implication of the revisions is that employees must precisely state certain information when requesting FMLA leave, and the standard is different for employees requesting leave for the first time and employees who have previously taken FMLA leave.¹¹⁰ For employees seeking leave for the first time, merely "calling in 'sick'" is not enough, but the employee does not need to "expressly assert rights under the FMLA or even mention the FMLA."¹¹¹ Such information could include that the employee is "unable to perform the functions of the job" because of a medical condition, that the employee's family member is "under the continuing care of a health care provider," or that the employee is pregnant or has been hospitalized overnight.¹¹² For employees who have previously taken FMLA leave, they must specifically reference the previously qualified condition or the need for FMLA leave.¹¹³ However, the revisions provided little clarity to the sufficiency of information requirement, which is the most contested issue addressed by the federal courts.¹¹⁴

In *Lichtenstein v. University of Pittsburgh Medical Center*,¹¹⁵ the employee conveyed the following facts to her employer when calling in: "(1) she was 'currently in the *emergency room*,' (2) her 'mother had been brought into the hospital via *ambulance*,' and (3) she 'would be *unable* to

107. See Hawley, *supra* note 86, at 150.

108. *Lichtenstein v. Univ. of Pittsburg Med. Ctr.*, 691 F.3d 294, 304 n.15 (3d Cir. 2012).

109. *Norton*, 620 F. App'x. at 411.

110. 29 C.F.R. § 825.303(b) (2016).

111. *Id.*

112. *Id.* §§ 825.302(c), 825.303(b).

113. *Id.* § 825.303(b).

114. See *Lichtenstein v. Univ. of Pittsburg Med. Ctr.*, 691 F.3d 294 (3d Cir. 2012); see also *Lanier v. Univ. of Tex. Sw. Med. Ctr.*, 527 F. App'x. 312 (5th Cir. 2013).

115. See discussion *supra* Part II.A.

work that day.”¹¹⁶ The district court concluded that the employee did not give enough information to her supervisor to place the employer on notice of FMLA leave.¹¹⁷ In its reasoning, the court stated the fact that a family member has been taken to the emergency room does not necessarily mean the situation is serious enough to warrant coverage under the FMLA.¹¹⁸ The court noted that although an emergency room visit may be serious, it may not require ongoing treatment.¹¹⁹

The Third Circuit reversed this decision, stating that the district court’s analysis was incorrect.¹²⁰ The question is not whether the given information eliminates non-FMLA situations, but “whether the information allows an employer to ‘reasonably determine whether the FMLA may apply.’”¹²¹ A dissenting opinion argued that the majority’s reasoning dictates that the employer must assume the FMLA may apply any time an employee calls in saying he or she needs to go to the hospital.¹²² The majority denied that their holding facilitated this result because Lichtenstein gave more than a generic reference to a hospital.¹²³ Instead, she specifically told her employer that her mother had been “taken to the emergency room in an ambulance.”¹²⁴ The majority reasoned that being rushed to the hospital in an ambulance is more severe, and more likely to be covered by the FMLA, than employees who check themselves into the emergency room.¹²⁵ Thus, the majority concluded that this case is not one in which a vague reference to a hospital makes a serious health condition “merely conceivable but not sufficiently likely to warrant shifting the burden of inquiry onto the employer.”¹²⁶ Although the Third Circuit held the provided information was sufficient to invoke the employee’s right to FMLA leave, its decision is sharply contrasted with a nearly identical Fifth Circuit case, *Lanier v. University of Texas Southwestern Medical Center*.¹²⁷

116. *Lichtenstein*, 691 F.3d at 304 (emphasis added).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* (quoting 29 C.F.R. § 825.303(b) (2012)).

122. *Id.* at 305 n.16.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* (citing Gregory Luke Larkin et al., *National Study of Ambulance Transports to United States Emergency Departments: Importance of Mental Health Problems*, 21 PREHOSPITAL & DISASTER MED. 82, 85 tbl.1 (2006)).

127. *Lanier v. Univ. of Tex. Sw. Med. Ctr.*, 527 Fed. Appx. 312 (5th Cir. 2013).

In *Lanier*, the Fifth Circuit rejected a discharged employee's interference and retaliation claims, holding that the employee's text message to her supervisor, stating that her father was in the emergency room and that she was not able to make her on-call shift, was insufficient to place the supervisor on notice that the employee was requesting medical leave to care for her father.¹²⁸ The plaintiff argued that her employer had the duty to further inquire because her supervisor knew her father was over 90 years of age, in poor health, and having breathing problems.¹²⁹ The court found that it would be unreasonable to expect the employer to know that the employee meant to request FMLA leave based on these facts.¹³⁰ Although the ultimate issue in *Lanier* was the content of the notice and not the form in which it was provided, the fact that the employee gave notice via text message likely contributed to the deficiency in information.¹³¹ Text messaging and other similar forms of communication generally encourage abbreviated and informal communications.¹³² Ultimately, the form in which the notice was provided can have an effect on the amount of content the employee provides.¹³³

C. Sufficient Form Under the FMLA and the Internal Procedures of Employers

The last requirement for determining the sufficiency of notice is whether the form of the notice was appropriate, which is examined in reference to the employer's internal call-in policy.¹³⁴ The current unforeseeable leave provisions now provide that the employee's form of notice "must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances."¹³⁵ The regulations also explicitly state that such policies may require employees "to call a designated number or a specific individual to request leave."¹³⁶ The regulations provide that the employer can take action under its internal rules and procedures for employee noncompliance, absent unusual circumstances, as long as the actions do not discriminate against employees taking FMLA leave.¹³⁷

128. *Id.* at 316–17.

