JPI WORKING for you
Fighting for Workers' Rights
Summer 2016

The Use of **SOCIAL MEDIA POSTINGS** as Evidence In Litigation

When our office is retained to represent individuals in personal injury litigation or claims for workers' compensation benefits, it is often months after the injury occurred. During the initial consultation, clients are surprised when we inquire as to whether they have a Facebook account or utilize any social media networking sites.

The use of social media as evidence in litigation is staggering. Some experts have estimated Facebook postings are used as evidence in as many as 60% of all divorce cases. Personal injury litigation is a close second, followed by employment cases, which include workers' compensation litigation, as well as employment discrimination and wrongful discharge. Despite these alarming statistics 25% of all Facebook users have NO privacy settings.

It is not unusual to find that damaging evidence was posted before our office was retained. When a discovery request is received from the defense attorney, we can file objections arguing the request is beyond the scope of allowable discovery. However, it is impossible to predict how a Court will rule on such issues. Based upon Court decisions to date, it is abundantly clear any postings on the public portion will be admissible.

When our clients advise us they participate in social media networking sites, we provide the following advice:

- Stop posting anything on this site about the accident, or your activities after the accident.
- Do not allow anyone to "friend" you unless you absolutely know that person.
- Do not post photos or videos of yourself, or allow others to "tag" you.
- Do not send emails about your case to anyone except our office.
- Do not write anything about the person who caused the accident.
- Do not participate in blogs, chat rooms or message boards.
- Immediately make your site private.

Please note that the above advice DID NOT include "delete your account or any damaging posts or photos." This is for a very simple reason – IF YOU DO, YOU WILL BE IN MORE TROUBLE. Such conduct is considered "spoliation of evidence," and you can be subjected to fines, and a jury will be given evidentiary instructions that will

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Best Lawyers® BEST LAW FIRMS U.S.News & WORLD REPORT 2016

JPI Once Again Named to the "BEST LAW FIRMS" List by *U.S. News & World Report*

Jubelirer, Pass & Intrieri has been named to the 2016 edition of the *U.S. News & World Report* – Best Lawyers® "Best Law Firms." Our firm received recognition for professional excellence in the practice areas of Workers' Compensation Law – Claimant, Labor Law – Union, Litigation – Labor and Employment, and Employment Law – Individuals. Rankings are compiled annually through client and attorney evaluations, peer review and information provided by law firms. To be eligible for a practice area, law firms must have at least one attorney included in Best Lawyers in that same area.

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Labor and Employment Law

CASE LAW UPDATE

On December 24, 2015, the NLRB issued a decision in *Whole Foods Market, Inc. and the UFCW,* 363 NLRB No. 87 addressing the employee's use of social media and recording activities by photos or sound devices in the workplace. Whole Foods had the following policy:

> *"It is a violation of Whole Foods Market policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership. The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialog especially when sensitive or componential matters are being discussed."*

In finding that Whole Food's policy violated the law, the Labor Board held:

> *"Photography and audio or video recordings in the workplace, as well as the posting of photographs and recordings on social media, are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. Such protective conduct may include, for example, recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms, conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment related actions."*

While the Labor Board finds this activity protected, you must keep in mind that voice recordings may be in violation of Pennsylvania and federal wiretap laws if the conversation being recorded is between two individuals and the other individual believes the conversation is just between the two of you; recordings where everyone is gathered around and there is no expectation of privacy are permitted. Also, phone conversations in which the two individuals expect what is said to be private may not be recorded unless mutually agreed to by the parties.

This type of issue comes up from time to time and the NLRB has made it very clear that recordings, be they video or audio, which are made in the production area, or during the operation of a facility are permitted unless the facility has some secret processes or there is a significant overriding employer interest. An example would be the U.S. Postal system where employees cannot photograph mailing addresses and other protected confidential information.

Another Decision which has important labor implications is *Alan Ritchey, Inc.,* 359 NLRB No. 40 (2012). This case provides an excellent explanation of what an employer cannot do once the Union is certified but before a collective bargaining agreement is reached. The significant impact of this ruling is that if an employer has an existing policy in which it has discretion when imposing discipline i.e. whether it should be a warning, suspension, discharge or nothing at all, it must advise the Union that it intends to impose discipline and bargain with the Union over that discipline even if there is no collective bargaining agreement in place. If the employer fails to do so, it will be considered a

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The Use of **SOCIAL MEDIA POSTINGS** as Evidence In Litigation

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seriously compromise your chance of success. In order to remove potentially offending postings, the entire website must first be downloaded to a thumb drive, or better yet, have a third party professionally download the site to avoid any challenge that portions were omitted. By the time you come into our office, it is a safe assumption that the involved insurance company has already viewed your public domain. Although a "private" setting on your account is good, don't assume your private profile, photos and videos are safe and are only being viewed by your friends. Investigators may view your page through a "friend's" site or by posing as a "friend." Therefore, even if your social media account is set to "private", don't post photos depicting your activities after the accident, the parties involved, or anything you don't want the world to see.

In instances where damaging evidence has been posted in the public domain, the Courts uniformly hold there is no expectation of privacy. In addition, if damaging evidence is available in the public domain, a court will be more likely to compel the injured party to turn over their username and password, thereby giving the defense complete access to your account. Privacy settings will not protect you from a Court Order.

Everyone is aware of the adage about a picture being worth a thousand words. This is certainly true in social media, and photographs and comments from social media networking sites that are inconsistent with an individual's claimed injuries or disability have ruined many meritorious claims. The purpose of this article is to educate and forewarn potential clients to be extremely careful with all social media postings if you have been involved in any accident that could give rise to litigation.

