

THE LEGALITY OF ONLINE SCREENING

An Interview with Pam Devata



ABOUT PAM DEVATA



Pam Devata is a partner in the Labor and Employment Practice Group of Seyfarth Shaw, LLP, and is one of the nation's leading voices on the Fair Credit Reporting Act (FCRA) and state laws affecting employment background screening.

Ms. Devata's employment litigation practice includes state and federal court cases involving allegations of sex, race, and national origin discrimination and harassment under Title VII of the Civil Rights Act of 1964 and state laws, allegations of retaliation, allegations of disability discrimination and reasonable accommodation issues under the Americans with Disabilities Act (ADA) and state statutes, allegations of age discrimination under the Age Discrimination in Employment Act (ADEA), allegations of discrimination under the Family Medical Leave Act (FMLA) and wage and hour disputes.

In addition to these areas, Ms. Devata has a special emphasis on the FCRA and state laws affecting background screening. She counsels both employers and providers of background information (resellers and consumer reporting agencies) on compliance requirements under the FCRA and related state laws. Ms. Devata is a former member of the Board of Directors of the National Association of Professional Background Screeners.

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THE LEGALITY OF ONLINE SCREENING: AN OVERVIEW

According to the Society for Human Resource Management (SHRM), the cost of making a bad hire can be as much as \$240,000 when including indirect costs such as lowered productivity, lost time to recruiting and training, and impacts on employee morale. As a result, more employers are looking to social media and creating policies around the use or restriction of social media for a variety of workplace decisions.



While many standard background checks examine the negative, highlighting the fact that someone is not a felon, social media checks examine the positive and help uncover who this person “is.” As an employer, you need to use all the data available to you, especially when making difficult employment decisions. But as the scope of accessible information expands, so does your potential for liability. Many employers who are considering using social media for pre-employment background checks have asked us:

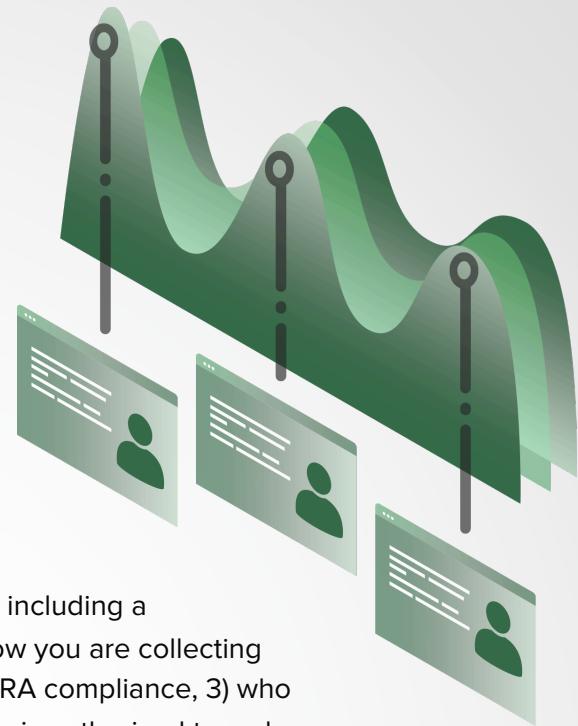
- *“What information is okay to use in a social media background check?”*
- *“Where should I be looking?”*
- *“How can I ensure the information is accurate?”*

To help answer these questions, Fama met with **Pam Devata**, one of the leading employment attorneys in the U.S., to talk about the impact of social media on background checks and how employers can mitigate liability in this rapidly changing area of employment law.

Pam says social media can be an effective tool in employment background screening when used “correctly, efficiently and legally.” To avoid mishaps in the screening process, employers need to follow best practices under employment law, choose vendors that understand FCRA compliance, and understand how to use the information they find on social media.

BEST PRACTICES FOR ONLINE SCREENING

"In general, the same rules apply whether you are using social media or more traditional methods for conducting background checks. The keys are consistency, accurate record keeping, ensuring data accessed is not legally protected information prohibited from being used in employment decisions, and that any decisions are rooted in business necessity."



Be Consistent

Implement consistent hiring practices across the business, including a thorough background screening process that lays out 1) how you are collecting and documenting information, 2) how you are ensuring FCRA compliance, 3) who has access to the information you are gathering and 4) who is authorized to make decisions on such information.

Ensure Accurate Record Keeping

All pre-employment decisions should be well-documented. This includes tracking compliance with FCRA disclosure requirements and detailing the rationale behind any employment decisions. To defend against a claim you will need to prove that the decision was job-related. Be very specific. For example, don't allow broad statements like "the candidate had poor judgment." Rather, ensure your reasons are rooted in business necessity.