129. *Id.* at 317.

130. *Id.*

131. Yip, *supra* note 2.

132. *Id.*

133. *Id.*

134. *Lichtenstein v. Univ. of Pittsburg Med. Ctr.*, 691 F.3d 294, 302 (3d Cir. 2012).

135. 29 C.F.R. § 825.303(c) (2016).

136. *Id.*

137. *Id.* § 825.304.

Since the revisions, the enforcement of the employer's internal policies in retaliation cases has developed in two factual circumstances: first, where the employee gives notice in the wrong form and the employer lacks actual knowledge of the notice;¹³⁸ and second, where the employee gives notice in the wrong form, but the employer has actual knowledge of the notice.¹³⁹ The court must then decide if the employer's termination was justified or taken in a discriminatory manner.¹⁴⁰

However, even if the court finds that the employer's termination was legitimate, the employee may still be excused for noncompliance if there are unusual circumstances.¹⁴¹ Even in cases with almost identical fact patterns, courts reach different results in deciding whether terminations are discriminatory and if there are unusual circumstances that excuse employees' noncompliance with employer policies.¹⁴²

1. Wrong Form of Notice and Employer Lacks Actual Knowledge of Notice

When an employee fails to give notice in accordance with the requirements of the employer's internal leave policy and is later terminated, whether the employer had actual knowledge of the notice is a significant consideration in retaliation and interference claims. *Cavin v. Honda of America Manufacturing, Inc.* was decided before the 2009 revisions to the notice requirements and is a case in which the Sixth Circuit reversed and remanded a district court's grant of summary judgment in favor of the employer on FMLA interference and retaliation claims.¹⁴³ Honda's leave policy required any employee requesting FMLA leave to contact its Leave Coordination Department, but for ordinary, non-FMLA absences, employees contacted security.¹⁴⁴ After injuring himself in a motorcycle accident, Cavin, a Honda employee, called security to request a leave of absence, indicating that the leave was potentially FMLA leave.¹⁴⁵ Honda

138. See *Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713 (6th Cir. 2003); see also *Srouder v. Dana Light Axle Mfg., LLC*, 725 F.3d 608 (6th Cir. 2013).

139. See *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 161 (2d Cir. 2011); see also *Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 861 (8th Cir. 2015).

140. *Lichtenstein v. Univ. of Pittsburg Med. Ctr.*, 691 F.3d 294, 302 (3d Cir. 2012).

141. 29 C.F.R. § 825.303. See, e.g., *Lichtenstein*, 691 F.3d at 302.

142. See *Srouder*, 725 F.3d at 612; see also *Millea*, 658 F.3d at 162.

143. *Cavin*, 346 F.3d 713.

144. *Id.* at 716.

145. *Id.* at 725 n.8.

argued Cavin's notice was insufficient because the notice that Cavin gave to security was never relayed to management.¹⁴⁶

The Sixth Circuit recognized that “[t]he goals of the FMLA are more likely to be met when a large company coordinates FMLA leave through one department that is familiar with the FMLA and its accompanying rules and regulations.”¹⁴⁷ However, it ultimately concluded that if notice to security is sufficient for non-FMLA call-ins, then it should also be sufficient for FMLA notice, and that emergency-type situations should be afforded more leniency.¹⁴⁸ The court stated the knowledge of Cavin's supervisor should be imputed to Honda's management.¹⁴⁹ Moreover, the court noted that Honda could have protected itself against inadequate notice by requiring communication between its security and Leave Coordination Departments to ensure that the management would have actual notice of an employee's leave request.¹⁵⁰ This ruling was overturned by the 2009 revisions because the unforeseeable leave regulations now explicitly provide that “an employer may require employees to call a designated number or a specific individual to request leave.”¹⁵¹ Following the revisions, *Srouder v. Dana Light Axle Manufacturing* was decided, and in that case the Sixth Circuit recognized that Cavin's holding could no longer be enforced.¹⁵²

In *Srouder*, an employee brought an interference claim after he was terminated for numerous violations of the employer's attendance policy.¹⁵³ The policy required employees to call a specified “call-in line” for reporting absences.¹⁵⁴ The employee failed to call the specified line to report his absence and instead had a brief discussion with his supervisor about the need to have surgery.¹⁵⁵ The employee claimed that he provided his employer with adequate notice through the conversation with his supervisor and that he thought the supervisors directly received the messages from the call-in lines.¹⁵⁶ The court looked to the express

146. *Id.* at 716 n.1.

147. *Id.* at 726 (quoting *Cavin v. Honda of Am. Mfg., Inc.*, No. C2-00-400, 2002 WL 484521, at *14 (S.D. Ohio Feb. 22, 2002)).

148. *Id.*

149. *Id.* at 725 n.8.

150. *Id.* at 726 n.9.

151. 29 C.F.R. § 825.303(c) (2016).

152. *Srouder v. Dana Light Axle Mfg., LLC*, 725 F.3d 608, 614 (6th Cir. 2013).

153. *Id.* at 612.

