

# Can we terminate a no-call/no-show employee?

**Q. We have an employee who has missed the last several days of work without notice. We also have a policy that says employees who miss three days without notice are deemed to have resigned and are terminated. Are there any legal risks associated with terminating this employee?**

**A.** One risk that leaps to mind is potential discrimination liability if this employee is in a protected class and you have not uniformly applied this policy in the past. Another potential landmine is exposure under the FMLA if this employee is out of work because of sudden and unforeseen illness.

The recent amendments to the FMLA's regulations, however, give some much needed protection to employers who apply policies such as yours. According to the regulations (*Sect. 825.303*): "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."

A recent U.S. Labor Department opinion letter says these rules permit the enforcement of reasonable call-in procedures. It says: "Where an employer's usual and customary notice and procedural requirements for requesting leave are consistent with what is practicable given the particular circumstances of the employee's need for leave, the employer's notice requirements can be enforced."

In your case, you should be free to terminate your AWOL employee under this regulation. If, however, you later learn that the employee could not call in because of unusual circumstances, you may have to retroactively grant FMLA leave for the absences and rescind the termination.