

Tamara Devitt in HR Dive: High-Tech FMLA, Workers' Comp Investigations Fall in a Legal 'Gray Area'

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Haynes Boone Partner [Tamara Devitt](#) recently talked with *HR Dive* about the legalities of employers using publicly available information—like social media—in workers' compensation or Family and Medical Leave Act (FMLA) fraud investigations.

"There isn't a lot of case law," said attorney Tamara Devitt, a partner at the Orange County and Palo Alto offices of Haynes Boone. "I'm not sure if the courts haven't caught up with technology, or if the statutes haven't. Of late, the privacy focus has been more on the consumer privacy angle than the privacy in employment angle."

Devitt cautioned about using publicly available information that the employee might believe is private, such as that obtained from an employer device or employer Twitter account. "An employer will want to have some policy spelling out the use constraints and giving notice to the employee that 'this information may be available to us,' and get consent from the employee to avoid any privacy concern."

There's an additional angle employers need to think about: "The other thing I'm always concerned about is that there's a risk of getting more than you bargained for when you're doing online sub rosa, or other sub rosa," Devitt said. Discovering that an employee is in a protected category—even if that wasn't information you were seeking—may make it legally harder to discipline or terminate the employee down the line. "That information can be part of an allegation for wrongful termination," noted Devitt. ...

If an employer suspects employee misconduct and wants to use information available through social media to catch the employee in this misconduct, a full investigation would still have to occur, said Devitt.

"Most of the time, we would not recommend just relying on that information alone. Unless there is no possible way the employee could provide an explanation ... employers should go to the employee and get an explanation," she said.

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