154. *Id.*

155. *Id.*

156. *Id.* at 612–13.

language of the statute to hold that his employer did not interfere with the employee's FMLA rights and that the termination was justified.¹⁵⁷

Because the employer satisfied the burden of proving a legitimate, non-discriminatory reason for the employee's termination, the court then turned to any possible "unusual circumstances" that may have justified the employee's noncompliance.¹⁵⁸ However, the court found that no such circumstances existed.¹⁵⁹ In a footnote to the opinion, the court explained that the employee's hernia did not render him incapable of complying with his employer's policies because he was able to go to his doctor's office with FMLA paperwork and then drop off that paperwork before his surgery that afternoon.¹⁶⁰ Thus, there was no reason to conclude the employee was unable to make any phone calls.¹⁶¹

Although unforeseeable leave is generally afforded more flexibility in the sufficiency of notice that is required, the Department has recognized the importance of employers receiving actual notice of an employee's request for leave and being able to properly manage FMLA leave requests.¹⁶² However, when employers do receive actual notice of an employee's leave, albeit not in the manner required by the employer's policy, courts have difficulty finding this shortcoming to be an adequate justification for termination.¹⁶³

2. *Wrong Form of Notice and Employer Has Actual Knowledge*

In sharp contrast to *Srouder*, the U.S. Court of Appeals for the Second Circuit in *Millea v. Metro-North Railroad Co.* held that an employer's leave policy could not require an employee to provide notice directly to the supervisor when such a policy would impose stricter requirements than what is required by the FMLA.¹⁶⁴ Millea, an ex-Marine who suffered from post-traumatic stress disorder, and his supervisor became involved in a heated disagreement while at work, triggering a panic attack for Millea.¹⁶⁵ Millea immediately left work to see his doctor.¹⁶⁶ Metro-North's leave

157. *Id.* at 614–15.

158. *Id.* at 612.

159. *Id.* at 615.

160. *Id.* at 615 n.7.

161. *Id.*

162. *See* *Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713, 726 (6th Cir. 2003).

163. *See* *Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 861, 867 (8th Cir. 2015); *see also* *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 161–62 (2d Cir. 2011).

164. *Millea*, 658 F.3d at 161.

165. *Id.* at 160.

166. *Id.*

policy provided, “[i]f the need for FMLA leave is not foreseeable, employees must give notice to their supervisor as soon as possible.”¹⁶⁷ Because the encounter with his supervisor triggered the attack, Millea did not inform his supervisor that he was leaving work to go to the doctor, but instead asked the lead clerk to inform the supervisor, which the clerk did.¹⁶⁸

Metro-North argued that Millea’s termination was justified as a matter of law by Millea’s failure to comply with Metro-North’s internal leave policy requiring an employee to “notify his supervisor *directly* when FMLA leave is taken.”¹⁶⁹ The company argued that the district court erred when it instructed the jury that an employer cannot provide more stringent notification rules than what the FMLA requires.¹⁷⁰ Metro-North argued that the “not more stringent” language applies only when the employer’s timing requirement of notice is more stringent, but not when the form is more stringent.¹⁷¹ The Second Circuit disagreed, stating that the FMLA limits stringency in terms of timing and form of notification¹⁷² and that the FMLA allows an employee to provide notice through a spokesperson if the employee is unable to provide notice himself.¹⁷³ Thus, the court held the employee’s termination was not justified because the supervisor had actual knowledge and the regulations allow a “spokesperson” to provide notice if the employee is unable to do so himself.¹⁷⁴

In *Hudson v. Tyson Fresh Meats, Inc.*, the Eighth Circuit also held that the termination of an employee was unjustified when the employer received actual notice despite noncompliance with the employer’s policies.¹⁷⁵ The court reversed and remanded a district court’s grant of the employer’s motion for summary judgment, finding that Hudson presented sufficient evidence to raise a genuine issue of fact that he adequately notified Tyson and was actually terminated based on his use of FMLA leave.¹⁷⁶ Hudson, a manager at Tyson, was terminated after he failed to show up for work due to an illness.¹⁷⁷ Tyson’s attendance policy, which Hudson signed, stated, “[a]ll management Team Members are expected to

167. *Id.*

168. *Id.*

169. *Id.* at 161.

170. *Id.* at 162.

171. *Id.*

172. *Id.*

173. *Id.* at 161–62.

174. *Id.*

175. *Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 861, 867 (8th Cir. 2015).

176. *Id.*

177. *Id.* at 863.

personally call their direct supervisor to report an unplanned absence or report that they will be late.”¹⁷⁸ In violation of this policy, Hudson asked his girlfriend and co-worker to report that he was sick and would be out a few days.¹⁷⁹

Additionally, Hudson claimed that he sent his supervisor a text message before the start of his shift that he was having health issues, needed to see a doctor, and would be out for a few days.¹⁸⁰ Hudson alleged that he frequently texted with his supervisor and that he had previously notified his supervisor via text of an absence despite Tyson’s policy requirements that he call his direct supervisor.¹⁸¹ Hudson’s supervisor contradicted this by testifying that employees were “supposed to call in, just like anybody else. They’re supposed to get ahold of somebody” or “notify HR.”¹⁸² The court looked to the precise language contained in Tyson’s policy, noting that the policy did not require calling a specific person.¹⁸³ From these facts, the court concluded that a trier of fact could infer that terminating Hudson for failing to call his supervisor, when other methods of notification are acceptable, is a pretext for discrimination.¹⁸⁴

The court emphasized the fact that the employer had actual notice. In its analysis, the court pointed to the fact that the employer’s own notes stated that “Hudson *had* notified the company (although not by phone).”¹⁸⁵ Thus, the court concluded that Hudson presented sufficient evidence to raise a genuine issue of fact that he adequately notified Tyson and was actually terminated based on his use of FMLA leave.¹⁸⁶

Courts’ inconsistency in the interpretation and application of the notice requirements for unforeseeable leave has undermined the primary objective of the FMLA.¹⁸⁷ The Act was intended to benefit both employers and employees.¹⁸⁸ However, the benefit has become more of a burden as inconsistent jurisprudence leaves employers and employees uncertain of

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 867.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 867–68.

