

Employment Contracts – One Size Does Not Fit All: Employment Labor Issues

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DISCLOSURE

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Oral vs. Written Contracts

▶ Oral Contracts

- ▶ Proof issues
- ▶ Prone to misunderstandings

▶ Written Contracts

- ▶ Content can be proven
- ▶ Can be better planned and negotiated
- ▶ Security and respect to employee



Contract Core Elements

- ▶ Dental Records Ownership
- ▶ Confidentiality Provisions
- ▶ Noncompete/Nonsolicitation
- ▶ Duties
- ▶ Compensation & Benefits
- ▶ Termination

Ownership Considerations

- ▶ Practice Buy-In Opportunity?
 - ▶ Is there an opportunity for the employee to become a co-owner in the dental practice?
 - ▶ Is there a buy-in?
 - ▶ What is the process to use such opportunity?
 - ▶ Is the opportunity mandatory or discretionary?

Co-owner Employee

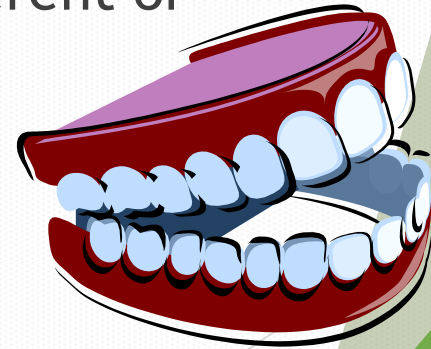
- ▶ Succession plan for
 - ▶ Death, disability, employment termination, split-up, other
- ▶ How to handle
 - ▶ Debt
 - ▶ Personal guaranties
 - ▶ Buyout
 - ▶ Leases
 - ▶ Employment/Contract agreements

Formation of Contract

- ▶ Offer & Acceptance
- ▶ Initialing of changes
- ▶ All blanks completed
- ▶ Signature by employer and employee
- ▶ Delivery of contract to both parties

Pitfall - Using Unknown/Old Contracts

- ▶ “Contracts are like dentures,
▶ one size does not fit all”
- ▶ Contract may be out of date
- ▶ Relationships of parties may be different or
▶ reversed
- ▶ Critical terms may be missing
- ▶ Best to avoid this pitfall, and
▶ seek advice of your attorney



Take-Aways (1)



- ▶ Choose your employees/employers with care
- ▶ Only enter into contracts that you believe you can honor
- ▶ Have contracts in writing
- ▶ Be sure you understand the contract
- ▶ Have examples in the contract, especially for financial terms

Take-Aways (2)



- ▶ Get legal help during the planning process
- ▶ Read final version before you sign
- ▶ Keep fully signed contract original in safe place
- ▶ Calendar system notification of deadlines/duties

Take-Aways (3)



- ▶ Comply with your contracts!
- ▶ Terminate contracts in writing!
- ▶ If other party is in violation, or has issues with contract, address these matters with your attorney early to determine options

- ▶ “As in dentistry, in contract matters, prevention is key.”

Giving the Pink Slip: Employment Termination

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Overview

- ▶ Termination Considerations and Steps
- ▶ Termination Alternatives
- ▶ Employee as Patient
- ▶ Special Case: Embezzlement
- ▶ Special Case: Computer Sabotage
- ▶ Resources

Termination Considerations and Steps (1)

- ▶ Situation is not fixable
- ▶ Contract or “At Will” employee?
 - ▶ If there is an employment contract, terms must be satisfied
 - ▶ “At will” - may terminate any time

Termination Considerations and Steps (2)

- ▶ Don't fire for an illegal reason - For example
 - ▶ Jury duty or military duty
 - ▶ Voting
 - ▶ Refusal to commit an illegal act
 - ▶ Inquiring about the legality of an employer's instruction
 - ▶ Involvement in a claim over wages, workers compensation, or discrimination
 - ▶ "Whistleblowing"

Termination Considerations and Steps (3)

- ▶ “To avoid shock and unnecessary claims and lawsuits, treat employees fairly and consistently according to known, job-related rules and standards, follow stated policies as closely as possible and avoid exceptions whenever possible” -
Source: Texas Workforce Commission

Termination Considerations and Steps (4)

- ▶ Employment Policies and Procedures
 - ▶ Written Policies
 - ▶ Written acknowledgement from employee for receipt of policies
 - ▶ Follow policies and procedures
 - ▶ Progressive discipline, including oral and written warnings

Termination Considerations and Steps (5)

- ▶ TWC Termination 10 Point Checklist
 - ▶ Was there an incident near the time of discharge?
 - ▶ Did employee violate a known policy or law?
 - ▶ Are witnesses available?
 - ▶ Is there documentation to support termination?
 - ▶ Did employee progress through disciplinary process?
 - ▶ Was employee aware of infraction and given the opportunity to explain or correct?

