

DENTAL LEGAL UPDATE

Giving the Pink Slip: Employment Termination

by Jeanine Lehman, Attorney

Webinar

**Update on Texas State Board of Dental Examiners and Legislature with Jeanine Lehman and Duane Tinker
Tues., Nov. 25, 2014: 12 p.m. – 1 p.m.**

To attend, register at:
<https://dentalcompliance.leadpages.net/sbde-legislative-update-webinar-nov-2014/>

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Firing an employee is hard. Dentists face this difficult task in many contexts. Sometimes, the employee is not doing a good job; has violated practice policies; is not a good “fit”; or the practice needs to shrink its workforce for financial reasons.

When facing this difficult decision, the dentist should evaluate if firing is the best decision or if the situation can be remedied. If the situation cannot be remedied, or if the dental practice would operate better with the employee gone, then evaluation of options should be undertaken. Since labor law issues entail substantial financial risk to the dental practice, it is prudent for the dentist to seek the advice of his or her attorney early.

Contract or “At Will”

At the outset, there needs to be a determination of if there is an employment contract between the dental practice and the employee. More commonly, written employment contracts are used with employee dentists, and less commonly with dental auxiliaries and support staff. If there is an employment contract, the contract’s requirements for termination of employment need to be carefully analyzed and satisfied.

If there is not an employment contract or an agreement to employ an employ-

ee for a certain length of time, under Texas law, the employment of the employee will usually be “at will”. “At will” employment may be terminated by the employer or the employee at any time.

Illegal Firing

It is critical not to fire an employee for an illegal reason. There are many illegal reasons. These include, but are not limited to, absence due to jury duty or for voting, and discriminatory reasons. Also, if an employee has made a whistleblower claim, for example, for Medicaid fraud, before taking adverse action against the employee, the dentist should seek the advice of his or her attorney.

Policies & Procedures

The dental practice should adopt and

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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

Giving the Pink Slip (cont.) --

follow employment policies and procedures. For fairness to the employee and to mitigate exposures to an unemployment claim and to other risks, it is prudent to provide an employee with oral and written warnings. The Texas Workforce Commission (TWC) has provided a helpful Termination Checklist. See page 3.

Alternatives

In some circumstances, if relationships with the employee are good and the practice has adequate finances for the employee to stay with the practice for a while, the dentist may want to inform the employee that the employee's employment will not be able to continue, and to encourage the employee to seek other employment. If a budgetary shortfall is expected to be short-term, the dentist may consider if the staff is agreeable to job-sharing or reduced hours. TWC has a voluntary Shared Work program to help employers and employees withstand a slowdown in business. In that program, after a plan is approved by TWC for the employer, certain employees continue to work on a reduced schedule and receive partial unemployment benefits for reduction of hours, and employers may receive a better calculation of their future unemployment tax rate attributable to benefits paid out under the plan.

Termination & Exit Interview

If firing the employee is necessary, it should be done with dignity and not in anger. It is best for the firing to occur outside of the presence of patients. Also, if possible, it is helpful to have an exit interview with the departing employee to discuss and

document the reasons for the employment termination, to inform the departing employee of continuing obligations, including confidentiality obligations, to obtain the return of all dental practice property, and to listen to the departing employee and to accept the employee's written comments.

Final Paycheck & Payments

At the termination of employment, if possible, it is helpful to have the final paycheck ready and give it to the employee at that time. By Texas law, an employee whose employment is being terminated by the employer must receive the final paycheck within six calendar days of the termination of employment. By contrast, when an employee resigns, the employee must be paid his final paycheck on the next regularly scheduled payday. Payment for vacation and other leave, and severance pay, must be made if owed to the employee under a written agreement or under a written policy of the employer. If there is no written agreement or written policy, then severance pay is not required, but can be provided voluntarily.

Release

Some employers provide a separation payment in return for a release of claims by the terminated employee. To accomplish this, a separation and release agreement is signed between the employer and the employee. These agreements are more commonly used by large companies when laying off employees, to mitigate the risk of an employee suing the employer. The agreements are complex and if desired, should be prepared by the employer's attorney.

Security Concerns

When the employee is terminated, the dental practice should take all prudent steps to protect its security. These include, but are not limited to, assuring that the practice has log-on capability to the computer systems used by the employee, disabling the terminated employee's log-on access to computer systems, changing passwords, changing key code access to the office and building, obtaining all keys, potentially changing the locks to the office (with landlord consent/notification), having the employee return all practice property, and notifying practice personnel that the employee is no longer employed.

