

DENTAL LEGAL UPDATE

Employment Minefield: Overtime Woes

by Jeanine Lehman, Attorney

Invitation to Free Webinar

Update on Texas State Board of Dental Examiners 2/27/2015 meeting and Legislature with Jeanine Lehman and Duane Tinker
Tues., March 3, 2015: 12 p.m.–1 p.m.

To attend, register at:

<https://attendee.gotowebinar.com/register/7754926243495633666>

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Most dental practices are subject to the requirements of the Fair Labor Standards Act (FLSA). This federal law has requirements for minimum wage, overtime pay, recordkeeping, and child employment. Unless exempt, an employee must be paid at least the minimum wage and not less than 1 ½ times the employee’s regular rate of pay for overtime worked. Generally, overtime is the time worked over 40 hours in a workweek.

Record Keeping

Every covered employer must keep certain records for each non-exempt employee. The FLSA requires no particular form for the records, but does require that the records include certain identifying information about the employee and data about the hours worked and the wages earned. The law requires this information to be accurate. The following is a listing of the basic records that an employer must maintain:

1. Employee's full name and social security number.
2. Address, including zip code.
3. Birth date, if younger than 19.
4. Sex and occupation.
5. Time and day of week when employee's workweek begins.
6. Hours worked each day.
7. Total hours worked each workweek.

8. Basis on which employee's wages are paid (e.g., "\$9 per hour", "\$440 a week", "piece-work")
9. Regular hourly pay rate.
10. Total daily or weekly straight-time earnings.
11. Total overtime earnings for the workweek.
12. All additions to or deductions from the employee's wages.
13. Total wages paid each pay period.
14. Date of payment and the pay period covered by the payment.

The employer may also maintain these records for exempt employees. Then, if the employer is found to have

In a lawsuit brought by an employee or the U.S. Secretary of Labor, the employer may be liable to the employee for unpaid overtime pay, plus an additional amount of “liquidated damages” equal to the unpaid overtime pay, as well as attorney’s fees and lawsuit costs.

Speaking Requests

For **Jeanine Lehman** and her colleagues to speak to professional and business groups on legal and practice management topics, please contact Jeanine Lehman at (512) 918-3435 or jeanine@jeanine.com

**Website Favorites**

Law Offices of
Jeanine Lehman P.C.
www.jeanine.com

Capital Area Dental Society
www.capitalareadental.org

Texas State Board of Dental
Examiners
www.tsbde.state.tx.us

Texas Dental Association
www.tda.org

Texas Academy of
General Dentistry
www.tagd.org

American Dental Association
www.ada.org

Texas Workforce
Commission
www.twc.state.tx.us

US Department of Labor
www.dol.gov

Employment Minefield (cont.) --

misclassified an employee as exempt, it will be helpful to have time records to determine if over 40 hours were worked in a workweek, and in such case, to be able to calculate overtime pay due.

Minimum Wage

The minimum wage in Texas is currently \$7.25 per hour, with limited exceptions.

Overtime*Timekeeping*

If a dental practice fails to keep accurate time records, the risk of an FLSA overtime claim by an employee or former employee increases significantly. Therefore, it is important to keep contemporaneous time records for employees. Some practices use a time clock or time keeping software, for employees to enter their time, on a daily basis. The dentist should assure himself that these records are being regularly made and maintained. It is also advisable to include the requirement for proper timekeeping in the dental practice's employment policy manual and to have employees acknowledge this requirement. If there are inadequate time records, an employee may claim that he is due overtime pay and penalties. Absent good records, the employer faces a difficult defense.

Meal breaks of less than 30 minutes and break time of less than 20 minutes are work time for non-exempt employees. There are special rules for determining if travel time, meetings and training, and on-call time is compensable work time, and those rules should be reviewed for applicable situations.

Employers may not have employees "working off the clock". Working off the clock occurs when an employee performs services after he has already clocked out. For example, if the

assistant has clocked out and then performs additional services, for example, working on the schedule for the following day with the dentist or other staff members, or setting up a treatment room, the assistant should be paid for those services. Some practices will have an employee leave the premises after clocking out, to avert future claims of "working off the clock".

Exempt vs. Non-Exempt

Certain "white-collar" employees are exempt from the overtime requirements. In looking at the availability of an exemption, the duties of the job, rather than the title of the position, are what matter.

Dentists

Under the "Professional Exemption", licensed dentists, who are practicing dentistry, are classified as "Learned Professionals" and are exempt from the minimum wage and overtime requirements. They are also not required to be paid a minimum salary. Dentists are treated the same as other learned professionals, such as physicians and attorneys.

Dental Hygienists

Under the "Professional Exemption", some, but not all, dental hygienists, who are practicing dental hygiene, are classified as "Learned Professionals" and are exempt from the minimum wage and overtime requirements, provided they are paid on a salary or fee basis of at least \$455 per week. The Department of Labor regulations provide that dental hygienists, who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association,

generally meet the duties requirements for the learned professional exemption.

