

For Employers, Playing 007 Is Not A Good Idea

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Have you ever questioned whether an employee's medical leave was legitimate? Did you think about spying on them while they were out? There are pros and cons in regard to surveilling employees while on leave. Overall, however, the potential benefit employers may gain from spying on employees on medical leave will likely be outweighed by the potential negative consequences.

The benefit to spying on employees on medical leave is that you may catch an employee who has falsely claimed the need for medical leave for himself or herself or to care for a member of the family. For example, say you hire a private investigator to check on your employees whereabouts while out on FMLA and find that, instead of staying home and recuperating from a broken leg, the employee has traveled to Florida. Before accusing an employee of what amounts to lying, the employer must make sure that the assumption is correct and the employee is faking the need for medical leave. In the above scenario, if the employee's doctor told the employee he or she can travel and the employee has arranged for physical therapy in Florida, near to the support of immediate family who live there, then travel to another state may be legitimate and the employee's actions will not constitute a false claim for medical leave.

An employer who incorrectly accuses an employee of faking the need for medical leave should prepare for a claim by the employee of retaliation based on taking protected leave. This is particularly true if the employer disciplined or terminated the employee because of the belief that the employee falsely claimed the need for medical leave. In that circumstance, the fact that the employer was spying on the employee may give the employee grounds to further claim that the employer possessed animus against the employee for taking protected leave.

Spying on your employees who are on medical leave may also negatively impact the morale of other employees at your workplace. Employees will believe that their employer does not trust them, which will decrease good will between them. In addition, employees may believe that their privacy has been invaded by their employer, particularly because the spying is going on outside the workplace.

If a matter should ever proceed to litigation, employers should be aware that juries do not look favorably on employers who spy on employees, even on the job. For example, in a 2005 case, *Fasold v. Delaware River & Bay Authority*, the United States District Court for the District of New Jersey granted a motion by the employer to bar from evidence surveillance tapes of an employee because the tapes would create bias against the employer (even though it was the employer who taped the employee).

TAKEAWAY: Spying on employees on medical leave has a much greater downside than upside. Leave the spying to the 007s of the world!

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