Unemployment Claim

Often, after an employee is fired, the employee will file a claim for unemployment benefits with the TWC. The employer may dispute the claim by following the process required by the TWC, but may choose not to dispute the claim. The reason for the employee's termination and the process used for termination, including documented warnings and progressive discipline, are major factors considered in a disputed unemployment claim. If unemployment benefits are paid, the employer does not directly pay for the unemployment benefits paid to the fired employee. Instead, the employer's future unemployment insurance tax rate will be adjusted and then applied to calculate its future unemployment insurance tax payments. The employer's claims history is used to calculate the General Tax Rate, which is one of five components used in calculating the overall tax rate. The rate calculation is at: <http://www.twc.state.tx.us/ui/tax/your-tax-rates.html#replenishmentTaxRate> In many cases, the benefit of terminating the employee exceeds the risk of a higher unemployment tax rate.

Legal Advice & Planning

Given the significant risks in employment relations, it is prudent for dentists to consult with their attorneys when facing the difficult decision to fire employees, so that they can fulfill their obligations and mitigate their risks. ■

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

Termination Checklist

1. Was there a specific incident close in time to the discharge?
2. Can the employer show that the employee violated a known policy or law?
3. Are witnesses available?
4. Does the employer have documentation to support its reasons for termination?
5. Did the employee progress all the way through the disciplinary system?
6. Was the employee confronted with the problem and given a chance to explain?
7. Discrimination issues:
 - a. Does the employee belong to a protected minority? (depending upon the state, the most common minority categories are race, color, religion, gender, age, national origin (including citizenship status), and disability; a few states include sexual orientation, veterans status, and others)
 - b. Was the treatment given to the employee different from that given to non-minorities?
 - c. Was the treatment given to the employee different from that given to other workers in general?
8. Was the employee involved in a protected activity?
 - a. Involvement in a claim over wages, workers' compensation, or discrimination?
 - b. Jury or military duty?
 - c. Voting?
 - d. Refusal to commit an illegal act?
 - e. Inquiring about the legality of an instruction from the employer?
 - f. "Whistleblowing"?
9. In the case of a simple layoff, is the company using neutral, business-related criteria, not related to any minority characteristics, to evaluate the affected department and select those who will be laid off?
10. Depending upon the answers to these questions, the employer may need to seek legal advice prior to taking any adverse job action against the affected employee.

Source: Especially For Texas Employers, Texas Workforce Commission

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. © 2014 Jeanine Lehman.

Dental Board Update

Practice Discontinuance Proposed Rule 108.15 on Notification of Discontinuance of Practice was withdrawn at the August 2014 Board meeting, after receiving a “mountain of comments”. The proposed rule would have had a high compliance cost for dentists.

Sleep Dentistry Sleep Dentistry Rule 108.12 was adopted effective 6/11/2014. The Rule has mandatory education requirements and delineates dentist and physician roles.

Death & Hospitalization Reports A new, more detailed report form for “Dentist – Self Report – Patient Hospitalization/Mortality” is available on the Dental Board’s website and will become mandatory. Rule 108.6 requires timely reporting by the dentist of patient death and hospitalization as a consequence of dental treatment. The Board is considering further revisions to Rule 108.6 to require reporting of emergency room visits caused by anesthesia/sedation, particularly involving pediatric patients.

Pediatric Dental Records Retention Effective 6/11/2014, rule 108.8 was amended to provide for a longer period of retention of dental records for pediatric patients. The rule provides that “Records shall be kept for a period of not less than five years from the date of treatment by the dentist. If a patient was younger than 18 years of age when last treated by the dentist, the records shall be maintained by the dentist until the patient reaches age 21 or for five years from the date of last

treatment, whichever is longer.” Also, if federal or state laws have a longer retention period, the longer period will apply.

Stabilization of Pediatric & Special Needs Patients Rule 108.14 was adopted effective June 11, 2014 to address protective stabilization (restraint) for pediatric and special needs patients.

Lasers & RDH’s A Laser Ad-Hoc Advisory Committee was formed to address the use of lasers by hygienists. The Board currently has a policy on the use of lasers by hygienists, which does not allow hygienists to use lasers that are capable of cutting or removing hard or soft tissue or tooth structure. At the August 2014 Board meeting, after hearing public comments, laser use by hygienists was referred to the Dental Hygiene Advisory Committee, who will then contact the Laser Committee.

Practice Ownership, DSO’s & Liability An Ownership Ad-Hoc Advisory Committee was formed to address concerns with practice ownership and dental service organizations, to delineate liability of dentist owners of a dental practice, and to recommend changes to the Disciplinary Matrix related to new proposed rules 108.70 “Improper Influence on Professional Judgment” and 108.74 “Dental Practice Responsibilities”. On October 1, 2014, a public hearing was held on these proposed rules. Expect that these proposed rules will be further addressed at the November 21, 2014 Dental Board meeting.

Sunset Commission Review The Dental Board is scheduled to be reviewed by the Texas Sunset Advisory Commission in the 2016 -2017 review cycle. It was last reviewed in the 2002 - 2003 cycle. ■

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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!