



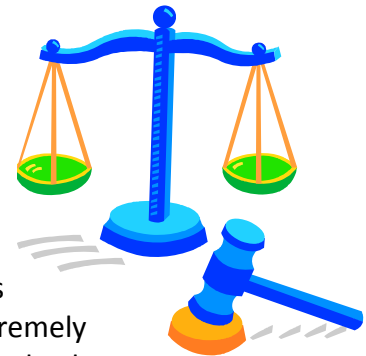
KOPKA PINKUS DOLIN & EADS, LLC

WORKER'S COMPENSATION FRAUD: *A Series of Articles on Why We Should Care, Tips to Prevent it and New Ways of Investigating it with the use of Social Media and the Internet*

WORKER'S COMPENSATION FRAUD PART III: PRIVACY AND THE INTERNET

In this point in our series of articles, we have learned about fraud, why we need to care about it, the types of fraud and some tips to prevent and detect it. In today's world, we also need to possess the knowledge on how to investigate it.

First off, let us point out that ad hoc investigation tools do not replace the thorough work-up done by the professionals. In our state, there are many reputable, results-orientated investigative companies. These companies are still a necessity in the claims handling world on certain types of cases. The work done is reliable, easily authenticated and instrumental to investigating a questionable claim or claimant. The old adage is that a picture speaks a 1,000 words and surveillance can be extremely useful and persuasive. Also, background searches and activities checks oftentimes provide a wealth of information that can lead to discoverable information relevant to the case. Some tips to get the most out of your investigation services of choice is to provide them with as much information at the front end as possible. Not only an accurate physical description, name, telephone numbers, et cetera, but also any information that is common knowledge regarding marital/family status, right or left hand dominance, lifestyle habits, and routine. Let the professional know if the employee in question participates in a particular sports league or recreational activity. Additionally, provide information concerning scars, tattoos, piercings, mobility restrictions, and routinely updated alleged injuries. If videos are taken in the workplace, an investigator can often help an employer or claims specialist obtain the relevant footage from the employer's security company. Electronic tracking systems or GPS systems on company vehicles produce information that the skilled investigator can use to create a timeline of activities.



With the above stated, many tools exist on an employers' or claims specialists' desktop to assist with the claims investigation process. A simple search of someone's name can often produce some interesting information with the use of a few keystrokes. Plus, we are now living a world where many individuals subscribe to the mantra "Look at me! Look at me!" For some, the importance of privacy has become very low on the priority list. What we can do is obtain very relevant leads or information to our claims that are rather suspect. What we cannot do is entrap an individual or invade their privacy.

Privacy and the Internet is a hotly debated topic everyday in our country. What does the federal law say regarding privacy and the Internet? The Stored Communications Act 18 U.S.C. Section 2701 makes it a criminal offense to, without authorization, intentionally access a facility wherein electronic service information is provided, or intentionally exceed an authorization accessing that facility to obtain electronic communication while in its storage. In a nutshell, the only communications that the SCA protects are those communications wherein the claimant has a reasonable expectation of privacy. Meaning, if the party in question puts information on a social media site it may very well be deemed public and no protection is afforded under the SCA.

What is Indiana saying? The answer is, stay tuned. Other states are developing laws on this issue and eventually, Indiana will most likely follow suit.

What are the courts saying? There definitely is a current trend that private is not truly private and locked is not truly locked. In 2010, the Southern District of Indiana took up the issue of whether information posted on an employee's social media site could be deemed discoverable. *EEOC v. Simply Storage Management, LLC* 270 F.R.D. 430 (S.D. Ind. 2010). In this case, the court found that the employee's Facebook and MySpace account, although marked as private or locked on the account were discoverable. In reaching its decision, the court noted that because the injuries at question involved emotional distress, it was reasonable to expect that the Facebook and MySpace account would contain information relevant to the injuries claimed.

This trend and decision is not to say that fishing expeditions are tolerated by the courts. The information sought must relate to the relevance of the injuries in question. Thus, updated statuses on such social media sites are extremely relevant in the worker's compensation world. Videos or pictures can show activities that can discredit the alleged injuries in a suspect case. Updated statuses on such social media sites can be self-incriminating admissions.

It is at this point where, like at the end of every giveaway commercial on television, the legal disclaimer comes into relevance. Err on the side of caution when proceeding in the cyberworld. Although some information from social media sites can be relevant, not all information is. Information needs also to be true, accurate and

authenticated. Entrapment is never a legal or ethical option. For example, making up a fake Facebook name and “friending” the claimant to gain access to their world oversteps the bounds. However, stay tuned because there are many efficient and ethical ways to obtain useful, relevant and discoverable information through the Internet and social media sites.

