

DENTAL LEGAL UPDATE

Janitorial Fraud Ring Targets Austin Medical Facilities: Who's in Your Office?

by Jeanine Lehman, Attorney

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The jackpot is the information comprising the identities of the patients, staff and dentists.

Dental offices are targets of thieves. Thieves have many faces including the front desk person stealing cash, the addict taking controlled substances, and the office manager embezzling funds. Thieves may also have the faces of your janitors and their confederates. The jackpot is the information comprising the identities of the dental practice's patients, staff and dentists. Recently, an Austin-based janitorial fraud ring targeted medical facilities to steal patient identities.

In the multi-million dollar Austin-based "stolen identity refund fraud" scheme, the defendants engaged in a fraudulent scheme to steal the identity of hundreds of US citizens and exploit those identities for financial gain by filing fraudulent income tax returns and by opening credit cards in the names of the victims. Money laundering was also involved. The intended loss of the fraud conspiracy was approximately \$3.9 million. Among the ways that the conspiracy illegally acquired Personal Identification Information (PII) of US victims was through operating cleaning services in the Austin area, cleaning offices, and then looting those offices of PII. Among the locations the conspiracy victimized were medical facilities, where patient files were stolen. The indictment indicated that one of the defendants and one of the at-large suspects owned cleaning franchises. On April 27, 2018, U.S. District Judge Lee Yeakel sentenced the two apprehended

foreign nationals to 8 years and 7 years in federal prison and ordered payment of restitution in the amount of \$1,358,489 for these identity theft crimes. Two additional suspects were still at large at the time of the sentencing. For more information on this identity theft fraud scheme, see the U.S. Attorney's Office press release at: www.justice.gov/usao-wdtx/pr/two-foreign-nationals-sentenced-federal-prison-role-austin-based-multi-million-dollar While the federal indictment did not list the names of dental practices as victims, dental practices can fall prey to the same identity theft crimes.

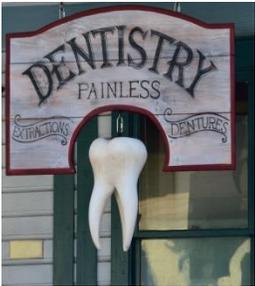
City of Austin Sued Over Paid Sick Leave Ordinance

On April 24, 2018, the Texas Public Policy Foundation on behalf of a business coalition including the Texas Association of Business, the National Federation of Independent Business, American Staffing Association and four corporations that provide temporary staffing in the Austin area filed suit against the City of Austin challenging Austin's sick leave ordinance in Travis County District Court. The lawsuit seeks a hearing on a temporary injunction on May 29, 2018 to stop the ordinance from going into effect, followed by a permanent injunction after trial. The lawsuit alleges that the ordinance is preempted by the Tex-

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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

U.S. Department of Justice
www.justice.gov

Lawsuit Sick Leave (cont.) --

as Minimum Wage Act and violates the Texas Constitution. On April 30, 2018, Texas Attorney General Paxton filed to intervene in the lawsuit on behalf of the State of Texas in opposition to Austin's sick leave ordinance.

For background – On February 15, 2018, the Austin City Council adopted a controversial ordinance requiring private employers (including dental practices) to provide paid sick leave for employees - Ordinance No. 20180215-049. The link to the ordinance is:

www.austintexas.gov/edims/document.cfm?id=293797

Employees accrue one hour of paid sick leave for every 30 hours worked in Austin for the employer. Paid sick leave will accrue starting at the commencement of employment, or the date that the ordinance is effective, whichever is later. Generally, sick leave is available to use as soon as it is accrued. The ordinance applies to all types of employees, including temporary, part-time, and full-time, and does not distinguish between employees who are covered by overtime regulations and those who are exempt from overtime, such as dentists. However, an individual, who is an independent contractor according to Texas Workforce Commission rule 821.5, is not an employee under the ordinance.

The yearly caps for paid sick leave are: (1) 48 hours per employee per calendar year for employers with 15 or fewer employees and (2) 64 hours per employee per calendar year for employers with more than 15 employees. For the employee count for the sick leave cap, the maximum number of employees employed at any time within a 12 month lookback period is used. All available sick leave up to the maximum annual sick leave cap will be carried forward into the following year. Most employers must comply with the ordinance starting **October 1, 2018**.

Employers with no more than 5 employees (including family members) at any time in the preceding 12 months must comply starting October 1, 2020. An employer is not required to allow an employee to use earned sick leave on more than 8 days in a calendar year. An employer with a paid time off policy available to an employee that meets the accrual, purpose, and usage requirements of the ordinance is not required to provide additional paid sick leave to an employee.

To note – On February 16, 2018, State Representative Paul Workman, R-Austin, announced that he will be filing a bill in the Texas legislature to overturn Austin's paid sick leave ordinance. (The earliest that could occur is in 2019, when the legislature convenes.)

Anesthesia Rule Update

As directed by the Texas Legislature, the Texas State Board of Dental Examiners (Board) has been promulgating a series of rules on dental anesthesia, including at the April 2018 Board meeting. These rules are discussed below. The Board will address rules for pediatric and high risk patients at the June 2018 Board meeting.

Preoperative Sedation/Anesthesia Checklist.

New Rule 110.13 for checklist applies to Nitrous Oxide and Levels 1, 2, 3, 4 Sedation/Anesthesia. During deliberations, there was discussion concerning the application of the checklist to nitrous. Since nitrous is a form of anesthesia and the Legislature in the Sunset Bill required new rules to cover all forms of anesthesia, the checklist applies to nitrous as well as other forms of anesthesia.

