

The Firehouse Lawyer

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Eric T. Quinn, Editor

Joseph F. Quinn, Staff Writer

The law firm of Eric T. Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

Our office is located at:

**7403 Lakewood Drive West, Suite #11
Lakewood, WA 98499-7951**

Mailing Address: See above

Office Telephone: 253-590-6628

Joe Quinn: 253 576-3232

Email Joe at joequinn@firehouselawyer.com

Email Eric at ericquinn@firehouselawyer2.com

Access and Subscribe to this Newsletter at:
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INDEPENDENT MEDICAL EXAMINATIONS AND SOCIAL MEDIA

In *Ten Injured Workers*,¹ the Washington State Court of Appeals issued a significant ruling. The court found that the prohibition on posting recorded independent medical examinations (IMEs)² to social media, as outlined in RCW 51.36.070(4)(g), was an unconstitutional prior restraint on free speech. This provision, which was part of a 2023 legislative amendment, allowed injured workers to record their IMEs but prohibited them from sharing these recordings on social media.

The case, brought by ten injured workers, challenged the constitutionality of the social media ban, arguing that it infringed on their First Amendment rights. The State of Washington contended that the restriction was a valid time, place, and manner regulation. However, the court determined that the provision constituted a prior restraint by broadly prohibiting workers from engaging in protected speech on social media.

¹ See the case here: <https://www.courts.wa.gov/opinions/pdf/859978.pdf>

² Injured workers must undergo IME’s in order for L&I to deem whether a claim should be allowed. See RCW 51.36.070 (1).

The court's analysis focused on whether posting a recorded IME on social media is considered speech or conduct. It concluded that such posts are indeed expressive conduct, particularly within the adversarial context of workers' compensation claims. The court emphasized that social media serves as a modern public square, making the prohibition on posting recordings a significant infringement on free speech.

As a result of this ruling, the prohibition in RCW 51.36.070(4)(g) will no longer be enforceable. Consequently, under *Ten Injured Workers*, employees may share their IME's on social media. This decision highlights the delicate balance between regulation and free speech, particularly in cases where personal experiences and public platforms intersect. This decision may be appealed to the Washington Supreme Court. So, stay tuned.

Interaction Between the GEMT Program and the Treat and Refer Program

The Ground Emergency Medical Transportation (GEMT) program, established by House Bill 2007 in 2015,³ provides supplemental payments to publicly owned or operated emergency medical services (EMS) providers for ground emergency transportation services rendered to Medicaid clients. The GEMT program is funded through a Certified Public Expenditure (CPE) model, which allows participating government units to report all medical transportation costs, including those for Medicaid and non-Medicaid clients. The reported costs, after deducting any received revenue, are eligible for federal matching funds, which are

³ The GEMT statute is here: <https://app.leg.wa.gov/RCW/default.aspx?cite=41.05.730>

then paid as supplemental payments to the providers.

The Treat and Refer program, authorized by House Bill 1358 in 2017, allows publicly owned and operated EMS providers to receive Medicaid reimbursement for non-transport services provided under the Community Assistance Referral and Educational Services (CARES) program. The CARES program was designed to reduce unnecessary emergency department visits by identifying high utilizers of 9-1-1 services and connecting them with appropriate healthcare or social services.

Interaction Between GEMT and Treat and Refer Programs

The Treat and Refer program⁴ complements the GEMT⁵ program by allowing EMS providers to bill Medicaid for on-site services that do not require patient transport. These services include referrals to healthcare providers, crisis responders, and other social services. This interaction between the two programs is significant for several reasons:

1. **Billing and Revenue:** Providers participating in both programs can increase their total Medicaid revenue by billing for Treat and Refer services in addition to the GEMT-related transports. Treat and Refer services are billed using specific procedure codes (e.g., A0998 with various modifiers), and the revenue from these services is included in the

⁴ The treat and refer FAQ presently located on the Washington State Health Care Authority website is located here: <https://www.hca.wa.gov/assets/billers-and-providers/treat-and-refer-faq.pdf>

⁵ GEMT stands for "ground emergency medical transportation."

total Medicaid revenue reported under the GEMT program.