For more, go to **jpilaw.com/about-jpi/practice-overview.html**

The **FAMILY** and **MEDICAL LEAVE ACT**

The Substitution of Paid Leave for Unpaid FMLA.
The problem when our employer double dips our contractual benefits!

General Rule:

The FMLA guarantees qualifying employees up to 12 weeks of unpaid medical leave each year. Even though FMLA leave is unpaid, "employees may elect, or an employer may require, the employee to substitute" accrued paid leave for the employee's FMLA leave. 29 C.F.R. § 825.207(a). Accrued paid leave includes benefits such as vacation leave, personal leave and sick leave. Simply put, the law provides employees the option to take their accrued paid leave concurrently with their FMLA leave in order to mitigate their wage loss. If an employee elects not to substitute accrued paid leave, however, the employer has the right to require such substitution. Where either the employee or the employer elects to substitute accrued paid leave, the employee will be entitled to FMLA protection during the period in which paid leave is substituted. In this instance, the accrued paid leave and the unpaid FMLA run concurrently.

Circumstances where a CBA Governs the Bargaining Relationship

Importantly, the FLMA specifically provides that nothing in the Act "shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment [19] benefit program or plan that provides greater family or medical leave rights than the rights established under this Act. . . ." 29 U.S.C. § 2652(a). See *Bhd. of Maint. of Way Emples. v. CSX Transp., Inc*., 478 F.3d 814, 817 (7th Cir. 2007) (provisions in the FMLA do not allow employers to violate labor agreements under the Railway Labor Act). In *CSX Transp., Inc*, the Seventh Circuit held that a "reasonable conclusion is that, while substitution is allowed, the carriers cannot require substitution without complying with procedures set out in the RLA. Using those procedures, the carriers can bargain for substitution provisions." In short, an Employer must bargain any such change with the Union before implementing the same. A similar decision was issued under the NLRA in *Verizon North, Inc. and International Brotherhood of Electrical Workers, Local 1637,* 352 N.L.R.B. 1022. In *Verizon,* the parties applied negotiated contractual language to permit employees to save their FML time when they chose instead to use paid leave, and the employer was not privileged to unilaterally determine that it no longer had to abide by this practice because FMLA permitted it to do otherwise. The Board concluded that the Employer in *Verizon* violated the Act when, without first affording the Union notice and an opportunity to bargain, it began charging employees FML leave time when they opted to use paid vacation or float day leave.

What does this mean?

Any time your employer forces you to use your accrued paid benefits earned under your CBA concurrently with your unpaid FMLA, object by challenging such action as a violation of your CBA and as a unilateral change in the terms and conditions of employment.

WORKERS' COMPENSATION Update

We have recently updated our Pennsylvania Workers' Compensation Handbook. Please contact us for a free copy.

Reporting Injuries:

Unless your employer has knowledge of your injury within 21 days of the injury, no compensation benefits are due until notice is given. Notice must be given no later than 120 days after the injury for compensation to be allowed.

Your employer is required to immediately report all injuries to its insurer or, if self-insured, the individual responsible for management of its workers' compensation program.

Employee Compensation Benefits:

Injured employees are entitled to employer-paid medical treatment and, if cumulative periods of disability exceed 7 days, wage loss benefits. Wage loss benefits must commence within 21 days of your employer's knowledge or notice of the injury resulting in disability, unless the claim is denied within that time period. If your claim is denied, you have 3 years from the date of your injury to file a claim with the Bureau of Workers' Compensation.

Workers' compensation wage loss benefits can be reduced by wages received through other employment or self-employment. Wage loss benefits for injuries occurring after August 31, 1993, can be reduced by unemployment compensation benefits received. Wage loss benefits for injuries sustained after June 24, 1996, can be reduced by 50 percent of "old age" Social Security benefits received, as well as employer-paid severance and pension plan benefits.

Bureau of Workers' Compensation Contacts:

Bureau of WC..... (717) 783-5421
Helpline..... (800) 482-2383

Reference Materials:

The WC Act is available in soft form on the internet at www.dli.state.pa.us and in hard copy from the State Bookstore of PA, Commonwealth Keystone Building, Plaza Level, 400 North Street, Harrisburg, PA 17120.

Contact us for a copy of our Workers' Compensation Handbook.

Labor and Employment Law: **CASE LAW UPDATE**

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unilateral change in the terms and conditions of employment. Essentially, the National Labor Relations Board found that discretionary discipline in the context of a recently certified Union is a mandatory subject of bargaining. Unless an employer's policy is crystal clear that there is no discretion in its disciplinary system, it must, before issuing discipline, provide the Union with notice and an opportunity to bargain.

The NLRB's decision in *Alan Ritchey* became "non-binding" as a result of the recent Supreme Court's decision in *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014). This notwithstanding, the Alan Ritchey holding is alive and well with the Board and the General Counsel's office. In a recently released Advice Memorandum, the NLRB's General Counsel's office has requested that cases involving this issue be submitted to the Division of Advice pursuant to General Counsel Opinion of 14-01 which states:

> *"Case involving the following novel issues arising from the application of the Board's Decision in Alan Ritchey 359 NLRB No. 40 (2012) must go to advice (1) whether an employer has demonstrated "exigent circumstances" that permitted unilateral discipline, (2) what is the appropriate remedy for a failure to engage in pre-discipline bargaining, and (3) what suffices for purpose of good faith bargaining in the circumstances."*

According to the Advice Memorandum, the NLRB General Counsel's office has taken the position that the decision in the *Ritchey* case was soundly reasoned and that the Board should adopt the *Alan Ritchey* rationale as its own. Consequently, in the event the Union wins an election but has not yet reached an agreement with the employer and the employer disciplines an employee, the Union should file an NLRB Charge claiming a violation of Section 8(a)(5), i.e. refusal to bargain with the Union over a mandatory subject of bargaining.

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