



## Dear HR Knowledge: We suspect our employee is abusing their FMLA leave; what do we do?

Unfortunately, Family and Medical Leave Act (FMLA) abuse happens. When employers do catch it, often the cases go to court and the employer only succeeds if they can demonstrate in court that they documented everything related to the leave, that they conducted a thorough investigation, and were able to prove without doubt that the abuse happened.

### What should an employer do?

Even the most egregious FMLA abuse cases can end in victory for the employee on leave, unless the employer can show clear documentation and proof of the abuse. In a Connecticut case, an employee took FMLA leave claiming she had a bad back and couldn't stand or sit for lengthy periods. After the leave was granted, the employer found photos on Facebook of the employee on leave drinking and dancing at a bar. The employer fired her and, hoping to have her FMLA claims dismissed, brought the case to court. The US District Court for the District of Connecticut refused to dismiss the FMLA claims, finding that, instead of seeking out a second medical opinion that might have held in the investigation, the employer simply relied on its "opinion" that if the employee could dance, she could work.

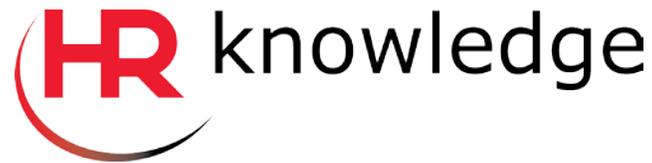
### Successful cases of FMLA fraud

One successful case involved an employee who requested a vacation, which was denied, then afterwards asked for FMLA leave for the same period to care for a "sudden panic attack" at work, which was granted. The company investigated the leave when they discovered the time frame from the two requested leaves was the same, and terminated the employee for FMLA fraud. The employer won that case by having proper policies in place clearly stating the requirements for FMLA leave and by conducting a thorough investigation showing that the employee had requested FMLA to use as vacation time.

As another example, a Chicago case alleged an employee who went on FMLA leave for the birth of their child for 12 weeks instead spent that time working for another agency in the same city. The employee was fired and sued the employer for FMLA retaliation. During his deposition, the employee denied having any agreements with the new employer, but when the previous employer subpoenaed records from the new employer, it found a written contract proving that the employee had worked for the new agency during his FMLA leave.

### What does this mean for employers?

If you suspect employees of abusing their FMLA leave, be sure to immediately document all details, including the employee's request for the leave, any disciplinary action taken, and any investigation that occurs. Ensure that your FMLA and leave policies are up to



date and very clear on usage requirements.

Attorney Brittany Bogaerts, of Nixon Peabody in Chicago noted to the Society of Human Resource Management (SHRM) that “one of the biggest areas of abuse we commonly see are poor-performing employees requesting FMLA leave just before they are about to be terminated.” If you are planning to terminate an employee, be sure to document all verbal and written warnings, as well as any performance issues, in addition to when and why you ultimately decide to terminate the employee. This way you can demonstrate that any termination decisions were made or disciplinary actions were taken *before* requests by the employee for FMLA leave, thereby showing that the termination was unrelated to the leave request.

If you have any questions about your current FMLA policies or how to deal with employees potentially abusing FMLA leave, please [contact us](#).

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