

DENTAL LEGAL UPDATE

Dentist Employment Agreements

by Jeanine Lehman, Attorney

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Employment contracts are like dentures - one size does not fit all.

Dentists are key assets of a dental practice. Their legal roles in the practice may be varied, including owner, employee, independent contractor, landlord, or a combination of different roles. Often, with the demands of the practice, the relationship of the parties may be based on a handshake rather than a written contract. That can be a mistake.

A comprehensive written and signed employment contract that is prepared by a knowledgeable health law attorney, and understood by the parties to the contract, can protect against misunderstandings and help preserve value in the practice.

One Size Does not Fit All.

Employment contracts are like dentures – one size does not fit all. For example, an employment contract drafted to protect the interests of the employer does not necessarily work the same way as an employment contract drafted to protect the interests of the employee. That said, a successful contract needs to meet the needs of both parties. Using an employment contract found on the

Non-competes in the Crosshairs of the Federal Trade Commission

The Executive Branch of the US Government is taking steps to place limitations on non-competes through action of the Federal Trade Commission (FTC). On July 9, 2021, President Biden issued his Executive Order on Promoting Competition in the American Economy. In that order, a White House Competition Council was established. Also, the President ordered: “To address agreements that may unduly limit workers’ ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC’s statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”

On July 20, 2021, a Petition for Rulemaking to Prohibit Worker Non-Compete Clauses was filed with the FTC by labor organizations, individuals and others. The FTC received thousands of comments concerning the petition. On

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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

Dentist Employment Agreements (cont.) --

Internet or from a friend is very risky and more often unenforceable. Laws change. A contract that worked two years ago may no longer work today. Practice owners often modify contracts without legal advice. In doing so, they may delete the very clause that is required to make the contract enforceable, damaging their practice and financial position.

Noncompete. A hardworking excellent associate dentist is of great value to a dental practice. If that same dentist quit and opened a practice across the street, and the patients followed the departing dentist, the dental practice's value would be greatly diminished. Even the threat of that occurring can drastically diminish the value of the practice and make it difficult to sell. For example, when the owner-dentist dies, the surviving spouse is left with little bargaining power. This loss of bargaining power can also occur to a living owner-dentist.

To protect the practice against these risks, noncompete covenants are often used. Key provisions are necessary. The Texas statute requires a covenant not to compete to be ancillary to or part of an otherwise enforceable contract at the time the contract is made. Further, the statute requires that the covenant not to compete must contain limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary

to protect the goodwill or other business interest of the person being protected. Additionally, Texas law requires noncompete covenants restricting physicians to have several additional clauses, including buyout provisions. These additional requirements affect contracts with dentists dually licensed as physicians, such as certain oral surgeons. This area of law is litigated and has been changed by the legislature and court decisions. Therefore, the advice of a health law attorney is critical.

Consideration and clear implementation of noncompete covenants for associate dentists and co-owner dentists are often prudent.

Ownership of Dental Records.

Under Texas State Board of Dental Examiners (Board) rules, dental records are the sole property of the dentist who performs the dental service. Therefore, if the dental practice wants to own the dental records, a provision to transfer the dental records needs to be included in the employment contract, in accordance with Board rules.

Confidentiality. Confidentiality provisions are often included in employment contracts and provide important protections.

Duties. A clear description of the duties of the employee should be included in the employment contract. The allowance or disallowance of moonlighting can be addressed. Call and emergency

coverage responsibilities can be included.

Compensation & Benefits. Compensation and benefits should be covered in the employment agreement. Will compensation be on an hourly, salary, or other basis? Is there a base salary? Are there bonuses? If compensation will be performance based, for example, based on production or collections, the methodology for calculation should be clear. An issue to consider addressing is how the redo of dental work will be handled. What is the payroll period? What benefits are available? Is there health/dental insurance, for employee only or for employee and dependents? What is the vacation, illness, and leave policy? Are there benefits for continuing professional education? Who pays for malpractice insurance, including any "tail" coverage? Are there retirement plans? Who pays for professional licensure fees and professional association dues? Are there any other benefits?