187. See Mark R. Waterfill, *FMLA: Friend or Foe? Business Groups Say Law Has Created Confusion*, RES GESTAE, May 2006, at 19.

188. 29 C.F.R. § 825.101(c) (2013).

their obligations under the Act, rendering employers vulnerable to lawsuits and employees vulnerable to termination.¹⁸⁹

III. THE CURRENT NOTICE PROVISIONS FOR UNFORESEEABLE LEAVE CAUSE UNFORESEEABLE RESULTS

The Department report summarizes the problems the 2009 revisions to the FMLA intended to address.¹⁹⁰ In an attempt to meet employer needs, the notice requirements in the regulations were aimed at giving the employer sufficient notice to make staffing accommodations, to correctly classify leave as FMLA protected, and to clarify employers' obligations under the Act.¹⁹¹ In recognizing employee needs, the Department noted that it is not always practicable to require employees to give advance notice, to provide overly detailed notice, or to comply with the obligations of their employer's internal policies.¹⁹² To meet the needs of both the employer and the employee, the regulations generally require compliance with the employer's internal policies, but this compliance is subject to a case-by-case analysis.¹⁹³ Moreover, the regulations recognize exceptions to the rule of compliance, and these exceptions are couched in ambiguous wording to provide more flexibility in their interpretation.¹⁹⁴ However, the same debate remains just as prevalent, if not more, six years after the revisions' enactment.¹⁹⁵ Employers continue to complain of untimely notice, ambiguous requirements, and policy abuse.¹⁹⁶ Additionally, employees continue to face uncertainty in job security when an unforeseeable emergency arises and fear that their notice was not sufficient to withstand termination.¹⁹⁷

189. See Waterfill, *supra* note 187.

190. Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35,550, 35,584 (proposed June 28, 2007) (codified at 29 C.F.R. 825 (2016)).

191. *Id.*

192. *Id.*

193. 29 C.F.R. § 825.302.

194. Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. at 35,584.

195. Waterfill, *supra* note 187.

196. *Id.*

197. *Id.*

A. The Timing Requirements are Not “Practicable”

The current FMLA regulations require an employee to give notice of the need for unforeseeable FMLA leave as soon as practicable, which should generally comply with the employer’s policies applicable to such leave.¹⁹⁸ The vague language and case-by-case analysis, as opposed to having a definite time period, leads to situations in which employees may be tempted to use their certification of FMLA leave to justify tardiness, ignore mandatory shift call-in procedures, and fail to allow enough time for the employer to make staffing adjustments.¹⁹⁹

Both *Lichtenstein* and *Norton* illustrate the difficulties courts face in trying to apply the timing requirements under the current regulations.²⁰⁰ In *Lichtenstein*, the Third Circuit found the employer’s argument that Lichtenstein failed to give advance notice of her leave unconvincing because of the unforeseeable nature of the emergency.²⁰¹ The court also emphasized Lichtenstein’s emotional state after seeing her mother in the hospital, noting that she had never seen her mother cry as she did that day and that she called her employer despite being “unnerved.”²⁰²

However, Lichtenstein was aware that her mother was being taken to the hospital early that morning and notified her employer around noon, only after her arrival at the hospital and just three hours before her shift was to begin.²⁰³ The court could have just as easily determined that the notice was not given as soon as practicable, and that Lichtenstein should have notified her employer when she first became aware that she would not make her 3:00 p.m. shift, which she likely realized before noon. Advance notice was especially important since Lichtenstein was working in health care, a field that the Department has recognized as being especially harmed by little or no advance notice because employee specialization makes finding replacements difficult to coordinate.²⁰⁴

Similar to *Lichtenstein*, *Norton* also illustrates how the deficiency in the regulation’s timing requirements can lead to seemingly arbitrary decisions.

198. 29 C.F.R. § 825.302.

199. Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information, 72 Fed. Reg. at 35,584.

200. *Lichtenstein v. Univ. of Pittsburg Med. Ctr.*, 691 F.3d 294 (3d Cir. 2012); *Norton v. LTCH*, 620 F. App’x 408 (6th Cir. 2015).

201. *Lichtenstein*, 691 F.3d at 304 n.15.

202. *Id.* at 298.

203. *Id.*

204. Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information, 72 Fed. Reg. 35,550, 35,584 (proposed June 28, 2007) (codified at 79 C.F.R. 825).

In *Norton*, the employee, Norton, alleged that she could not give advance notice of her late arrival to work because she experienced symptoms of her condition while she was driving to work, and she did not anticipate being late.²⁰⁵ Assuming Norton did unexpectedly experience symptoms of her condition while she was driving to work, such as vomiting, which required her to pull over and caused her tardiness, then it would seem impracticable to require advance notice.²⁰⁶ However, it seems unlikely that employees who have been previously qualified for FMLA leave because of a recurring medical condition will frequently experience an attack of their condition at the exact moment or just immediately before the time their shift is to begin.²⁰⁷ To an employer, this scenario looks like a classic case of an employee's abuse of previously qualified leave, where the employee is using her condition to justify tardiness and failure to comply with the employer's policies.²⁰⁸

Furthermore, the timing requirements do not differentiate between unforeseeable leave for emergency-type situations and leave for previously qualified conditions, and thus encompass everything from recurring migraines to a heart attack.²⁰⁹ The regulations attempted to balance the needs of employers and employees in all situations by generally requiring compliance with the employer's policies.²¹⁰ Although the timing requirements do not differentiate between unforeseeable leave for emergency-type situations and unforeseeable leave for previously qualified conditions, the requirements governing the content of an employee's notice do make this distinction.²¹¹ It is illogical to make the distinction between an emergency situation and intermittent leave in regard to content of notice, but not in regard to the timing of notice, especially because these two requirements are often intertwined.