Termination Considerations and Steps (6)

- ▶ Discrimination issues?
- ▶ Was the employee involved in a protected activity?
- ▶ Layoff Criteria?
- ▶ 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.

Termination & Exit Interview (1)

- ▶ Terminate with dignity - in private
- ▶ Discuss and document termination reasons
- ▶ Inform employee of continuing obligations
 - ▶ Confidentiality
 - ▶ Noncompete and Nonsolicitation
 - ▶ Return of property to practice
- ▶ Listen to departing employee, and accept written comments
- ▶ If appropriate, get written acknowledgements from employee

Termination & Exit Interview (2)

- ▶ Final Paycheck- within 6 days of firing
- ▶ Potential Unemployment Claim
 - ▶ Employer may dispute claim
 - ▶ Claims history and tax rate
- ▶ Release of Claims
 - ▶ Separation payment in return for release of claims
 - ▶ Prepared by attorney

Termination & Exit Interview (3)

▶ Security Concerns

- ▶ Disable computer log-on
- ▶ Change passwords
- ▶ Change key code access to the office and building
- ▶ Obtain all keys
- ▶ Potentially change locks (with landlord consent)

Termination & Exit Interview (4)

- ▶ Obtain practice credit/debit cards
- ▶ Notify office personnel that employee is no longer employed and not to have access to office or computers
- ▶ Notify vendors that employee is no longer employed and is not authorized to make purchases or have access to systems

Termination Alternatives

- ▶ If good relationship and finances....
- ▶ Encourage employee to seek other employment
- ▶ Job-sharing or reduced hours
- ▶ TWC voluntary Shared Work Program

Former Employee as Patient

- ▶ TSBDE Abandonment Rule - Rule 108.5
 - ▶ A dentist, without reasonable cause, shall not abandon a dental patient. Once a dentist has undertaken a course of treatment, the dentist, absent reasonable cause, shall not discontinue that treatment without giving the patient adequate notice and the opportunity to obtain the services of another dentist. A dentist shall exercise the level of care necessary to prevent jeopardizing the patient's oral health during this process.
 - ▶ A dentist shall give a minimum of 30 days written notice of his/her intent to discontinue undertaken treatment. Notice shall be either hand-delivered to the patient or sent via certified mail, return receipt requested to the patient's last known address, with the dentist retaining a copy of the notice letter in the patient's file along with proof of service.
 - ▶ Notice needs to have details specified in rule and dentist needs to state and be available to render emergency treatment for up to 30 days. (See entire rule)

Special Case: Embezzlement(1)

- ▶ Unique challenges - could involve
 - ▶ Police
 - ▶ Prosecutor
 - ▶ Investigator
- ▶ **Should notify your attorney ASAP!**

Special Case: Embezzlement(2)

- ▶ Consult attorney, accountant, banker, IT consultant, anti-fraud consultant - immediately and throughout process
- ▶ Stop access to practice - leave of absence, security measures
- ▶ Contact police and file police report
- ▶ Collect evidence
 - ▶ Try to obtain confession - best in writing with a witness

Special Case: Embezzlement(3)

- ▶ Fire employee
- ▶ Freeze bank accounts and credit cards
- ▶ Mitigate damage by instituting and, if necessary, correcting security measures
- ▶ Terminate computer access
- ▶ IT services to freeze computer and perform forensic analysis, for embezzlement and HIPAA purposes

Special Case: Embezzlement(4)

- ▶ Audit of financial records and systems - certified fraud examiner/accountant
- ▶ Determine if repayment to Medicaid, Medicare, or other payors is needed - address promptly
- ▶ Change locks
- ▶ Change passwords
- ▶ Notify staff to not provide access to office or systems to terminated employee

Special Case: Embezzlement(5)

- ▶ Notify janitors/landlord to not provide office access to terminated employee
- ▶ Determine if HIPAA breach has occurred - commence patient and government notifications with assistance of attorney
- ▶ Check with insurance agent to determine if employee theft insurance coverage
- ▶ Check with malpractice insurance carrier for coverage
- ▶ Be careful not to slander or libel employee

Special Case: Embezzlement(6)

- ▶ Have dentist and other employees make written statements, contemporaneously of events, timelines, and mitigation steps, to preserve evidence and to help refresh their memories
- ▶ Prior to embezzlement occurring, include a provision in employment policies and procedures for authorizing wage deduction for amount of misappropriated funds (and have employees agree to the change in policies and procedures)

Special Case: Embezzlement(7)

- ▶ For future, review hiring and operations to institute checks and balances to lessen probability of future embezzlement, including but not limited to:
 - ▶ Background checks, including criminal, references, exclusions from the Medicaid/Medicare programs. Have permission to update background checks. Review Medicaid/Medicare exclusion databases on ongoing basis.
 - ▶ Accounting controls
 - ▶ Banking controls
 - ▶ Cash handling policies & procedures

Special Case: Computer Sabotage

- ▶ Outgoing IT vendor:
 - ▶ Changed passwords
 - ▶ Disabled all accounts
 - ▶ Removed drive mappings
 - ▶ Removed backup program
 - ▶ Deactivated antivirus software
- ▶ This could have been done by a disgruntled employee!

