



LABOR AND EMPLOYMENT LAW

Mark D. Dore

MOUNCE, GREEN, MYERS, SAFI, PAXSON & GALATZAN, P.C.

100 N. Stanton Street
Suite 1000, P.O. Box 1977
El Paso, TX 79950-1977
Phone: 915-532-2000
Fax: 915-541-1548

Q : I have an employee on intermittent FMLA leave who I think is "faking it." Can I fire or discipline him?

A : Only if you have reasonable, clear, and convincing proof. You may take action against an employee of FMLA leave if you have an "honest suspicion" of fraud or misconduct. Scenarios that give rise to an "honest suspicion" may include:

- Patterns of absence (extended weekends)
- Frequency/duration of absences (more frequent/longer than the medical certification estimate)
- "Mall sightings" (by co-workers or supervisors)

Be careful, though. Any discharge based on fraud or abuse of FMLA leave can easily lead to a retaliation or interference with FMLA rights claim. Use caution when considering surveillance or using a private investigator as part of your investigation because doing so can easily appear to be overreaching. All proof must be well-documented and appear clear and convincing to a reviewing agency, jury, or arbitrator before you take action.