Termination Provisions. Termination provisions in the employment contract are very important. Is employment "at will" or for a set term? Is notice required prior to termination? Is the notice period long enough to obtain the services of another dentist? Can the contract be terminated "for cause" and if yes, what constitutes cause?

Ownership 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?

Coordination of Responsibilities. The dentist employee may also be a dentist co-owner. In such event, a succession plan should be made for what will happen with the practice if one or more of the dentist co-owners leave employment by the practice, either voluntarily or by death or disability. For example, how will practice debt, personal guaranties, practice ownership buyout, dentist employment agreements, practice building/lease, and other issues be handled? Several of the contracts of the dental practice will

need to be coordinated to provide an overall plan. This critical planning takes close collaboration with the dental practice's team, including the health law attorney, accountant, and practice management consultant.

Importance of Signatures and Legal

Formation of Contract. The legal steps to form a valid contract should occur, including but not limited to, signatures and delivery of the contract. Not surprisingly, a Texas court refused to enforce a dental practice noncompete agreement that was never signed.

Prevention is Key. As in dentistry, prevention is key in contract matters. The first visit to your lawyer should not be at the point of litigation, any more than the first visit to a dentist should be because of toothache. Instead, the services of the health law attorney should be sought at the outset to draft the dentist employment contract. Also, the health law attorney should be consulted before modifying the contract, and periodically to check for changes in the law.

On the flipside, it is prudent for the employee dentist or independent contractor dentist to have his own health law attorney review the employment contract or independent contractor contract prior to signature, to advise him on the terms of such contract. ■

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Non-competes in the FTC's Crosshairs (cont.) --

December 6-7, 2021, the FTC and the US Department of Justice held a workshop to discuss efforts to promote competitive labor markets and worker mobility, including concerns about the increased use of restrictive contractual clauses in labor agreements, including non-competes and nondisclosure agreements.

On June 9, 2022, the Wall Street Journal (WSJ) published an interview with FTC Commission Chairwoman Lina Khan reporting that she indicated the FTC is considering a new rule to restrict the use of non-compete clauses and that the FTC planned to also target non-competes in individual cases through enforcement actions. The WSJ reported that the U.S. Chamber of Commerce representative stated that "Non-competes have a legitimate place in contract law, especially when a business is bought or sold. A blanket ban on non-competes would be a clear sign of FTC overreach."

The U.S. Chamber of Commerce in its September 29, 2021 comments to the FTC noted "State legislatures and courts nationwide recognize that an employer has a legitimate interest in protecting against a competitor's acquisition of its sensitive business information through engaging a former employee. Courts further uniformly recognize that "non-compete" agreements are a reasonable tool for achieving such protection. The kinds of protectable information that non-compete contracts legitimately protect include trade secrets known by the employee, special business relationships (customer, vendors, etc.) managed or known by the employee, confidential business plans designed or

known by the employee, pricing or bidding strategies learned by the employee; among other things." The Chamber also asserted that the FTC lacks statutory authority to adopt a rule banning non-compete clauses.

If the FTC promulgates a rule that seeks to overrule state law on non-compete agreements, it is likely that litigation will occur. It will be particularly troublesome if an FTC rule seeks to impose a blanket ban on existing non-compete agreements. For background concerning federal agency rule-making authority, on June 30, 2022, the U.S. Supreme Court in a 6 to 3 decision in West Virginia v. Environmental Protection Agency struck down the EPA's Clean Power Plan rule, which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants, finding the EPA lacked statutory authority from Congress. Going forward, expect the U.S. Supreme Court to closely examine the rule-making authority of federal agencies in cases that it hears.

Since 1989, Texas has had a statute authorizing non-compete agreements. There are strict requirements in that statute. Texas courts have decided many cases under that statute, both upholding non-compete agreements and finding other agreements to be unenforceable. Over the years, there have been changes brought about in court cases and the Texas Legislature.

Texas employers and businesses, including dental practices and dentists, need to be aware of Texas law and also need to keep an eye out for FTC action on non-compete agreements. This is a complex area and consultation with a knowledgeable attorney is prudent. ■

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About Our Firm ...

Law Offices of Jeanine Lehman P.C. is a Texas law firm headquartered in Round Rock 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 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 7965, Round Rock, TX 78683, and visit our website at www.jeanine.com