

THE WR&H UPDATE

WEIL AND ALCORN: CHANGING PERSONAL INJURY LAW

The Colorado Supreme Court's rulings in *Weil v. Dillon Companies, Inc.*, 109 P.3d 127 (Colo. 2005) and *Alcon v. Spicer*, 113 P.3d 735 (Colo. 2005) may operate to prevent defendants from discovering medical records that would normally be seen as relevant in a lawsuit.

In *Weil*, the plaintiff customer slipped and fell in the produce section of a grocery store owned by the defendant, Dillon Companies, Inc. As a result of his fall, the plaintiff suffered several injuries, including a fractured pelvis, a

fractured tailbone, and a torn rotator cuff in his left shoulder. The plaintiff sued Dillon Companies to recover his medical expenses associated with these injuries and to obtain noneconomic damages for "pain and suffering, inconvenience, impairment of quality of life, inability to engage in his normal activities, permanent physical impairment, and past and future economic losses."

During pretrial discovery, Weil provided the defendant with medical records, reports, and bills cov-

ering the period of time from the date of the accident through approximately 11 months after the accident.

Dillon Companies subsequently requested records regarding the specifics of the plaintiff's injuries, as well as any prior injuries and hospitalizations. They also asked Weil to sign and execute blanket releases for medical records from 14 healthcare providers that had not been disclosed to defendant.

The requested records included psychiatric consultation reports, angiograms, physicals, and pathology reports, as well as numerous other reports and documents for treatments received prior to the accident. The plaintiff was basically asked to disclose all of his medical records from these various healthcare providers, not just those records related to the injuries and damages he suffered as a result of the accident at issue.

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CONGRATULATIONS TO MICHEL P. WILLIAMS OF WR&H
MIKE RECENTLY RECEIVED THE BOMA AWARD FOR HIS LEGISLATIVE LOBBYING EFFORTS ON BEHALF OF THE BUILDING OWNERS AND MANAGERS ASSOCIATION.

NOTICE REQUIREMENTS UNDER THE CGIA

The Colorado Governmental Immunity Act ("CGIA") governs how and when a person may file a lawsuit against a public entity within the state of Colorado for state tort claims. C.R.S. § 24-10-101, *et seq.*

When a person suffers an injury for which the CGIA allows a recovery, the most important provision of the CGIA for a potential plaintiff in the first months after the injury will be the pre-lawsuit notice requirement. An insurer should

also be interested in this statute since it may file the notice on behalf of an insured in order to preserve a claim. *Isbill Assocs. v. City and County of Denver*, 666 P.2d 1117 (Colo. App. 1983).

Under the CGIA notice statute, "any person claiming to have suffered an injury by a public entity or by an employee" must file written notice with that public entity within 180 days "after the date of the discovery of the injury." C.R.S. § 24-10-109.

Failure to file the notice within the time allotted will lead to the dismissal of any lawsuit subsequently filed against the public entity and "forever bar" the plaintiff's claim.

The substance of the notice is also governed by statute. The written notice should contain: (1) the name and address of the claimant, his attorney, and any public employee involved (if known); (2) a concise statement of the facts

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EMPLOYMENT CORNER Q&A: THE FAIR LABOR STANDARDS ACT

Q: If I pay my employees a salary, I don't have to pay them overtime, right?

A: Wrong. You might have to pay overtime. The Fair Labor Standards Act ("FLSA") divides employees into two groups: exempt and non-exempt. 29 C.F.R. 541.0. Non-exempt employees may receive either an hourly wage or a salary, but regardless of the method of payment, non-exempt employees must be compensated at least at the minimum wage and must receive overtime pay for overtime work.

Certain employees qualify for exemptions from the overtime pay and minimum wage requirements under the FLSA and thus are considered exempt employees. All exempt employees must be salaried. 29 C.F.R. 541.600. In other words, if an employee receives an hourly wage, by definition, that employee cannot be considered exempt and overtime pay must be provided.

The FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional, and certain computer employees (among a few others). To qualify for an exemption, employees must meet certain tests regarding their job duties. Job titles do not determine exempt status. 29 C.F.R. 541.2.

Also, the employee must be paid on a salary basis at not less than \$455 per week, or \$23,660 per year. 29 C.F.R. 541.600. Therefore, any employee who earns less than \$23,660 per year is

QUESTIONS ABOUT HOW TO DETERMINE WHETHER AN EMPLOYEE MUST BE PAID OVERTIME? PLEASE CALL US.

