

FMLA Insights

Guidance & Solutions for Employers

Will Employers Soon Use GPS to Catch FMLA Abuse?

By Jeff Nowak on July 22, 2011



Earlier this week, the folks at the [Texas Employment Law Update](#) highlighted a [case](#) before the U.S. Supreme Court in which the high court will consider whether law enforcement's placement of a GPS device on a suspect's vehicle without a warrant constitutes an unlawful search in violation of the Fourth Amendment. This case led the authors to [wonder aloud](#) whether an employer might surreptitiously use GPS to track an employee who is suspected of abusing leave under the Family and Medical Leave Act.

Clearly, FMLA abuse can literally turn a workplace on its head. I have worked with many an in-house counsel and HR professional who would do just about anything -- ahem, anything -- to bring these FMLA abusers to justice. But GPS? It's an interesting thought, but presently does not enjoy the support of any case law. The closest the courts have come to address the issue has involved the use of private investigators to follow employees using FMLA and to report their findings to the employer. However, as our friends in Texas point out, data from a Global Positioning System may very well be the next frontier for discovery during litigation. For instance, might we subpoena GPS or "Onstar" data during the discovery period so as to defend our employer clients in the future? If we can legally do so, absolutely!

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In the meantime, employers, let's not get ahead of ourselves. Until the courts provide more guidance on the (legal) use of GPS tracking of FMLA leave, we might consider implementing these options first:

1. **Check in on the employee while he or she is on FMLA leave.** My clients have far greater success combating FMLA abuse when they maintain regular contact with an employee who is out on FMLA leave. You need not approach this practice in a combative kind of manner -- maintain a "check-in" policy for employees out on leave, and apply it in a consistent manner. That said, be mindful of our previous post regarding [Terwilliger v. Howard Memorial Hosp.](#), in which the court found that "weekly calls" to the employee may constitute FMLA interference because it could have the effect of *discouraging* FMLA leave.
2. **Certify and re-certify.** The certification process is your best tool to fight FMLA abuse. Thus, where the pattern or duration of leave changes, obtain re-certification.

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- 3. Surveillance.** Where FMLA abuse is particularly rampant, the use of surveillance can be effective to ensure employees are being honest. Before heading down this path, make sure it is consistent with your personnel policies (courts typically want to know that employees have been on notice of the possibility of surveillance) and any applicable collective bargaining agreements. Where a CBA is involved, surveillance arguably needs to be bargained with the union.
- 4. Enforce call-in procedures** and where the employee does not meet them, follow your disciplinary policies (unless the employee was unable to notify due to unusual circumstances).
- 5. Personal certification.** Some employers have required as part of their usual and customary practice that an employee sign a "person certification" acknowledging that he/she took time off for FMLA or another medical reason. If the employee fails to provide one, or takes leave inconsistent with the stated reason on the personal certification, it can be grounds for discipline.
- 6. Keep training your managers.** Front-line managers often are ill-equipped to identify the possible need for FMLA leave and to interact with the employee to obtain lawful information about their medical condition to which the employer is entitled. Employers reduce the risk of litigation and ultimately save money when they train all managers to properly manage an employee with a medical condition.

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