Hire Trained Professionals

Generally speaking, Human Resources professionals are trained in employment law and are often best suited to making employment-related decisions. If your hiring managers are involved, make sure they are adequately trained. Also, having a limited scope of access and prohibiting the sharing of information in certain instances is a good practice. Your hiring managers don't need access to all of the information you are finding on the web.

WHAT YOUR VENDOR SHOULD KNOW

“One of the benefits of using a vendor is to help employers from themselves.”

While not every employee will have a firm grasp on the ever-changing laws around the FCRA and EEOC, your vendor should. Any vendor you choose must thoroughly understand the laws and implications of the FCRA, and stay current on trends and regulation changes. This knowledge can help prevent lawsuits in the rare case that an employee inadvertently or unknowingly asks a vendor to surface a protected class of information.



Your vendor should understand the scope of employment law to ensure that the information being accessed and reported is job-related and not protected class information. For example, employers do not want to know information related to a person's disability, gender or sexual orientation. A trusted vendor who is FCRA-compliant can separate your company from data you don't want to use in making employment decisions.

Additionally, your vendor should be able to protect your business by disallowing the surfacing of protected classes of information and ensuring accurate identity verification (also known as entity resolution) at a technological level. This is even more important if your business is hiring at scale. A vendor who utilizes social media should align itself around the same standards for accuracy and false positives as other consumer reporting agencies who are pulling more traditional consumer reports (e.g. criminal, credit, motor vehicle, etc).

In addition to having the right tools, your vendor should be able to guide you through the landscape of notification requirements in the event of an adverse action. These steps include but are not limited to communicating with the candidate and providing details on the information used in the employment decision.

Pam says that one of the benefits of using a third-party screening vendor is to help employers from themselves. However, in the event that a claim is filed, you want to be able to show that your vendor's practices, as well as your company's, are fully compliant. The right vendor will be flexible enough to allow for these policies to be adhered to on a company-by-company basis.

HOW TO USE ONLINE INFORMATION IN HIRING

“Employers need to be cautious about what information they are accessing and how they are utilizing it. At the end of the day, the information must be specific and job-related.”

If you are performing social screens yourself and find information that is completely irrelevant and illegal to use in employment decisions, such as race, religion, sexual orientation or political affiliation, Pam says that it's hard to “unring the bell” and prove that you didn't use that information in an employment decision. This is because the U.S. Equal Employment Opportunity Commission (EEOC) assumes that if you accessed it, you used it.



Pam says that employers need to be cautious about what information they are accessing and how they are utilizing it. At the end of the day, the key is to be able to prove that the information you surface and the decisions you make are job-related. Here are a couple of real-life scenarios:

1. Suppose a candidate is applying for a job in which they would encounter, interact with, and serve a racially diverse audience. On their social media, this candidate has numerous inflammatory and bigoted posts about minority groups. This type of data, if publicly available, may be used towards an adverse action in an employment decision.
2. Consider the case of a candidate applying for a pharmaceutical sales representative position who openly discusses her illegal drug activities on various social media platforms. In this case, an employer could determine that providing this candidate access to drugs may present a problem, thus resulting in an adverse action.
3. A well-known LGBT cable channel decides not to hire a candidate for an Assistant General Counsel role after discovering that the candidate was the author of an anti-gay blog that he actively promoted on various social media platforms. Using this information, they determine that the candidate will not be able to effectively represent their channel's mission and values.

In all of these situations, the information found online can be reasonably connected to an adverse employment action (i.e. the decision not to hire the candidate) because what was posted is directly related to the candidate's ability to effectively perform the requirements of the job.

CONCLUSION

Social media can and should provide a good deal of job-related information to assist employers in making hiring decisions. Still, Pam says, employers need to be cautious. By following some practical guidance, you can avoid unlawful and unintentional mistakes:

- Understand employment law and the Fair Credit Reporting Act (FCRA)
- Be purposeful and conscious of what data you or your vendor are accessing
- Know how to properly and effectively use that data
- Choose your vendor wisely!

About Fama

Fama is an AI-based software solution that identifies problematic behavior among potential hires and current employees by analyzing publicly available online information. Historically, there hasn't been a viable solution for companies that want to proactively address people risk management, prevent hostile workplaces and protect brand equity. Fama helps highlight toxic behaviors that draw down on innovation in the workplace, and surfaces threats that are often hidden in reams of publicly available data. Enterprise customers count on Fama to help them intervene on problematic behaviors before they become a part of their culture, or worse yet, a news headline or incident.

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