

JPI

WORKING

for you

Fighting for Workers' Rights

Fall 2018



ELECTIONS HAVE CONSEQUENCES:

The NLRB is Coming After Unions with "Trumped Up" Breach of the Duty of Fair Representation Cases

On September 14, 2018, the NLRB General Counsel published a problematic memorandum directing the NLRB regional offices to aggressively pursue duty of fair representation cases against Unions in the private sector.

Under the National Labor Relations Act, a Union breaches its duty of fair representation to its members and can incur substantial liability if the Union engages in conduct which is arbitrary, discriminatory, or in bad faith. However, under longstanding legal precedent, a Union's mere negligence in processing a grievance does not constitute arbitrary conduct substantiating a DFR charge. As such, Unions can and have offered mere negligence as a defense when faced with a DFR charge.

Under the guise of "protecting" workers, the General Counsel directed regional NLRB offices to demand more proof from Unions when defending a DFR charge based on mere negligence, such as losing track of a certain grievance. More specifically, Unions will now be required to demonstrate established, reasonable procedures or systems to track

grievances or the negligence defense will fail. In addition, the General Counsel commented that a failure to communicate decisions related to a grievance or respond to inquiries for information from a grievant could also be more than mere negligence and subject the Union to DFR liability. As a result, Unions should maintain communication with members during the processing of a grievance and keep documentation of such communications in grievance files.

The GC's memorandum indicates a clear shift from how DFR charges have been pursued in the past and effectively announces the Board's intention to aggressively pursue DFR cases against Unions. Unions should be familiar with these new enforcement policies and should diligently follow them in order to avoid the potential liability of a DFR charge. If you have any questions about these new requirements or would like assistance in drafting a policy for your Union regarding the tracking of grievances and communications with grievants during the processing of grievances, please contact our office.



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For more than 75 years, the attorneys of Jubelirer, Pass & Intrieri have served as trusted allies for those we represent.

- Labor and Employment Law
- Workers' Compensation
- Personal Injury
- Social Security Disability
- Estate Planning and Administration
- Driver's License and DUI Issues
- Civil Litigation

Jubelirer, Pass & Intrieri has served as legal counsel for more than 80 local and national labor organizations in various industries in both the public and private sectors. The lawyers at JPI have represented working people and their families in a variety of legal proceedings.

JPI has a well-established track record protecting and enforcing workers' rights. Our attorneys are honored to have been named among Pennsylvania Super Lawyers, Pittsburgh's Top-Rated Lawyers, and Best Lawyers in America.

JPI has been designated as a Top-Tier Law Firm by *U.S. News & World Report*.

Let us serve you and your family.





INSURANCE FRAUD?

STATE FARM PAYS \$250 MILLION, AVOIDS TRIAL OVER ALLEGATIONS IT TRIED TO RIG THE ILLINOIS JUSTICE SYSTEM

State Farm Mutual Automobile Insurance Company, the largest auto insurer in the United States, agreed to pay \$250 million to settle a lawsuit over substandard vehicle repairs and racketeering. The nationwide class action was filed in Illinois over 20 years ago, but a \$1 billion jury verdict against the company was thrown out by the Illinois Supreme Court in 2005. What revived the suit was the undue influence State Farm exerted over that decision by secretly funding the election campaign of Justice Karmeier.

Lloyd A. Karmeier was elected to the Illinois high court in 2004, and now serves as Chief Justice. He joined while the rest of the Court was deadlocked over *Avery v. State Farm*, and the lawsuit's proponents contended his vote proved decisive in State Farm's favor. According to the testimony of a forensic accountant, State Farm funneled over \$3.5 million to Justice Karmeier's campaign.

Plaintiffs alleged that State Farm laundered the money through front groups like the Illinois Civil Justice League, which had former State Farm CEO, Edward B. Rust, Jr., and current State Farm lobbyist, William G. Shepard, on its Executive Committee.

Records confirmed the close contact between State Farm and the Illinois Civil Justice League, which exchanged a total of 244 phone calls during the campaign. The Illinois Civil Justice League handpicked Karmeier to run for an open seat on the Court, and then raised the money to bankroll his campaign. To keep from having Justice Karmeier recused from the Avery case, State Farm emphatically denied it had anything to do with the Justice's election. However, a federal judge found the allegation that State Farm engaged in racketeering to influence the Court's decision was credible.

"Here, the court finds that plaintiffs have advanced evidence in support of its allegations to establish causation," U.S. District Judge David R. Herndon ruled. "A reasonable jury could find that had State Farm's involvement been revealed, Justice Karmeier's impartiality could have been reasonably questioned and he could not have participated in the Avery decision and plaintiffs would not have suffered the injury or the damages. In addition, a reasonable jury could find that defendants' alleged fraudulent conduct tainted the Avery proceedings/decision."

Rather than continue the proceedings by having a jury sort out the facts, State Farm agreed to settle without admitting wrongdoing. The company will pay \$250 million to those customers who had their cars repaired with non-OEM parts between 1987 and 1998. With news stories like this, it's no wonder State Farm recently abandoned its "good neighbor" sales pitch.

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

NEGOTIATING SEVERANCE AGREEMENTS with FORMER EMPLOYERS

Although union employees normally have protection against termination from employment without “just cause”, employees who are not represented by a union have little protection against termination. For non-union employees, there is often little that can be done to challenge a termination unless it can be shown in court that the employer engaged in unlawful discrimination. However, it can take years to successfully litigate a discrimination case and the nature of such cases makes them difficult to prove.

