

Insights, News & Events

# HONESTY IS THE BEST POLICY: AN EMPLOYER'S GUIDE TO COMBATING FMLA FRAUD AND ABUSE

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It is officially summertime. And with warm temperatures and the draw of fun in the sun comes one of the largest challenges for leave and absence managers: Family and Medical Leave Act (FMLA) fraud and abuse. Unfortunately, misuse of FMLA is at its peak this time of year, and when it becomes a chronic problem, it can drive up costs because of lost productivity and the need for hiring replacement workers, while also negatively affecting workplace morale.

It is not unusual for employers to doubt whether an employee is abusing FMLA leave. Fortunately for employers, courts have begun to recognize with increasing frequency an "honest belief" defense in FMLA claims brought by employees who were ultimately terminated after suspicion of leave abuse. While this defense should not be used as an excuse by employers to immediately retaliate against those needing to take FMLA leave—and in fact would rarely serve as a magic bullet if an employer were to misuse the legal standard—it can serve as a valuable tool in a litigation setting.

## HONEST BELIEF DEFENSE, IN A NUTSHELL

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Under the defense, an employer would not be found liable in a FMLA claim if it shows that the reason for an employee's discharge was an honest belief that the employee was misusing FMLA leave—even where that belief was mistaken. Employers relying on the defense need not conclusively prove that the discharged employee actually engaged in abuse. Rather, the employer need only show that it was reasonable in its belief that the employee did so.

Since 2011, a [recent Bloomberg Law analysis](#) revealed 10 published federal appeals court decisions applying the “honest belief” defense in FMLA cases. Six of those cases came out of 6th Circuit Court of Appeals, followed by one each in the 3rd, 7th, 8th, and 11th circuits. Although courts in the 6th Circuit apply the honest belief defense to FMLA retaliation claims, those courts remain split as to the defense's applicability to FMLA interference claim (such as in cases of denial of leave).

## THE DEFENSE IN ACTION

Notably, the honest belief defense works particularly well in cases where the employer has objective evidence of FMLA abuse (rather than a mere hunch) and conducts a thorough investigation. For instance, in the 2012 case of *Seeger v. Cincinnati Bell Tel. Co., LLC*, the 6th Circuit rejected an FMLA retaliation claim brought by a longtime employee against his employer after coworkers witnessed him walking 10 blocks without discomfort and drinking beers at Oktoberfest while he was on FMLA leave recovering from a herniated disc. According to the court, the determinative question was not “whether the employee actually committed fraud, but whether the employer reasonably and honestly believed that he did.” Understandably, the employee's actions were a red flag in this case, and the court ultimately found that the employer made a “reasonably informed and considered decision” before terminating him.

However, the honest belief defense may not work in cases where an employer changes its reasons for terminating someone. This is so even where the employer can demonstrate strong evidence of abuse. For example, in the recent *Jones v. Gulf Coast Health Care of Delaware, LLC* case out of the 11th Circuit, a nursing facility terminated its activities director after discovering pictures on his Facebook page of his three-day vacation in St. Martin, and his two visits to the Busch Gardens theme park in Florida, while on FMLA leave. Despite this clear evidence of FMLA abuse, the nursing facility's shifting reasons for his termination ultimately eroded its honest belief defense.

## 4 IMPORTANT TIPS

The honest belief defense can be a powerful tool for employers in jurisdictions that recognize it. However, establishing this defense is not always straightforward, and an employer will be in a stronger position if it does not have to rely upon it exclusively. With this in mind, here are a few practical tips to effectively detect and curb FMLA fraud and abuse, and to ultimately bolster an honest belief defense when necessary:

- **Detect FMLA Abuse:** Patterns of absences, such as those occurring on Fridays or Mondays (or both), or before and after a holiday, are one of the largest indicators of FMLA abuse. Another suspicious circumstance is where an employee requests FMLA leave on a day where they were unable to get approval for a vacation day or a personal day. And much like the situations in *Seeger* and *Jones*, described above, you may even receive complaints or tips from coworkers who spot an employee on social media or out in public acting in a manner apparently inconsistent with protected leave. Managers and supervisors are the eyes and ears of your organization, which places them in a strong position to spot any potential FMLA abuse.
- **(Thoroughly) Investigate Suspected Abuse:** Again, the honest belief defense will be less successful if it

is supported by a mere hunch or suspicion. However, after detecting suspicious circumstances suggesting FMLA abuse, you should investigate further by interviewing the employee about their actions and whereabouts on the dates in question. Before doing so, you should gather objective evidence indicating abuse, such as publicly available information from social media postings. You may even speak with other coworkers who may have witnessed any apparent abuse. When interviewing an employee in this context, you should consult with counsel to ensure such questions do not include prohibited medical inquiries or interfere with the legitimate taking of FMLA leave. You should also provide the employee an opportunity to explain any apparent abuse before making a decision. In addition, if a coworker provides information relating to suspected abuse, you should investigate further and ensure it is credible and not attributable to an unrelated factor such as personal animosity.

- **Consider Assistance From A Neutral Third Party:** If you have exhausted all other options and still hold an honest belief that FMLA abuse is occurring in your workplace, consider the use of lawful surveillance. In this context, many employers utilize private investigators who can observe and document actions taken by an employee inconsistent with the taking of FMLA leave. Critically, those investigators can provide objective facts you can point to in order to justify an employment decision in the event one is challenged.
- **Use FMLA To Your Advantage To Curb And Deter Abuse:** Once you detect potential FMLA abuse, you can curb it by using FMLA protections to your advantage. Among other steps, you should consider requiring employees to complete a written leave request form for absences and return that form to Human Resources. This small but often underutilized step tends to deter those employees seeking to take leave for an impermissible reason. And when an employee's medical certification appears questionable, you may ask for a second opinion from

another healthcare provider of your choosing. Word of these requests often spreads among employees, which can also help deter others from abusing FMLA leave. Requesting recertification after an employee seeks to extend existing FMLA leave can also have a similar effect. You may also request recertification in conjunction with an employee interview or surveillance.

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