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automatically considered non-exempt and thus subject to minimum wage and overtime pay requirements regardless of job duties or method of payment.

Q: Do commissions and bonuses have to be included in overtime pay?

A: Yes, commissions and other similar remuneration to employees must be included in overtime pay for non-exempt employees. Certain bonuses must also be included. In computing overtime pay, each employee must have an established or fixed workweek, which consists of 168 hours over 7 consecutive days. Each employee's workweek can start on any day and at any time, but it should remain fixed for each employee after it is set for that particular employee.

Overtime pay is calculated by first determining the employee's regular rate. Typically, the regular rate is the employee's hourly wage plus all other remuneration paid or earned during the workweek, divided by the number of hours worked in that week.

Commissions must be included in the regular rate. 29 C.F.R. 778.117. Certain bonuses must also be included, such as promised bonuses or bonuses announced as an inducement to award performance. Discretionary bonuses, where the employer has discretion as to fact and amount of payment, do not have to be included in figuring the regular rate. 29 C.F.R. 778.211.

Q: How do I compute overtime pay for salaried employees?

A: If an employee is salaried, then you

must determine the amount of pay applicable to each workweek. If an employee receives a *monthly* salary, figure the weekly wage as follows: multiply the monthly salary by 12 (the number of months) and then divide by 52 (the number of weeks).

If an employee receives a *bimonthly* salary, figure the weekly wage as follows: multiply the bimonthly salary by 24 and then divide by 52.

If an employee receives a *bimonthly* salary, figure the weekly wage by simply dividing the salary by 2 to arrive at the amount allocable to each week. Obviously, an employee whose hours fluctuate from week to week will have different regular rates each week.

Q: How do I apportion commissions and bonuses?

A: Commissions and bonuses may be paid in arrears. 29 C.F.R. 778.119. However, the commission or bonus must still be included in the appropriate regular rate to determine proper overtime pay, even though such calculations are done after the original pay period. Thus, when the commission or bonus is paid, any related overtime pay as a result of the commission or bonus must also be paid. The commission or bonus must be apportioned over the appropriate workweek when it was earned by the employee.

Accordingly, if the employer is able to determine when a particular commission or bonus was earned by an employee in a particular workweek, the amount of overtime compensation

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WEIL AND ALCORN: CHANGING DISCOVERY IN COLORADO PERSONAL INJURY CASES

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Weil objected to the defendant's request for blanket medical releases. He claimed that the records the defendant sought were for treatments unrelated to the injuries and damages claimed in his suit and therefore were protected by the physician-patient privilege. The plaintiff also asserted that he did not waive this privilege by simply filing a lawsuit.

Dillon Companies then filed a motion with the trial court to compel plaintiff to authorize blanket releases of all of his medical records. The trial court ordered plaintiff to issue the releases so that Dillon Companies could know the quality of plaintiff's life prior to being injured in the fall, or the court would limit noneconomic damages to what "an ordinary person would likely experience in similar circumstances."

The Supreme Court reversed the trial court and held that plaintiff's generic claims for pain and suffering and loss of enjoyment of life did not constitute an implied waiver of the physician-patient privilege for medical services wholly unrelated to his claims.

Accordingly, the Court held that, while records related to the cause and extent of the injuries and damages claimed are discoverable, the defense may not compel the plaintiff to authorize blanket releases of his medical records where the plaintiff makes generic, gar-

den variety claims for pain and suffering and loss of quality of life.

In *Alcon*, a case which dealt with a discovery dispute nearly identical to the one encountered in *Weil*, the Supreme Court held that a trial court abused its discretion by ordering a blanket release of a personal injury plaintiff's medical records, her pharmaceutical records from the past ten years, and her tax returns from the past ten years.

Alcon filed a suit against Spicer after Spicer's car struck Alcon's car from behind. In her complaint, Alcon alleged that the defendant's negligence caused the following damages: past and future loss of enjoyment of life; past and future pain, suffering and mental anguish; past and future inconvenience; and past and future loss of essential services.

She also claimed past and future medical, rehabilitative and other health-care related expenses; loss of past and future earnings and earning potential; and permanent physical impairment and/or residuals." Both parties agreed that these are standard categories of damages commonly claimed by personal injury plaintiffs.

In *Alcon*, the Supreme Court reaffirmed *Weil* and concluded that a patient does not waive the physician-patient privilege simply by filing a personal injury lawsuit. Rather, a plaintiff impliedly waives the privilege *only* with

respect to those medical records relating to the cause and extent of the injuries and damages sustained as a result of defendant's claimed negligence.

