

Using Technology to Detect, Confront, and Prevent Leave Abuse

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Protections under the Family and Medical Leave Act (FMLA) do not extend to an employee who fraudulently obtains FMLA leave.¹ Nor does the FMLA provide an employee with a greater right to reinstatement than they would have had if they had been continuously working.² An employee, therefore, is not shielded from misconduct by virtue of taking FMLA leave. This means an employee on FMLA leave can be terminated for acting dishonestly if the employee's actions would have resulted in termination had the employee been working.

While this can provide employers with some welcome relief, given the FMLA's strong antiretaliation protection, many companies struggle with how to investigate suspected leave fraud and abuse. In fact, employers identify trying to control employee FMLA abuse as a top organizational challenge.³

Many employers are not aware of the tools available to them or how to effectively use them to investigate and confront employees who fraudulently obtain or use FMLA leave. Use of social media and video surveillance, when coupled with what is known as the "honest belief rule," can be effective in investigating and addressing situations in which employees are less than truthful when taking leave.

An FMLA retaliation claim requires discriminatory intent by an employer.⁴ Courts have routinely applied the "honest belief rule" to show a lack of discriminatory intent to defeat an FMLA retaliation claim. The honest belief rule provides that an employer's honest suspicion that an employee was not using the leave for its intended purposes is enough to defeat an FMLA retaliation claim. This is because the employer's honest belief that the employee engaged in misconduct demonstrates that the employer lacked the required discrimi-

natory intent.⁵ The honest belief rule does not even require that the employer's belief be correct; it just requires that the belief be honest.⁶

This is where advancements in technology can be of value to employers. Employees often share a great deal of information through their social media accounts that they may not otherwise reveal in the workplace. In an increasing number of cases, social media postings provide a basis for a suspicion of fraudulent FMLA leave use that ultimately results in an employee's termination.

If an employee is "friended" through social media with members of management or co-workers, the employee's posts can be used as a basis for the honest belief rule.⁷ There are limitations, however, usually related to privacy issues; employers are not entitled to unfettered access to an employee's social media accounts. Many states have laws that protect employees' online privacy by explicitly prohibiting employers from asking for access to an employee's personal social media accounts. When monitoring social media, no individual should access postings unless the person is connected, "friended," "linked," or so on to the person posting or the postings are otherwise publicly available. This also means a manager/supervisor should not direct an employee to access the private social media account of a coworker to view the coworker's social media posts.

There is an increasing body of case law supporting employer use of social media to address suspected leave fraud. For example, in *Lineberry v. Richards*,⁸ while out on approved FMLA leave, Lineberry took a planned, prepaid trip to Mexico. During the vacation, she posted pictures on her Facebook page showing her, among other things, riding a motorcycle and holding bottles of beer. Some of Lineberry's coworkers saw the Facebook posts and complained to her supervisor. When asked about the vacation trip, Lineberry, unaware that the employer had seen the posted pictures, told the employer that her medical condi-

tion limited her mobility and required her to use a wheelchair at the airport. After investigating, the employer terminated Lineberry for dishonesty and fraud in violation of company policy. Lineberry sued the employer, accusing it of violating the FMLA. The court upheld the termination, finding that the employer had an honest belief that Lineberry had misused her FMLA leave.

In *Jaszczyszyn v. Advantage Health Physician Network*,⁹ while on FMLA leave due to a back condition, Jaszczyszyn attended a local heritage festival with friends, one of whom posted pictures of Jaszczyszyn drinking and enjoying the festival with no signs of limitation. Over that same weekend, Jaszczyszyn left her supervisor multiple voicemails indicating that she was in pain and would not be attending work on Monday morning. One of Jaszczyszyn's coworkers, after seeing the Facebook postings, brought the pictures to her supervisor's attention after she felt betrayed by seeing Jaszczyszyn out "partying" on Facebook when she and other coworkers had to cover for Jaszczyszyn's absences. After investigating, Advantage terminated Jaszczyszyn, who later sued, claiming FMLA retaliation. The court upheld the termination, noting that the employer rightfully considered FMLA fraud to be a serious issue, and the basis of the termination was because of its honest belief that Jaszczyszyn was dishonest, not because she exercised a right to FMLA leave.

The honest belief rule has also been successfully used in cases in which employers used private investigators to uncover suspected fraud. In *Scruggs v. Carrier Corp.*,¹⁰ Carrier hired a private investigator to follow approximately 35 employees suspected of abusing company leave. After video surveillance revealed Scruggs did not leave his home while on approved FMLA leave to take his mother to a doctor's appointment, he was terminated for violating a company rule prohibiting falsification of company documents. Scruggs sued Carrier, alleging that his termination violated the FMLA. The Court upheld the termination, reasoning that because an employee has no greater right to reinstatement than if he had been continuously employed, Carrier needed only to show that it refused to reinstate Scruggs based on an honest suspicion that he was abusing his leave.

FMLA fraud continues to challenge employers, as well as employees covering for an employee who is improperly out on leave. Social media and video surveillance, when used with the honest belief rule, provide an effective means for confronting employees who abuse the FMLA's protection. Employers who are not paying attention to employee social media postings may want to consider this strategy, taking into account the proper way to do so.

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References

1. 29 C.F.R. § 825.216(d).
2. 29 C.F.R. § 825.216(a).
3. 2017 DMEC Employer Leave Management Survey White Paper.
4. In order to prevail on an FMLA retaliation claim, a plaintiff must show by a preponderance of the evidence that (1) they were engaged in an FMLA-protected activity; (2) the employer knew that the plaintiff was exercising their rights under the FMLA; (3) after learning of the plaintiff's exercise of FMLA rights, the employer took an adverse employment action; and (4) there was a causal connection between the FMLA-protected activity and the adverse employment action. *Capps v. Mondelez Global, LLC*, 847 F.3d 144 (3d Cir. 2017).
5. See *Scruggs v. Carrier Corp.*, 688 F.3d 821 (7th Cir. 2012); *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672 (7th Cir. 1997).
6. The Sixth Circuit, which includes Kentucky, Michigan, Ohio, and Tennessee, requires an employer demonstrate that the belief is honest but also reasonably based on particularized facts. See *Smith v. Chrysler Corp.*, 155 F.3d 799 (1998).
7. There can be limitations on the uses of information obtained through social media postings for nonleave-related purposes. The scope of this article relates to the use of the honest belief rule in FMLA leave situations. Employers should consult with counsel if using social media for purposes outside the scope of this article.
8. 20 Wage & Hour Cas. 2d (BNA) 359 (E.D. Mich. 2013).
9. 504 Fed. Appx. 440 (6th Cir. 2012).
10. 688 F.3d 821 (7th Cir. 2012) 4820-4246-1305, v. 1.