Labor Law for Dentists

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Fair Labor Standards Act (FLSA) Overview

- ▶ Minimum Wage
- ▶ Overtime pay
- ▶ Recordkeeping
- ▶ Child Employment

Minimum Wage & Overtime

- ▶ Minimum Wage (\$7.25/hr)
- ▶ Overtime
 - ▶ Time-and-a-half
 - ▶ Over 40 hours/week
 - ▶ All non-exempt employees

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.

Exempt Employees

- ▶ Dentists (always)
- ▶ Some Dental Hygienists paid on salary basis (\$455/wk min)
- ▶ Executive paid on salary basis (\$455/wk min)
- ▶ Administrative paid on salary basis (\$455/wk min)

Executive Exemption

- ▶ Primary duty is management
- ▶ Directs work of 2+ employees
- ▶ Hires and fires, or recommends hiring and firing
- ▶ Paid at least \$455/week on a salary basis

Administrative Exemption

- ▶ Non-manual work in management or general business operations
- ▶ Exercise of discretion and independent judgment
- ▶ Paid at least \$455/week on a salary basis

Salary Basis Considerations(1)

- ▶ Employee regularly receives
 - ▶ each pay period on a weekly, or less frequent basis,
 - ▶ a predetermined amount constituting all or part of the employee's compensation,
 - ▶ which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

Salary Basis Considerations(2)

- ▶ An exempt employee must receive the full salary for any week in which the employee performs any work
- ▶ Exempt employees need not be paid for any workweek in which they perform no work

Salary Basis Considerations(3)

You blow the exemption if...

- ▶ Deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business
- ▶ (Note: If the employee is ready, willing and able to work, deductions may not be made for time when work is not available)

Salary Basis Exceptions(1)

You may deduct when...

- ▶ Absent from work for one or more full days for personal reasons, other than sickness or disability
- ▶ Absent one or more full days occasioned by sickness or disability if covered by plan, policy, or practice that provides compensation for this circumstance

Salary Basis Exceptions(2)

You may deduct when...

- ▶ For jury duty, attendance as a witness, or temporary military leave
- ▶ You can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week

Salary Basis Exceptions(3)

You may deduct when...

- ▶ For penalties imposed in good faith for infractions of safety rules of major significance
 - ▶ e.g. smoking in gasoline plant
- ▶ Unpaid disciplinary suspensions of one or more full days
 - ▶ e.g. workplace violence

Salary Basis Exceptions(4)

You may deduct when...

- ▶ A partial first or last week is worked by the employee
 - ▶ You can prorate the salary
- ▶ Employee takes unpaid leave under the Family and Medical Leave Act
 - ▶ You can prorate the salary

Salary Basis Exceptions(5)

Calculating the deduction

- ▶ The employer may use the hourly or daily equivalent of the employee's full weekly salary, or any other amount proportional to the time actually missed by the employee.
- ▶ A deduction from pay as a penalty for violations of major safety rules may be made in any amount.

Other Exemptions

- ▶ Types of employees
- ▶ 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.

Record Keeping(1) - Must keep for each non-exempt employee

- ▶ Full name and Social Security number.
- ▶ Address
- ▶ Birth date, if younger than age 19
- ▶ Sex and occupation
- ▶ Time and day of week when employee's workweek begins
- ▶ Hours worked each day
- ▶ Total hours worked each workweek

Record Keeping (2)

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

Record Keeping (3)

- ▶ The employer may also maintain these records for exempt employees. If an employee has been misclassified, it will be helpful to have time records to determine if the workweek exceeded 40 hours. The records will be useful in calculating overtime pay due the employee.

Minimum Wage

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

Timekeeping(1)

- ▶ Contemporaneous time records critical
 - ▶ Time clock
 - ▶ Software
 - ▶ Sign-in sheet
- ▶ Make sure these occur and are accurate
- ▶ Include in policy manual, and get employee acknowledgement
- ▶ Inadequate time records can lead to a claim for overtime and penalties that is difficult to defend!