As such, when a non-union employee is terminated from employment, it often makes sense to try to negotiate a severance agreement rather than engaging in litigation. In a severance agreement, the former employer agrees to pay the former employee a payment in exchange for a waiver of any legal claims that could be brought against the former employer. This payment provides the former employee with a financial cushion that affords him/her time to find other employment. Although the monetary payment is important, there are other important parts of a severance agreement.

In any situation where an employee is terminated, unemployment compensation benefits are an issue. In some severance agreements, the employer will agree not to



contest claims for unemployment benefits. Although the employer cannot guarantee that unemployment compensation benefits will be granted, an employer’s agreement not to contest claims for unemployment substantially increases the likelihood that unemployment benefits will be granted. Furthermore, a claimant may receive a payment of up to \$20,280 in a severance agreement without any impact whatsoever on his/her eligibility for unemployment compensation benefits.

Employers may also agree to provide the former employee with a neutral employment reference. In a neutral employment reference,

the former employer will only confirm the former employee’s position, dates of employment, and rate of compensation. Neutral employment references are helpful because they protect the ability to find other employment.

Our firm regularly represents individuals in connection with the negotiation of severance agreements. Often, we are able to provide representation in severance agreement negotiations on a contingency basis. In a contingency arrangement, there is no cost to you unless we are able to obtain a severance payment from your former employer.

WHAT YOU NEED TO KNOW ABOUT A LIVING WILL IN PENNSYLVANIA

You have the right to decide the type of healthcare you want.

Should you become unable to understand, make or communicate decisions about medical care, your wishes for medical treatment are most likely to be followed if you express those wishes in advance by:

- 1 Naming a healthcare agent to decide treatment for you; and
- 2 Giving healthcare treatment instructions to your healthcare agent or healthcare provider.

An Advance Healthcare Directive is a written set of instructions expressing your wishes for medical treatment. It may contain a Healthcare Power of Attorney, where you name a person called a “Healthcare Agent” to decide treatment for you, and a Living Will where you tell your healthcare agent and healthcare providers your choices regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment and other specific directions.

You may limit your healthcare agent’s involvement in deciding your medical treatment so that your healthcare agent will speak for you only when you are unable to speak for yourself. A Living Will cannot be followed unless your



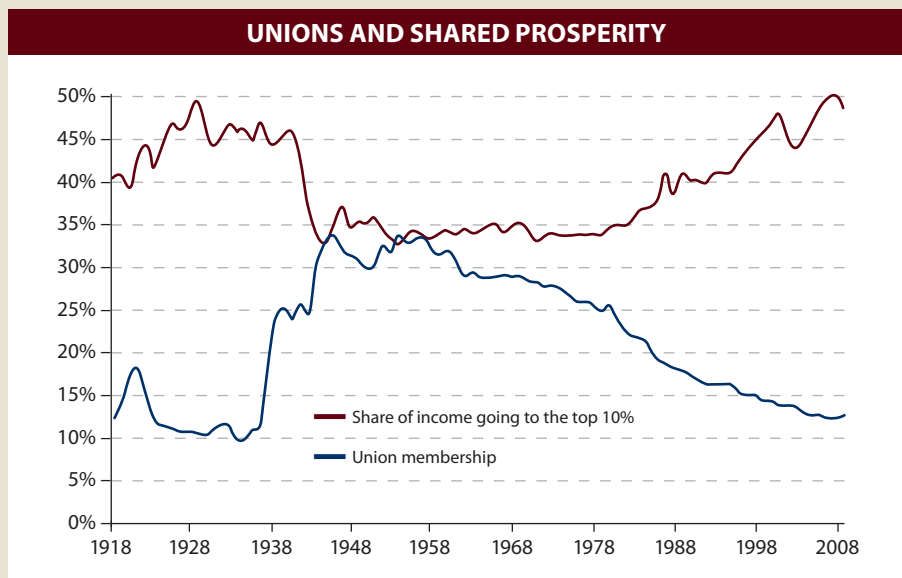
attending physician determines you lack the ability to understand, make or communicate healthcare decisions for yourself, and you are either permanently unconscious or you have

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DID YOU KNOW?

Did you know the level of inequality – which fell during the New Deal but has risen dramatically since the late 1970s – corresponds to the rise and fall of unionization in the United States?

The graph at right juxtaposes the historical trajectory of union membership and the income shared by the richest 10% of Americans. It finds that as union membership has fallen to around 1920s levels, inequality has worsened.



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WHAT YOU NEED TO KNOW ABOUT A LIVING WILL IN PENNSYLVANIA

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an end stage medical condition, which is a condition which will result in death despite the introduction or continuation of medical treatment. You, not your healthcare agent, remain responsible for the cost of your medical care.

Your healthcare agent may be a family member or a close friend whom you trust to make serious decisions. The person you name as your healthcare agent should clearly understand your wishes and be willing to accept the responsibility of making healthcare decisions for you. You can appoint a second person as your alternate agent. The alternate will step in if the first person you

name as a healthcare agent is unable, unwilling or unavailable to act for you.

You should give a copy of your Advance Healthcare Directive to your healthcare agent, your physicians, family members and others whom you expect would likely attend to your needs if you become unable to understand, make or communicate decisions about medical care. It is important in selecting a healthcare agent that you choose a person you trust who is likely to be available in a medical situation where you cannot make decisions for yourself. You should inform that person that you have appointed him or her as your healthcare agent

and discuss your beliefs and values with him or her so that your healthcare agent will understand your healthcare objectives.

Remember, if you do not write down your wishes about your healthcare in advance, and you later become unable to understand, make or communicate these decisions, those wishes may not be honored because they remain unknown to others.

Please contact us to have a Living Will drafted for you. During our consultation, we can also discuss your other estate planning needs.