Executive & Administrative

Under the “Executive Exemption”, an employee meeting all the following requirements is exempt from the overtime requirements:

- (1) Compensated on a salary basis at a rate of not less than \$455 per week;
- (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) Who customarily and regularly directs the work of two or more other employees; and
- (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

Under the “Administrative Exemption”, an employee meeting all the following requirements is exempt from the overtime requirements:

- (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week;
- (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

There are other exemptions from overtime requirements for certain computer employees, highly compensated employees, and business owners, but the exemptions described in detail above are the ones most commonly encountered in a dental practice.

There are specific requirements for paying an employee on a “salary basis”. If those requirements are not satisfied, for example if an employee’s salary is improperly docked, the exemption from the overtime requirements is at risk of being lost. There are seven exceptions to the salary basis “no pay-docking” rule contained in the Department of Labor’s rules at 29 Code of Federal Regulations § 541.602(b)(1) - (7). [It should be

noted that paying on the “salary basis” alone does not result in an exemption from the overtime requirements. Instead, payment on the salary basis is a required part of several of the overtime exemptions.]

Penalties for FLSA Violations

In a lawsuit brought by an employee or the U.S. Secretary of Labor, the employer may be liable to the employee for unpaid overtime pay, plus an additional amount of “liquidated damages” equal to the unpaid overtime pay, as well as attorney’s fees and lawsuit costs. The employer may also be liable for criminal and civil penalties payable to the federal government. Violations can occur due to failure to pay overtime, including but not limited, in cases of misclassification of employees as “exempt”, when they are truly “non-exempt”, or misclassification of employees as independent contractors, as well as failing to keep the proper records.

Poster

Employers must display an official poster outlining the provisions of the FLSA. To obtain the poster, go to:
www.dol.gov/oasam/programs/osdbu/sbrefa/poster/main.htm

Conclusion

The requirements of the FLSA are detailed, with complex nuances. It is prudent for dentists to consult with their attorneys to chart their course through this regulatory minefield. ■

Jeanine Lehman is an Austin, Texas health law attorney who practices dental, health, real estate, and business law.

Past issues of the **Dental Legal Update** are available at www.jeanine.com

The information in this newsletter is not a substitute for legal advice. The information is general in nature and should not be relied upon as legal advice generally, nor is it applicable to any particular situation. For legal advice in a particular situation, the reader is advised to retain an attorney. For reprints, call (512) 918-3435 or email jeanine@jeanine.com. © 2015 Jeanine Lehman.

Legislative Update

Dental Service Organizations: In 2013, in Representative Kolkhorst's House Bill 3201, the Texas Legislature passed DSO contract reporting requirements, which were implemented as mandatory questionnaires to be completed by Texas licensed dentists at the issuance and renewal of their licenses. The information obtained from those questionnaires is to be provided in reports to the legislature. In late 2014, legislators strongly encouraged the Dental Board to not pass an ownership rule under proposed amendments to rule 108.70, and the proposed amendments were withdrawn. The withdrawn proposed amendments to the rule would have impacted DSO contracts, as well as other business relationships. It is likely that new laws concerning DSO's will be proposed during the current Texas legislative session.

REINS Joint Resolution: In the 84th regular legislative session (2015), Senate Joint Resolution 9 by Senator Van Taylor proposes an amendment to the Texas Constitution to give the Texas Legislature broad authority to control agency rules, including by legislative committees. News accounts cite the Dental Board and DSO's as one of the reasons for this resolution. The proposed ballot language reads: "The constitutional amendment to provide for review or approval of state agency rules by the elected members of the legislature." At press time, no legis-

lative action other than introduction of this resolution is shown. ■

Legal Tips

☑ Check for Signatures – Check that you have signed originals of important documents, like employment agreements, buy-sell agreements, wills, trusts, and powers of attorney. Sometimes, documents do not get signed, so it is good to check now, before it is too late.

☑ Recording Deeds and Releases of Liens – Check to see that your deeds have been recorded. Sometimes, after a divorce, the spouse receiving the real estate does not record the deed, which can result in problems if an IRS or other lien is filed against the other spouse. Also, when loans have been paid off, properly drafted releases of mortgages or equipment/asset liens need to be filed.

Employment Resource:

Texas Business Today is a free online informational newsletter covering issues and interests of Texas employers produced quarterly by the Texas Workforce Commission's Office of the Commissioner Representing Employers. To subscribe, go to: www.texasworkforce.org/TexasBusinessToday

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About Our Firm ... Call us at (512) 918-3435

Law Offices of Jeanine Lehman P.C. is a Texas law firm headquartered in Austin with a state-wide health law practice, including representation of Texas dentists and physicians. Our health law practice is focused on business law, transactional aspects of individual and group practices, such as contracts and incorporations, office/facility leases, building purchases/condos, and build-to-suits, practice sales/purchases/buy-ins, employment agreements, financing, and consultation concerning the day-to-day legal concerns of running a health care practice. The firm is owned by Texas Attorney **Jeanine Lehman**. Jeanine has been in private practice as the owner of her firm for over 25 years and has over 30 years experience as a Texas attorney. She has had one book and over 70 articles published. She speaks to professional and business groups concerning legal topics. Jeanine is blessed to have one dentist and three dental hygienists in her family. Contact us at **(512) 918-3435**, jeanine@jeanine.com or PO Box 202211, Austin, TX 78720, and visit our website at www.jeanine.com. Suggestions for future newsletter topics and invitations to speak to professional groups are appreciated!