This checklist must be a separate document in the patient record titled "Preoperative Sedation/ Anesthesia Checklist" created by the dentist administer-

ing sedation/ anesthesia or the other delegated provider allowed to administer sedation/anesthesia under provisions of Section 258.001(4) of Dental Practice Act. The checklist may be paper or electronic.

At a minimum the checklist must include for each level of sedation/anesthesia documentation of:

- (1) Medical history including:
 - review of patient medical history
 - review of patient allergies
 - review of patient surgical and/or anesthesia history
 - review of family surgical and/or anesthesia history
 - review of patient medications and any modifications
- (2) Confirmation that written and verbal preoperative and postoperative instructions were delivered to patient, parent, legal guardian, or caregiver
- (3) Medical consults, as needed
- (4) Physical examination, including American Society of Anesthesiologists Physical Status Classification (ASA) classification, NPO status, and preoperative vitals, including height, weight, blood pressure, pulse rate, and respiration rate
- (5) Anesthesia-specific physical examination, including airway assessment, including Mallampati score and/or Brodsky score, and auscultation
- (6) Confirmation of pre-procedure equipment readiness check
- (7) Confirmation of pre-procedure treatment review (correct patient and procedure)
- (8) Special preoperative considerations for pediatric or high-risk patients
- (9) Documentation of reason for omission of any item required for inclusion in checklist

Note: Checklist information may be collected at any time, but dentist administering the sedation/anesthesia must verify information is current and correct prior to administration of sedation/anesthesia. Rule effective 5/10/2018.

Emergency Preparedness Policies & Procedures. New Rule 110.14 requires all permit holders, including for nitrous oxide, to develop written

emergency preparedness policies & procedures specific to the permit holder's practice setting, establishing a plan for management of medical emergencies in each practice setting where sedation/anesthesia is administered. These policies and procedures must include: (1) Written protocols, policies, procedures, and training requirements specific to the permit holder's equipment and drugs for responding to emergencies, including respiratory emergencies; (2) Annual review of the Emergency Preparedness Policies & Procedures to determine if an update is needed. Documentation of the dates of the policy and procedures creation, most recent update, and the most recent annual review; (3) Basic life support protocols, advanced cardiac life support rescue protocols, and/or pediatric advanced cardiac life support rescue protocols if treating pediatric patients consistent with the Board rules as applied to the permit holder; and (4) At a minimum, additionally, the following documents: (a) Specific protocols for response to a sedation/anesthesia emergency, including advanced airway management techniques, (b) Staff training log, showing training in emergency prevention, recognition, and response on at least an annual basis, (c) Emergency drug log documenting annual reviews for assurance of unexpired supply, (d) Equipment readiness log indicating annual reviews for assurance of function of required equipment, and (e) Individual office staff roles and responsibilities in response to an emergency, including specific to respiratory emergency. Rule effective 5/10/2018.

Prevention of and Response to Sedation/Anesthesia Emergencies New Rule 110.15

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establishes minimum emergency preparedness standards and requirements for the administration of sedation/anesthesia. Any time a permit holder administers sedation/anesthesia, the permit holder must have immediately available: (1) Adequate and unexpired supply of appropriate drugs and anesthetic agents, including but not limited to pharmacologic antagonists and resuscitative drugs; (2) Automated external defibrillator; (3) Positive pressure ventilation device; (4) Supplemental oxygen; and (5) Appropriate monitors and equipment, including but not limited to: Stethoscope, Sphygmomanometer or automatic blood pressure monitor, Pulse oximeter, Oxygen delivery system with full face mask and connectors for high flow oxygen to patient under positive pressure, with backup system, Suction equipment for aspiration of oral and pharyngeal cavities and a backup suction device to use in the event of general power failure, Lighting system to evaluate patient's skin and mucosal color, with backup for general power failure, and Precordial/pretracheal stethoscope, size-and-shape appropriate advanced airway device, intravenous fluid administration equipment, and/or electrocardiogram.

A permit holder administering sedation/ anesthesia for which a Level 4 permit is required must use capnography during sedation/ anesthesia administration. At least annually, each permit holder must conduct an emergency drug inspection for assurance of unexpired supply. Documentation of emergency drug inspections must be maintained in the permit holder's emergency drug log. At least annually, each permit holder must conduct an equipment inspection for as-

surance of function. Documentation of equipment inspections must be maintained in the permit holder's equipment readiness log. Rule effective 5/10/2018.

Portability. New Rule 110.7 eliminates need for separate portability permit for anesthesia. Instead, portability is stated on application for issuance or renewal of sedation/anesthesia permit. The Board dropped proposed requirement to list address of every location at which dentist would provide portable sedation/anesthesia. Rule effective 5/10/2018.

Emergency Preparedness. New Rule 108.15 requires dentists to maintain and annually update written policies and procedures for responding to emergency situations. Rule effective 12/25/2016.

Additional Continuing Education Requirement. New Rule 111.1 requires each dentist, with DEA permit for controlled substances, to complete at least two hours of continuing education in the abuse and misuse of controlled substances, opioid prescription practices and/or pharmacology, every three years. This continuing education may be used to fulfill the annual licensure renewal continuing education requirements. Rule effective 12/25/2016.

Self-query of Prescription Monitoring Program. New Rule 111.2 requires each dentist, who is permitted by the DEA to prescribe controlled substances, to annually conduct at least one self-query regarding the issuance of controlled substances through the Prescription Monitoring Program of the Texas State Board of Pharmacy. Rule effective 12/25/2016.

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your dentist col-
leagues, office
manager, and ad-
visors.**

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About Our Firm ...

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. Our health law practice is focused on business law, transactional aspects of individual and group practices, such as practice sales/purchases/buy-ins, contracts and incorporations, office/facility leases, building purchases/condos, build-to-suits and real estate law, 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 over 25 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