2. **Impact on GEMT Payments:** Although participation in the Treat and Refer program increases a provider's total revenue, it also affects the calculation of GEMT supplemental payments. The additional revenue from Treat and Refer services is deducted from the total transportation costs reported in the GEMT program, which reduces the net cost eligible for GEMT reimbursement. However, the overall financial impact is positive, as the increased Medicaid revenue from Treat and Refer services more than offsets the reduction in GEMT payments.
3. **Regulatory Considerations:** The Treat and Refer program⁶ is governed by specific regulations and statutes, including RCW 35.21.930, which outlines the requirements for CARES programs. To participate in the Treat and Refer program, providers must meet eligibility criteria, such as being a publicly owned and operated EMS provider and having an active Medicaid Core Provider Agreement (CPA). Additionally, the GEMT⁷ program currently allows for the inclusion of "dry runs" in cost reports, further aligning with the non-transport services reimbursed under the Treat and Refer program.

4. **Recent Question:** We were recently asked: "Can a nonprofit ambulance service, which

⁶ The "treat and refer" regulation is here: <https://app.leg.wa.gov/WAC/default.aspx?cite=182-531-1740>

⁷ The GEMT regulations are here: <https://app.leg.wa.gov/wac/default.aspx?cite=182-546>

has a contract with a fire district/RFA to provide EMS, qualify for GEMT reimbursement?" We do not think so, because of the language of RCW 41.05.730, which requires for GEMT eligibility that the provider be "owned or operated by" a governmental entity, or a community services district, a health care district or a federally recognized Indian tribe. "Owned or operated" would not seem to include a contractor that does not provide the service.

Corporate Seals Optional

Recently, a client, who was planning to issue municipal bonds, asked if it was still necessary to affix a corporate seal to the bonds. Apparently, some language relating to the issuance appeared to require a seal. We were reminded, however, that corporate seals, of both private and public corporations, are not required to be affixed to legal instruments, including bonds. See RCW 64.04.105. Apparently, this is true almost throughout the entire United States, since about 1960. The Washington statute was enacted in 1957. Of course, if bond counsel drafts a resolution requiring a seal for the issuance of bonds, your agency will likely be held to that.

FLSA DOES NOT REQUIRE OVERTIME PAY FOR WORK DONE AFTER SHIFT IS COMPLETED

Recently, we became aware of another collective bargaining agreement provision that requires overtime pay at time-and-a-half when a firefighter works beyond the end of their shift. We recall having dealt with that issue more than once in the last 40 years or so. The question presented is: What does the Fair Labor Standards Act (FLSA) require when a worker is required or

suffered to work longer than their usual daily shift?

At its most basic level, the FLSA requires overtime pay whenever more than 40 hours of work are performed during the work week. However, for fire service employees entitled to the coverage of Section 207(k) of FLSA, sometimes referred to as “7k employees”, overtime pay is required whenever they work more than a designated number of hours during the established “work period”. That work period can be set at a length of time (which repeats at the end of each cycle) determined by the employer, such as any number between 7 and 28 days, typically, in the fire service for 7k employees.

After establishing the work period, then the FLSA regulations inform us as to how many hours cannot be exceeded during that period without paying overtime pay. For example, if a 28-day work period is chosen (which is fairly typical, but not the only one chosen) then hours of work exceeding 212 create an overtime obligation.

The FLSA, however, does not require overtime pay on the basis of hours worked in a day or on a particular shift. Having said that, however, we hasten to note that some collective bargaining agreements for firefighters in Washington do have provisions requiring overtime pay for work done in excess of the daily or shift hours, or work on weekends, or work on holidays.

This is nothing new. In the *Firehouse Lawyer*, in June of 1997, which was only the third issue of this newsletter, the 41-year old Firehouse Lawyer, Joseph Quinn, wrote an article entitled: “What the

FLSA does not require.”⁸ The point of this article is that the more things change, the more they remain the same.

We want to also remind our readers (since we have written about this before in the *Firehouse Lawyer*) that there is no mandated way to establish your 7k “work period” no matter how many days you choose. The FLSA statute and regulations simply don’t tell employers how to do that. We simply recommend that the establishment—or choice of work period length—needs to be well documented in writing. It could be done by board resolution or even in a ratified collective bargaining agreement. We also do not recommend changing it, but rather maintaining the chosen work period permanently, or at least for a very long time, because changing the work period length creates its own host of problems, in our opinion.

It is also worth noting that, in the world of three (or more) shifts or platoons within the 7k workforce, the work period may not be the same for all shifts or platoons. It can be the same for all of the shifts but it does not have to be. However, for those departments that require or allow 7k firefighter/EMTs to move from one shift to another during their career, it is probably a bit simpler to have all three or four shifts start and end their work period on the same day, for obvious reasons. We have policies/contract language that can help simplify this.

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