Lastly, the timing provisions fail to articulate a bright-line rule to determine when noncompliance is justified.²¹² Without any bright-line rules to determine if timing was sufficient, the fact finder is given enormous discretion in determining whether an employee's notice was

205. *Norton*, 620 F. App'x 408.

206. Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. at 35,584.

207. *Id.*

208. *Norton*, 620 F. App'x at 411.

209. 29 C.F.R. § 825.303.

210. Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. at 35,584.

211. 29 C.F.R. § 825.303.

212. *Id.*

given as soon as practicable under the facts and circumstances.²¹³ This discretion is especially problematic in jury decisions.²¹⁴ Employers argue that they need advance notice of leave to make staffing accommodations, but juries are frequently unsympathetic to the employers' needs and instead sympathize with the employees who assert that they were sick or had an emergency.²¹⁵ This emotionally guided reasoning directly contradicts the revision's goal of providing employers with advance notice to make staffing accommodations.²¹⁶

Despite the more clearly defined standards for determining the content of an employee's notice, courts still vary in their interpretation of these standards.²¹⁷ Inconsistent jurisprudence leaves employers and employees uncertain as to whether an employee's stated reasons for leave are sufficient to invoke FMLA protection.²¹⁸

B. The Regulations Provide Insufficient Information to Determine What Constitutes Sufficient Information

Although the provisions governing the content of notice distinguish between emergency and intermittent leave and provide more detail than those on timing, there is still uncertainty surrounding the amount and quality of information an employee is required to give to invoke FMLA leave.²¹⁹ The content provisions create a spectrum of ambiguity, evidenced in *Lichtenstein* and *Lanier*, in which employers and employees alike are unsure whether the information given will place the employee on the side of sufficiency, insufficiency, or somewhere in the middle.²²⁰ The deciding factor in both cases hinged on the same facts—whether claiming a parent was in the hospital and that the employee was unable to work was sufficient notice—and the courts reached opposite results.²²¹ Moreover,

213. Interview with Jerry Stovall, Jr., Partner, Breazeale, Sachse & Wilson, L.L.P., in Baton Rouge, La. (Oct. 30, 2015).

214. *Id.*

215. *Id.*

216. *Id.*

217. Compare *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 302 (3d Cir. 2012), with *Lanier v. Univ. of Tex. Sw. Med. Ctr.*, 527 F. App'x 312, 317 (5th Cir. 2013); see *supra* Part II.B.

218. Waterfill, *supra* note 187.

219. Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35,584 (proposed June 28, 2007) (codified at 79 C.F.R. 825 (2016)).

220. See *Lichtenstein*, 691 F.3d at 302; see also *Lanier*, 527 F. App'x at 317.

221. See *Lichtenstein*, 691 F.3d at 305 n.16–17; see also *Lanier*, 527 F. App'x at 317.

the dissenting opinion in *Lichtenstein* agreed with *Lanier*, which recognized that it is not just confusion among the circuits as to the requirements of the content of notice, but also confusion within the circuits themselves.²²²

Courts are not alone in finding it difficult to determine what constitutes sufficient notice. Employers complain that “[m]uch of the frustration they experience in administering FMLA leave stems from the difficulty in spotting FMLA-qualifying absences. Employers are not mind readers and they often refrain from asking employees why they are absent for fear that they may invade an employee’s medical privacy.”²²³ Employers further assert that it is unreasonable to expect employers to train supervisors on the plethora of health conditions and emergencies that *might* qualify for FMLA leave.²²⁴

Despite these complaints by employers, the regulations do not require employees seeking leave for the first time to specifically state in their request from work that their leave potentially qualifies for FMLA protection.²²⁵ However, there are two main justifications for not requiring express invocation of FMLA leave.²²⁶ First, many employees are unaware of the FMLA or unsure if it applies to them.²²⁷ If it is a first-time encounter with an undiagnosed medical condition, employees may not realize their leave could potentially qualify under the FMLA, which makes them vulnerable to termination by failing to relay the proper information.²²⁸ Second, in cases of unexpected emergencies, the employee might be too preoccupied to contemplate exercising such a degree of precision when notifying the employer of leave, as *Lichtenstein* demonstrated.²²⁹

Although both of these arguments present valid concerns, requiring an employee’s notice to include enough information to allow an employer to

222. *Lichtenstein*, 691 F.3d at 305 n.16–17.

223. Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information, 72 Fed. Reg. at 35,584.

224. *Id.* (“Much of the frustration employers experience in administering FMLA leave stems from the difficulty employers have in ‘spotting’ FMLA qualifying absences. . . . It is also naïve to think that employers can effectively train front line supervisors on the myriad of health conditions and personal family emergencies that might qualify for FMLA protection.”) (internal quotations omitted).

225. 29 C.F.R. § 825.302 (2016).

226. Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information, 72 Fed. Reg. at 35,582.