Timekeeping(2) - Breaks; on and off clock

- ▶ Work time includes
 - ▶ Breaks less than 20 minutes
 - ▶ Meal breaks less than 30 minutes
- ▶ No work “off the clock”
 - ▶ Don’t clock out, then do something else
 - ▶ May enforce leaving after clock-out

Timekeeping(3) - Special Rules

- ▶ Travel
- ▶ Meetings
- ▶ Training
- ▶ On-call
- ▶ You need written policies for these

Penalties for FLSA Violations(1)

- ▶ Violation can be caused by
 - ▶ Misclassification of employees as “exempt”
 - ▶ Misclassification of employees as independent contractors
 - ▶ Failure to keep proper records

Penalties for FLSA Violations(2)

- ▶ Unpaid Overtime is serious
 - ▶ Back pay for overtime
 - ▶ Liquidated damages equal to back pay
 - ▶ Attorney's fees & lawsuit costs
 - ▶ Possible federal civil and criminal penalties

Penalties for FLSA Violations(3) (“Whatcha gonna do when they come for you?”)

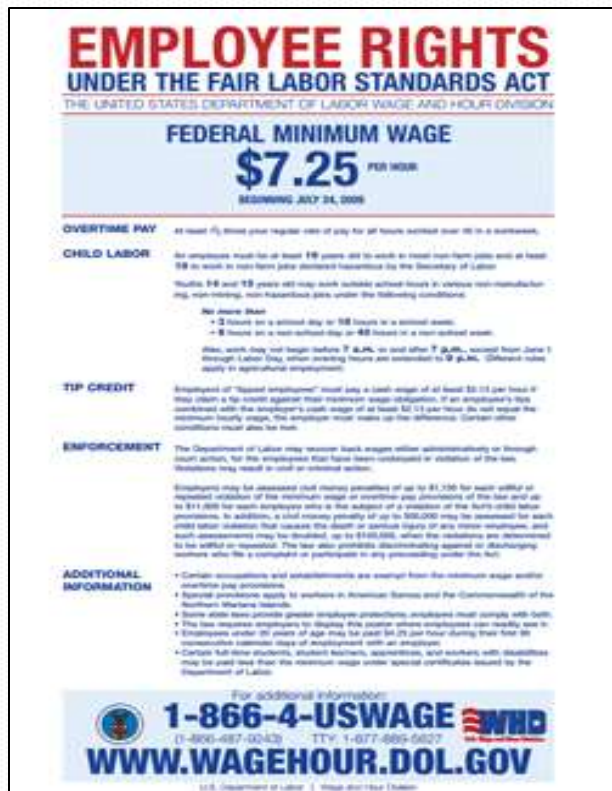
- ▶ US Department of Labor recovers \$4.83 million in back wages, damages for more than 4,500 Wal-Mart workers. Misapplied exemption resulted in pay violations; nearly \$464,000 assessed in penalties
- ▶ WASHINGTON – Wal-Mart Stores Inc., headquartered in Bentonville, Ark., has agreed to pay \$4,828,442 in back wages and damages to more than 4,500 employees nationwide following an investigation by the U.S. Department of Labor’s Wage and Hour Division that found violations of the federal Fair Labor Standards Act’s overtime provisions. Additionally, Wal-Mart will pay \$463,815 in civil money penalties.

The violations affected current and former vision center managers and asset protection coordinators at Wal-Mart Discount Stores, Wal-Mart Supercenters, Neighborhood Markets and Sam’s Club warehouses. Wal-Mart failed to compensate these employees with overtime pay, considering them to be exempt from the FLSA’s overtime requirements. The Labor Department’s investigation found that the employees are nonexempt and consequently due overtime pay for any hours worked beyond 40 in a week.

- ▶ *The U.S. Department of Labor vigorously enforces the provisions of the Fair Labor Standards Act (FLSA), and occasionally companies are sued for large amounts of money for violations of the FLSA.

FLSA Poster

- ▶ Employers must display an official FLSA poster
- ▶ 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 avoid problems related to employment law issues. Timely legal advice can keep a business from losing valuable financial resources.

Resources

- ▶ Especially For Texas Employers from Texas Workforce Commission:
www.twc.state.tx.us/news/efte/tocmain2.html
- ▶ TWC Appeals Policy and Precedent Manual:
www.twc.state.tx.us/ui/appl/unemployment-benefits-appeals-policy-precedent-manual.html
- ▶ Texas Business Today - online quarterly informational newsletter covering issues and interests of Texas employers from TWC's Office of the Commissioner Representing Employers:
www.texasworkforce.org/TexasBusinessToday

About Jeanine Lehman

- ▶ 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.
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