

DENTAL LEGAL UPDATE

HIPAA Case: Yelp® Review Responses

by Jeanine Lehman, Attorney

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On October 2, 2019, the Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services announced that a Dallas, Texas dental practice agreed to pay \$10,000 to the OCR and to adopt a corrective action plan to settle potential violations of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule.

On June 5, 2016, OCR received a complaint from a patient alleging that the practice had responded to the patient’s social media review on Yelp® and provided her health information including the patient’s last name, details of her treatment plan, insurance and cost information. OCR’s announcement indicated that (1) OCR’s investigation found that the practice had impermissibly disclosed the protected health information (PHI) of multiple patients in response to patient reviews on the practice’s Yelp® review page and (2) the

practice did not have a policy and procedure regarding disclosures of PHI to ensure that its social media interactions protect the PHI of its patients or a Notice of Privacy Practices that complied with the HIPAA Privacy Rule. OCR accepted a substantially reduced settlement amount in consideration of the practice’s size, financial circumstances, and cooperation with OCR’s investigation.

“Social media is not the place for providers to discuss a patient’s care,” said OCR Director, Roger Severino. “Doctors and dentists must think carefully about patient privacy before responding to online reviews.”

In addition to the monetary settlement, the practice will undertake a corrective action plan that includes two years of monitoring by OCR for compliance with the HIPAA Rules, adoption of

Social media is not the place for providers to discuss a patient’s care.

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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
tsbde.texas.gov

Texas Dental Association
www.tda.org

Texas Academy of
General Dentistry
www.tagd.org

American Dental
Association
www.ada.org

U.S. Dept. of Labor
www.dol.gov

HIPAA Case (cont.) --

HIPAA policies and procedures and keeping them current, provision of training, revising Notice of Privacy Practices, reporting failures to comply, issuance of breach notifications to any individuals or their personal representatives whose PHI was disclosed by the practice on its Yelp® page without a valid HIPAA compliant authorization and also submitting breach notifications to the U.S. Department of Health and Human Services through its online breach reporting portal, reporting to OCR, and retaining and producing documents and records relating to compliance with the corrective action plan. The resolution agreement and corrective action plan may be found at:

www.hhs.gov/hipaa/for-professionals/compliance-enforcement/agreements/elite/index.html

Credit Balances Land Texas Physician in Medical Board Trouble

In 2019, the Texas Medical Board and a Texas physician entered into an Agreed Order requiring the physician to have his billing practice monitored for eight consecutive monitoring cycles;

within one year complete at least eight hours of continuing medical education and billing and medical record-keeping; and within 60 days pay an administrative penalty of \$1000. The Board found the physician failed to refund patients' overpaid medical bills or to turn over the unclaimed overpayments to the Comptroller's office within three years of the date of service. The Board further found that the physician did not act diligently to ensure that refunds were given to patients in a timely manner, and failed to send un-refunded money to the Comptroller as required by law.

Failure to timely refund money to patients can result in loss of patient goodwill, as well as patient complaints and bad social media reviews. Dentists will be well served by ensuring that patient refunds are promptly made and that compliance with laws on unclaimed property requiring timely payment of un-refunded money to the Texas Comptroller of Public Accounts is occurring.

Overtime Rule Changes:

On September 24, 2019, the U.S. Department of Labor announced a final rule to make 1.3 million

American workers newly eligible for overtime pay.

The final rule updates the earnings thresholds necessary to exempt executive, administrative and professional employees from the Fair Labor Standards Act's (FLSA) minimum wage and overtime pay requirements, and allows employers to count a portion of certain bonuses/commissions towards meeting the salary level. The new thresholds account for growth in employee earnings since the thresholds were last updated in 2004.

In the final rule, the Department's changes include:

- raising the "standard salary level" from the currently enforced level of \$455 per week to \$684 per week (equivalent to \$35,568 per year for a full-year worker);
- raising the total annual compensation requirement for "highly compensated employees" from the currently enforced level of \$100,000 per year to \$107,432 per year;
- allowing employers to use nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10% of the standard salary level, in recognition of evolving pay practices.

The final rule is effective on January 1, 2020.

The other requirements of the FLSA law, including but not limited to, the duties requirements and compliance with the restrictions on docking of pay must also be satisfied for executive, administrative and professional employees to be exempt. Because of the difficulties complying with the requirements for the exemption, especially when an employee has both exempt and non-

exempt duties, some dental practices are choosing to pay their staff on an hourly basis and then paying overtime at time and a half.

The FLSA statute and rules are complex and the penalties for mistakes are high. Dentists will want to consult with a knowledgeable advisor concerning how to proceed, now, and be ready to implement changes on or before the January 1, 2020 change in the law. See:

www.dol.gov/whd/overtime2019/

Leases: Check your NNN

The most common type of commercial lease for dental offices is a net lease. Under a net lease, the tenant pays base rent, as well as additional rent which consists of pass-through of expenses from the landlord. In a triple net (NNN) lease, those additional expenses are typically the landlord's insurance, real estate taxes, and maintenance and other expenses allocable to the leased office. At the commencement of the lease, the landlord calculates estimated NNN expenses for the first year of the lease and that estimate is payable as additional rent on a monthly basis. Generally, leases require that soon after the end of the calendar year, the landlord will perform a

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Leases: Check your NNN (cont.) --

reconciliation to compare the NNN expenses paid in the calendar year to the amount of additional rent paid in that calendar year. If there is an underpayment, the tenant must pay the underpayment. If there is an overpayment, the landlord's responsibility for refund will be as set forth in the lease. After this reconciliation process, the landlord may recalculate the monthly additional rent to take into account expected NNN expenses for the next year. With the trend of increasing NNN costs, including significant annual increases in real estate taxes, it is critical to stay on top of reconciliation of NNN expenses.

A dentist may be a landlord because of retaining ownership of the dental office building or dental office condo when the dentist sold his or her practice or because of otherwise being a real estate investor. For all landlords, the provisions of the lease concerning reconciliation of NNN need to be reviewed and strictly followed in a timely manner. Dentists, who are tenants, also need to receive timely notice of underpayment or overpayment of the additional rent and the new monthly additional rent going forward. Otherwise,

the tenants have the risk of receiving a large unexpected bill for an extended time period.

If you are the landlord mark your calendar for January 2, to start reconciliation of the NNN expenses and the setting of the new additional rent. If you are a tenant, mark your calendar to request that information from your landlord, as soon as it is available.

Given ever-increasing real estate taxes, landlords and tenants will also want to discuss and cooperate in contesting tax assessments, if prudent.

For net leases, there are formulas for calculating the additional rent in the leases. Some formulas may include variants of NNN terms.

There is also a less common type of lease known as a gross lease or full-service lease, in which a flat fee rent is paid by the tenant and the landlord pays the expenses of ownership of the real estate.

Dental office leases are very complex. Dentist landlords and tenants, each need their own experienced real estate attorney to assist in the negotiation and review of such leases, prior to signature, and as questions arise.

**Have you moved?
Please send us a
change of address
to receive future
issues.**

**Please share this
newsletter with
your dentist
colleagues, office
manager, and
advisors.**

Thanks!

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newsletter by
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(512) 918-3435.**

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 and physicians. 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