

Social Media: Significant Tool in Fighting Workers' Comp Fraud

District attorneys and special investigative units (SIU) are turning to social media sites more and more to ferret out possible claimant fraud. Facebook, Twitter, MySpace, and even YouTube, as well as numerous other sites that have popped up, have become treasure troves of information, especially for incriminating evidence of injured workers suspected of lying about what they can and cannot do. But experts warn of legal issues to navigate in accessing and obtaining information.

Industry sources and district attorneys say that they're getting "a ton of stuff" from wall postings, photos and videos from social media sites, where employees say their injuries are such that they can't do certain physical things. In one instance, a warehouse worker said he was too injured to return to work, yet he bowled 300, according to his Facebook page. "Perfect game, stupid post," quipped a blog on the subject.

"People love to show off how cool they are."

—deputy district attorney

"People love to show off how cool they are," says one supervising deputy district attorney. He says that if someone under observation posts that he is going to be at an athletic or outdoor event, then the DA might send someone to observe the event.

"There was one instance of an individual who says he was too injured to work, yet he mounts a video camera to the handlebars of his BMX bike and participates in a race and posts it," he says. "It completely conflicts with [the physical limitations]."

Investigators and lawyers say hundreds of social media sites have sprung up over the past few years, many of which don't have the exposure of Facebook or MySpace, so the posts might be even more revealing. It's a challenge tracking them all and sifting through the open information. Using Google to search names is a good place to start, as it will find the name associated with various sites.

Andrew Matthews, assistant vice president with third-party administrator Avizent, says that his company actually has a full-time employee who monitors social media websites, trolling for information.

"It's really amazing what people put on Facebook, and then brag about it," Matthews says. "You're looking for an indication of activity they're talking about that they're not supposed to be doing."

And it doesn't just have to be a photo of the supposedly injured worker snowboarding on a half pipe. If someone writes on his wall that he's going to be moving this weekend, that's a good time to do some surveillance," says one fraud expert.

Private investigators say that getting behind someone's wall can be accomplished by setting up a Facebook page and then getting others to friend you, including someone you're monitoring. Claims shops set up pages and also monitor extensively.

"Many insurance companies don't want their claims staff to have access to these [social networking] sites, so some companies are setting up a password-required stand-alone computer in their claims departments," says Richard Harer, vice president of Specialized Investigations, adding that even those are rare.

“It’s fair game. There is nothing unethical for attorneys to be harvesting information from open sites from those who don’t understand the privacy controls.”

—Roy Mura,

attorney

Harer says his company has had much success using social media websites to investigate alleged fraud, and it goes beyond fraud investigations. It’s also used to locate potential witnesses and, in some cases of fraud, prove collusion.

“If there are two people who are in an auto accident and they say they don’t know each other, but we find out later that they are ‘friends’ on Facebook,” Harer says. “It turns out that these two people might be colluding to commit fraud. That may blow their case apart.”

He notes that his company investigates a lot of psych claims involving people who say they’re antisocial and withdrawn because of a work injury yet spend half the day on Facebook and Twitter or other social media sites.

Legal Issues

Despite its effectiveness, legal pitfalls are still inherent in obtaining the information. The law is still somewhat murky, especially when trying to obtain protected information or information behind the wall. Roy Mura, an attorney with Mura & Storm in Buffalo, New York, says no court has barred gathering of information from unprotected sites.

“It’s fair game. There is nothing unethical for attorneys to be harvesting information from open sites from those who don’t understand the privacy controls,” Mura says. “It’s the protected content that’s more difficult to obtain.”

He notes that social media providers are not going to turn over protected information in response to civil subpoenas. Established case law has laid that down, and “they’ve won over and over again,” he says. The most recent case is a California decision from 2010, *Crispin v. Christian Audigier, Inc.*, where the court quashed a subpoena trying to obtain the plaintiff’s information from his social media site.

One way to obtain the information is to ask the owner of the social media page for the information, Mura says. The owner is likely to say no. Furthermore, even if it is provided, there is concern that it might be edited. If the owner of the page refuses to grant authorization for discovery purposes, the party seeking the information can compel the individual to provide an authorization allowing social media sites to release the records.

A recent New York appellate court decision, *Russell Patterson v. Turner Construction Company*, upholds in part the compelled authorization, provided that the only information provided is what “contradicts or conflicts with plaintiff’s alleged restrictions, disabilities, and losses, and other claims. The postings on plaintiff’s online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service’s privacy settings to restrict access, just as relevant matter from a personal diary is discoverable,” the decision reads in pertinent part.

One deputy district attorney says that in criminal matters, if a case reaches the level of probable cause, the DA can get a search warrant and demand that the social media site turn over information and images.

He adds that timing is critical, and sometimes the DA will ask that images be preserved while a search warrant is obtained.

One area that could create complications for both criminal and civil cases is setting up a pretext — that is, creating a Facebook page and identifying yourself as someone you're not, to get people to "friend" you or vice versa. Mura says there is no law against this except in Minnesota, but that it's only a matter of time.

"Insurance companies need to exercise caution. Most insurers don't want to touch this," Mura says, adding that Facebook's own terms of use forbid it, but the most direct result is to be thrown off Facebook.

Mura says that the best way to use social media is as a tip. Rather than rely exclusively on wall posts and photos, following up with surveillance, witness interviews and evidence makes for a much stronger case.

Use of a fictitious social media profile to investigate suspicious insurance claims by "friending" individuals on their social media sites is an issue that has been raised by various insurance companies, attorneys and SIU departments. "Insurance investigators in a number of states — currently 14 (California Insurance Code Section 791.03) — have the legal and ethical right to utilize a pretext as long as it's for the investigation of a suspected insurance fraud claim," Harer says.

"However, you certainly don't want to go in with a thinly veiled reason for performing a pretext. You can't just go in on a wild goose chase or a witch hunt. There have to be some articulable red flags," he says.

(Filed by Bess Shapiro in Sacramento)

Source: Workers' Comp Executive, <http://wcexec.com>

Copyright 2011 Providence Publications, LLC. All Rights Reserved.