227. *Id.*

228. *Id.*

229. *See Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 867 (8th Cir. 2015).

determine if the leave is covered by the FMLA is important to the employer for purposes of classifying the leave.²³⁰ If employers incorrectly classify the employee's leave, the employee can bring a claim against the employer for interference.²³¹ Thus, there is a heavy burden on the employer at the outset to obtain as much information as possible to ensure compliance under the Act.²³² However, employers frequently refrain from further inquiry when an employee takes medically related leave for several reasons.²³³ One reason employers are skeptical to probe deeper into the circumstances surrounding an employee's medically related leave is that employers fear liability for invading the employee's privacy.²³⁴ Another reason is that if employees report the need for leave to a supervisor, that supervisor may not know the circumstances for which the Act provides protection and thus when leave would need to be classified as FMLA leave versus those that constitute ordinary sick leave.²³⁵ Additionally, the employee is in a better position to know if the leave could qualify as FMLA leave because only the employee knows the medical history of himself or herself and his or her family members.²³⁶ For example, if an employee reports to a supervisor that he needs the day off because of a "headache" and the supervisor mistakenly assumes the request is for ordinary sick leave or is unaware that vestibular migraines could qualify for FMLA protection, the supervisor would not understand the need to "inquire further" to correctly classify the leave as FMLA.²³⁷ However, the employee is in a better position to make the distinction because the employee knows if he has a medical history of vestibular migraines which could qualify as FMLA leave, which would require the employer to be aware of such to correctly classify it.²³⁸ The regulations fail to properly account for the fact that classification can be difficult to immediately

230. 1 EMPLOYMENT COORDINATOR § 12:69 (2015).

231. *Id.*

232. *Nelson, supra* note 3, at 622 ("The regulations state that an employer should make further inquiries to obtain the details needed to grant leave, especially to determine whether such conditions will qualify as 'serious health conditions.' This is nearly impossible if an employer does not know an employee is suffering from such a condition or that the condition has worsened enough to qualify her for FMLA leave.").

233. Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. at 35,584.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

determine in cases where the employee is taking unforeseeable FMLA leave for the first time.²³⁹

C. Compliance with Employer Policies for Form of Notice Causes Uncertainty Regarding FMLA Compliance

In many cases, the timing or content of the employee's notice are both adequate, but the employee fails to follow the employer's policies and gives notice in the wrong form. Employers frequently justify terminations by citing the employee's failure to comply with their internal policies.²⁴⁰ The Preamble to the FMLA regulations notes, "[t]he Department recognizes that call-in procedures 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 . . ." ²⁴¹ As evidenced by the Preamble, an employer's ability to enforce company call-in procedures is important to ensure the employee's notice is given to the proper person to allow the business to make necessary adjustments to continue functioning in the employee's absence.

Since the 2009 revisions, courts are more likely to find an employee's termination justified when the employee fails to call-in at all or blatantly ignores the employer's policy and gives notice to the wrong person, as seen in *Strouder*, because the employer does not have actual knowledge of the employee's notice.²⁴² However, the question of justified termination is more difficult to answer in cases like *Hudson* and *Millea*.

239. See 29 C.F.R. §§ 825.300–301 (2016). Currently, the regulations allow an employer five business days from the time of the employee's initial notice to designate the leave as FMLA-qualified or not. If the employer misclassifies the leave as non-FMLA and later obtains information from the employee that the leave was FMLA-qualified, section 825.301(d) allows for the retroactive designation of FMLA leave if the employer and employee mutually agree, but only if the misclassification did not harm the employee. If it did cause harm to the employee, under subsection (e), the employer may be liable for interference. Thus, if employees initially tell employers vague or incorrect information, the employer has an incentive to inquire more within five days of the initial notice to avoid liability. See Nelson, *supra* note 3, at 622.

240. See *Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 867 (8th Cir. 2015).

241. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,006 (Nov. 17, 2008) (codified at 29 C.F.R. § 825).

242. See *Strouder v. Dana Light Axle Mfg., LLC*, 725 F.3d 608, 609 (6th Cir. 2013).

In *Hudson*, the employee did report to the correct person and the company did have notice, and the violation was a mere technicality—that the notice was delivered via text message rather than a phone call.²⁴³ The Eighth Circuit found that a reasonable jury could find the proffered reason of noncompliance to be pretextual.²⁴⁴ Although the discussion of the text message was limited to showing that pretext was more likely if a text message had previously been acceptable, the opinion left some concluding that the court may refuse to accept such minor deviations from the policy as a legitimate reason for termination if the employer is still put on notice of the employee’s need for leave.²⁴⁵

Similarly, *Millea* appears to be a result-driven decision. The employer did have actual knowledge of Millea’s need for leave, but the notice was provided in a form prohibited by the employer’s policy—through the lead clerk rather than personally reporting to the supervisor.²⁴⁶ To circumvent the statutory language that explicitly allows termination for failing to provide notice to the specific person the employer’s policy designates, the appellate court tried to find a loophole by reasoning that the jury found that Millea was “unable” to give notice directly to his supervisor because his supervisor triggered the attack.²⁴⁷ Therefore, the court held that he was allowed to designate the lead clerk as his spokesperson authorized to give notice to his supervisor.²⁴⁸ This finding, however, ignores the plain language of the regulation that allows employers to enforce this exact kind of policy and expands Congress’s meaning of “unable to do so personally.”²⁴⁹ Moreover, allowing this circumstance to justify noncompliance opens the door for any employee with anxiety, depression, stress disorders, or any related disorder to blatantly ignore employer call-in policies and later claim that his or her employer was a contributing factor in causing an “episode.”