The Supreme Court's decisions in *Weil* and *Alcon* make it clear that defendants and their insurers and defense counsel will no longer be able to obtain blanket medical releases from plaintiffs based solely on generic claims for pain and suffering and loss of enjoyment of life. While some of the medical records obtained from such releases may very well be relevant, the Court has held that relevance alone cannot be the test.

Rather, the test is whether a plaintiff significantly injects his physical and mental condition as the basis of his claim. This is determined on a case-by-case inquiry into the cause and extent of the injuries which form the basis for a claim for relief.

Perhaps the most troubling aspect of the *Weil* and *Alcon* decisions is that the Court assumes plaintiffs will tell the truth when asked about previous potentially related injuries. If plaintiffs conveniently "forget" about such earlier injuries, these cases may make it exceedingly difficult for insurers and defense counsel to learn of significant and sometimes critical evidence. This development may increase the importance of insurance bureau indexes and ISO's.

Michael A. Paul

NOTICE UNDER THE CGIA

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including the date, time, place and circumstances involved in the claim; (3) the nature and extent of the injury claimed; and (4) a statement of the amount of monetary damages that is being requested. C.R.S. § 24-10-109.

Unlike the filing deadline, failure to

**GIVE US A CALL IF YOU HAVE SPECIFIC QUESTIONS ABOUT HOW TO
PRESERVE YOUR INSURED'S CLAIM AGAINST A PUBLIC ENTITY.**

strictly follow the statutory requirements regarding the contents of the written notice will not always result in the plaintiff losing his or her case. Courts have only required "substantial compliance" with this subsection.

Finnie v. Jefferson County Sch. Dist. R-1, 79 P.3d 1253 (Colo. 2003). Obviously, it is still best to follow the statute's content requirements as closely as possible, and include any information which

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TRODUCE OUR NEW
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◆ **Rachel A. Spicer**
graduated from the
University of Nebraska
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the University of Den-
ver in June 2005.



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Q&A: FAIR LABOR STANDARDS ACT

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should be determined by the following method. Add the extra pay to the wage or salary already determined for the workweek to arrive at the total remuneration for the workweek.

Divide the total remuneration for the workweek by the number of hours worked by the employee in that week. This provides the regular rate for that workweek. Compute overtime pay based on one and one-half of the regular rate for all hours worked over 40 hours for that week.

If you are unable to determine specifically when a commission or bonus was earned, then you must use some other reasonable and equitable method. For example, you may adopt a method where the extra pay is split equally among workweeks.

Under this method, if a commission or bo-

nus is paid every month, then multiply the amount by 12 and divide by 52 to get the amount allocable to each week. If it is paid biweekly, simply divide the commission by 2 to get the amount allocable to each workweek.

Q: *Are some industries exempt from the overtime pay requirements?*

A: Yes. Both the FLSA and Colorado state law provide that certain employees of specific industries are exempt from overtime pay. For example, salespersons, parts persons and mechanics of car dealerships are exempt. Most insurance adjusters are also exempt.

If you need assistance with the overtime pay requirements, or would like us to provide computations for actual payroll numbers, don't hesitate to give us a call.

Andrew D. Peterson

NOTICE AND THE CGIA

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may help fulfill the purposes of the statute, which include encouraging settlement and providing public entities the opportunity to investigate claims and remedy conditions.

Once the written notice has been prepared, it must be delivered to the appropriate person or entity. The statute requires that the notice be delivered to the attorney general if the state is being sued, or if a city is being sued, to the city attorney or other governing body of the city.

It should be delivered by "registered mail or by personal service." Courts have found notice by regular mail to be sufficient. However, if the public entity denies receiving the

notice and there is no other evidence to prove the public entity received the notice, the case could be dismissed by the court. *Armstead v. Memorial Hosp.*, 892 P.2d 450 (Colo. App. 1995).

Considering this possibility, it would be advisable to use only registered mail or personal service since both of these methods typically provide proof of delivery and the effective date of such delivery.

Compliance with the notice statute is extremely important to anyone attempting to preserve a claim against a public entity. Early dismissal of a case against a public entity may be prevented with a good working knowledge of the statute and compliance with its provisions.

Rachel A. Spicer

The WR&H Update contains summaries of legal developments, legislation and features. Wood, Ris, & Hames, P.C., makes every effort to print reliable and accurate summaries. Nevertheless, space restrictions prevent us from identifying every feature of a legal development or legislative enactment and the reader should consult with original, unedited materials and consult legal counsel before a decision is made in reliance upon matters discussed herein.

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