The courts’ reasoning in *Tyson* and dicta in *Millea* regarding unjustified termination when the employer has actual knowledge is flawed under the current statutory framework for two reasons. First, the only prohibition against having employer policies with stricter requirements than the FMLA appears in section 825.302(d). This section is a foreseeable leave provision which provides, “FMLA leave may not be delayed or denied where the employer’s policy requires notice to be given sooner than set forth in

243. *Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 867 (8th Cir. 2015).

244. *Id.*

245. See 1 ANDREW J. RUZICHO ET AL., EMPLOYMENT PRACTICES MANUAL § 6:13 (2015).

246. *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 162 (2d Cir. 2011).

247. *Id.*

248. *Id.*

249. 29 C.F.R. § 825.303(a) (2016).

paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.”²⁵⁰ Paragraph (a) of that section is specifically entitled “Timing of Notice,” and the provision the court relies on speaks only to timing.²⁵¹ Thus, there is no statutory prohibition on requiring the employer’s procedures to be followed—even if the designated persons receive actual knowledge of the FMLA leave. Second, the provisions governing both foreseeable and unforeseeable leave explicitly state that an employee must comply with the employer’s “usual and customary notice and procedural requirements,” and that “an employer may require employees to call a designated number or a specific individual to request leave.”²⁵² Further, the regulations also provide that if the employee fails to give notice as required by the Act and the employer does not waive the employee’s obligations under its internal leave rules, “the employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances,” as long as the actions are not taken in a discriminatory manner.²⁵³

The purpose of the revisions to form of notice was to ensure that employers could correctly manage and classify leave.²⁵⁴ If the employee is reporting the leave to the wrong person or calling the wrong number, it jeopardizes the employer’s receipt of the notice entirely.²⁵⁵ Those same concerns are not present when it is apparent that the employer received

250. *Id.* Paragraph (a) requires employees to provide the employer “at least 30 days advance notice before FMLA leave is to begin if the need for leave is foreseeable” or “[i]f 30 days is not practicable . . . notice must be given as soon as practicable.” Additionally, “[f]or foreseeable leave due to a qualifying exigency notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable.” 29 C.F.R. § 825.302(a). Thus, FMLA leave may not be delayed or denied where, for example, a pregnant employee gives 30 days advance notice before she intends to take FMLA leave, but then unexpectedly goes into labor the day after giving the employer notice. Although the need for leave was foreseeable, the unexpected and earlier onset of labor was not. Therefore, the employer could not terminate her for failing to give notice 30 days before her leave was to begin, provided that she informed the employer of her change in circumstances and more immediate need for leave “as soon as practicable.” *See id.*

251. *Id.* § 825.302(a).

252. *Id.* § 825.303(d).

253. *Id.* § 825.304(e).

254. Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information, 72 Fed. Reg. 35,550, 35,584 (proposed June 28, 2007) (codified at 79 C.F.R. 825).

255. *Id.*

actual notice of the employee's leave request, although the request was not provided in the manner required under the employer's policy.²⁵⁶ However, because the current regulations require compliance, absent unusual circumstances, and allow employers to take action under their policies for noncompliance, the language has been extended to justify terminations in cases where the policy behind it does not.²⁵⁷ Furthermore, some courts have demonstrated an unwillingness to justify an employee's termination for providing notice in the wrong form when an employer has actual knowledge of the notice.²⁵⁸ Therefore, to reach the equitable result, courts are making result-driven decisions, ignoring the statutory language and attempting to find loopholes by expanding the meaning of the terms beyond what Congress intended.²⁵⁹

IV. REVISIONS TO THE REGULATIONS FOR UNFORESEEABLE LEAVE ARE NECESSARY TO MAKE THE OUTCOMES OF FMLA CLAIMS MORE FORESEEABLE

To strike a better balance between the interests of employers and employees, the Federal Regulations should be amended to implement a two-step notice process for unforeseeable leave that would more efficiently balance the needs of employers and employees at each stage of notice. An update to the regulations is also necessary to account for advancing technology that can help to better achieve the goals of the FMLA in the context of notice. A two-step notice procedure that implements modern forms of communication would solve many problems related to the timing, content, and form of notice in cases of unforeseeable leave.

Under the first step, employees are required to give notice as soon as they are aware of their need for FMLA leave. However, the employees are required only to relay that they cannot make their shift. This first step of an employee's notice in cases of unforeseeable leave would serve the purpose of giving employers advance notice of the need for leave. Because the primary objective of this first step is allowing the employer to make necessary staffing arrangements, timely notice is essential while the amount of information and the medium in which it is provided are less important. Employees would be allowed to take advantage of more cursory forms of notice, such as text messaging, that can generally be a more convenient form of communication than a telephone call. Thus, despite enforcing a stricter timing requirement, the employee is given a safe harbor on issues of content and form. As long as

256. *Id.*

257. *Id.*

258. *See, e.g.,* *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 162 (2d Cir. 2011).

259. *Id.*

the employee's initial notice is timely, the employer would not be allowed to take any disciplinary action against the employee for violations of the employer's policy.

Although many argue in cases of unforeseeable leave that employees are often not in an emotional state, or potentially even a physical state, to give advance notice to employers, this argument is contrary to the intent of the Act as it fails to adequately account for employers' interests.²⁶⁰ There will always be situations in which an employee is unable to give notice. For example, if an employee is unconscious then he or she cannot give advance notice. However, absent being unable to give advance notice, the employee will be required to notify the employer as soon as the need for leave is apparent.

Under step two, once it becomes practicable for the employee to give the employer more information in the manner that the employer's policy specifies, the employee will be expected to provide notice under the employer's call-in policy. The purpose of notice at this step is to allow the employer to properly classify the leave, to ensure that the employee and employer are complying with their obligations under the Act, and to make any arrangements that may be necessary to accommodate both parties moving forward. Therefore, the requirements of notice at this stage would be more stringent and allow little room for noncompliance with the employer's policies. Although this solution adds an additional burden on employees, requiring them to give notice twice rather than once, separating notice into two stages will more sensibly align the notice requirements with the objectives of notice. Moreover, the burden on employees is mitigated by the protection provided by the safe harbor that will prevent termination in many cases.

This two-step procedure helps solve employer and employee concerns in several ways. Currently, the employer is left with little recourse when an employee with a chronic condition has an attack and fails to inform the employer of his absence before the start of the shift, claiming the attack prevented him or her from providing advance notice.²⁶¹ This scenario is

260. Interview with Jerry Stovall, Jr., Partner, Breazeale, Sachse & Wilson, L.L.P., in Baton Rouge, La. (Oct. 30, 2015).

261. Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35,550, 35,579 (proposed June 28, 2007) (codified at 79 C.F.R. 825) (citing a comment from the University of Minnesota which provided, "[S]upervisors do not know if the employee will come in to work on any given day. They do not know if the employee will work an entire shift. Employees will simply notify their supervisors, in many cases after the fact, that they have experienced symptoms and cannot come into work, or must leave work early. Without proper notice, a supervisor cannot make plans for

especially problematic in highly specialized fields in which replacements are difficult to coordinate.²⁶² Emphasizing that the first step is to give the employer advance notice to make staffing accommodations while simultaneously relaxing the requirements of content and form, the burden on the employee to provide notice even when the need for leave is unforeseeable is much more manageable. For example, if an employee's mother is rushed to the emergency room, the employee could send a text message to inform the employer without having to step away from the doctors and her mother to make a lengthy phone call. If the employee were required to call the employer and give all of the relevant details at this stage so the employer could determine if the leave was FMLA-qualified, it would be much more burdensome. If employees are able to inform their employers that they will not be able to work their shift sooner, then employers can work on making staffing accommodations sooner, which increases the chances of being able to cover an employee's shift.

Once the condition of the employee's mother has been stabilized and the chaos has lessened, the employee will be expected to provide all of the relevant information surrounding the leave in the form of notice that the employer's policies require.²⁶³ This way, employers do not have to worry

a replacement Nonetheless, the current statutory and regulatory provisions provide employers with few options.”)

262. *Id.* at 35,552 (noting the industries most impacted are “[employers] whose business operations have a highly time-sensitive component, e.g., delivery transportation, transit, telecommunications, health care, assembly-line manufacturing, and public safety sectors”).

263. Stage two of this solution does not implement a definite time limit. Arguably, without a definite timing requirement, the same difficulty employees and employers currently face in knowing if notice was given “as soon as practicable under the facts and circumstances” will still be present. However, setting a time frame within which the second stage of notice will be triggered is impracticable when considering emergency situations and the variety of circumstances that exist that would constitute exceptions to any deadline. One solution to this problem could be to make a distinction in the timing requirements between FMLA leave taken in emergency situations and recurring, intermittent FMLA leave, such that a definite time limit could be feasible for recurring, intermittent FMLA leave but would likely not be for emergency situations. However, there are several instances in which leave is both intermittent and an emergency, such as epilepsy, that would further complicate timing requirements under such a framework. Thus, given the myriad of circumstances that are present in the context of unforeseeable leave, the most logical timing requirement of an employee's notice at stage two remains “as soon as practicable under the facts and circumstances of each case.” Further, having a strict timing requirement for stage one of notice and a more lenient requirement at stage two will likely alleviate many current concerns. This is because employers' complaints that notice was not given as soon as

about misclassifying leave because the employee's original notice was deficient, and employees do not have to worry about being denied FMLA leave because the notice that they provided in the midst of an emergency situation was insufficient.

CONCLUSION

The purpose behind the FMLA is to strike a balance between the demands of work and family life.²⁶⁴ The Act aims to give employees job security during times of medical emergencies without causing undue hardship on employers' business operations.²⁶⁵ Recognizing the fact-sensitive situations that arise in the context of FMLA leave, particularly in cases of unforeseeable leave, the regulations governing employee notice provide vague and uncertain rules.²⁶⁶ The imprecise wording of the regulations, specifically regarding the timing, content, and form of employee notice, has left employees and employers unsure of their obligations under the Act, which in turn leaves employees vulnerable to termination and employers vulnerable to lawsuits.²⁶⁷

To strike a better balance between the interests of employers and employees, the FMLA's notice provisions in the Federal Regulations should be amended to include a two-step notice process, which would alleviate some of the problems employers and employees face in the application of the Act. These revisions would provide employers and employees with more predictability and stability and better align the FMLA's application with its intent.

*Melissa J. Shaffer**

practicable arise mainly because employers are unable to make staffing accommodations. Under the two-step notice procedure, employers will likely make staffing accommodation after receiving stage-one notice, and thus the timing of stage-two notice is less of a concern for employers.

264. 29 C.F.R. § 825.101 (1993).

265. *Id.*

266. Waterfill, *supra* note 187.

267. *Id.*

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