

DENTAL LEGAL UPDATE

Regulatory Roundup: HIPAA, Employment & Sunset

by Jeanine Lehman, Attorney

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Dental practices, which use patient testimonials, need to comply with HIPAA, including obtaining HIPAA-compliant authorizations.

HIPAA: Testimonials Settlement.

On February 2, 2016, a California physical therapy provider settled violations of the Health Insurance Portability and Accountability Act (HIPAA) with the U.S. Department of Health and Human Services Office for Civil Rights (OCR). The settlement agreement required payment of \$25,000, adoption and implementation of a corrective action plan, and annual reporting of compliance efforts for one year. This settlement was in response to the August 8, 2012 complaint alleging that the physical therapy provider impermissibly disclosed numerous individuals' protected health information (PHI), when it posted patient testimonials, including full names and full face photographic images, to its website without obtaining valid, HIPAA-compliant authorizations. The OCR investigation revealed that the physical therapy provider (1) failed to reasonably safeguard PHI; (2) impermissibly disclosed PHI without an authorization; and (3) failed to implement policies and procedures with respect to PHI that were designed to comply with HIPAA's requirements with regard to authorization. The take away from this settlement is that dental practices, which use patient testimonials, need to comply with HIPAA,

including obtaining HIPAA-compliant authorizations. Additionally, dental practices need to comply with the Texas State Board of Dental Examiner's rules on patient testimonials, and other applicable law. Consultation with an attorney is prudent.

Salary Threshold More than Doubles in Overtime Law.

On May 18, 2016, the U.S. Department of Labor adopted major changes to the overtime exemption rule, governing which executive, administrative, and professional (EAP) employees are exempt from overtime. The Department last updated these regulations in 2004, and the current salary threshold for exemption is \$455 per week (\$23,660 per year). Starting December 1, 2016, the Department more than doubled the salary threshold, setting the new salary threshold at \$913 a week (\$47,476 a year). The new salary threshold is the 40th percentile of weekly earnings for full-time salaried workers in the lowest-wage Census region, currently the South. Starting December 1, 2016, the rule allows up to 10 percent of the salary threshold to be met by non-discretionary bonuses, incentive pay, or commissions, provided these payments are made 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.taqd.org

American Dental Association
www.ada.org

Texas Sunset Advisory
Commission
www.sunset.texas.gov

American Society of Dentist
Anesthesiologists
www.asdahq.org

Overtime Law (cont.) --

at least a quarterly basis.

For an employer to use an EAP overtime exemption, all elements of the applicable exemption must be satisfied. These include paying the employee on the “salary basis”, with a guaranteed salary of at least the salary threshold, and also satisfying the duties requirement, including applicable supervisory responsibilities, for the applicable exemption. If the overtime exemption is not available, the employee must be paid overtime at 1.5 times the employee’s regular rate for all time worked over 40 hours in a work week. In response to this new rule, it is anticipated that employers will:

- Pay time-and-a-half for overtime work
- Raise workers’ salaries to or above the new threshold
- Limit workers’ hours to 40 per work week
- Reallocate earnings, in advance, between regular wages and overtime to keep overall pay largely the same, while also complying with the minimum wage laws
- Use some combination of the above

The Department’s rule automatically updates the salary threshold every three years, beginning January 1, 2020. Each update will raise the salary threshold to the 40th percentile of full-time salaried workers in the lowest-wage Census region, estimated to be \$51,168 in 2020.

If an employer fails to pay required overtime, the employer is subject to substantial penalties. Dental practices should review and revise their payroll policies and wage & employment agreements, in consulta-

tion with their attorneys to comply with this new law. For more information on the overtime final rule, see: www.dol.gov/overtime

City of Austin Fair Chance Hiring Ordinance.

On March 24, 2016, the Austin City Council passed the “Fair Chance Hiring” ordinance, which took effect on April 4, 2016. The purpose of the ordinance is to give a fair chance to job applicants and current employees seeking promotion, who have a criminal history that is not relevant to the job. This type of law is colloquially known as “Ban the Box”, i.e. banning the criminal record box on employment applications. The Austin ordinance applies to private employers, including dental practices, staffing agencies, and others, who employ at least 15 individuals, whose primary work location is in the City of Austin. An employer may not solicit or otherwise inquire about criminal history in a job application. Also, prior to making a conditional employment offer, an employer may not solicit criminal history information about an individual or consider the individual’s criminal history. A conditional employment offer is conditioned on the employer’s evaluation of the individual’s criminal history. An employer may not take adverse action against an individual because of the individual’s criminal history, unless the employer has determined that the individual is unsuitable for the job based on an individualized assessment conducted by the em-

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Austin Fair Chance Hiring Ordinance (cont.) --

employer. Adverse action includes refusing to hire or promote or revoking an offer of employment or promotion. If the employer takes adverse action against an individual based on the individual's criminal history, the employer must notify the individual in writing that the adverse action was based on the criminal history. Penalties for violation are up to \$500 per violation and employers are subject to subpoena. Dental practices, which are covered by the ordinance, need to review and revise their job applications and recruiting policies and procedures to comply with Ordinance No. 20160324-019. Given the risks and the complexity of the ordinance, it is prudent for them to consult with an attorney. For the ordinance, see:

www.ci.austin.tx.us/edims/document.cfm?id=251818

Sunset Report. In April 2016, the Staff Report of the Texas Sunset Advisory Commission on the Texas State Board of Dental Examiners (Board) was published, addressing five issues.

Issue 1: The Unusually Large Dental Board Inappropriately Focuses on Issues Unrelated to Its Public Safety Mission. Due to expert reviewers reviewing technical complaint issues beginning in 2013, the Staff noted a reduced workload for dentist Board members. The Staff stated that the Board, at the behest of dentist members, pursued significant rule changes more related to business practices than demonstrated public safety problems, despite widespread concern by stakeholders and others and a lack of broad consensus. Cited examples of such rulemaking activity were dental office ownership arrangements and specialty advertising. The Staff recommended reducing the size of the Board from 15 to 9 members, to consist of four dentists, two dental hygienists, and three public members. This change would result in the dentist Board members no longer being the majority of the Board. The Staff also

recommended allowing the Dental Hygiene Advisory Committee and the Dental Laboratory Certification Council to expire, and be replaced by stakeholder input. Decreasing the Board by six members will result in about \$13,000 per year of savings for travel costs.

Issue 2: Deregulate Dental Assistants. The Board's regulation of dental assistants expanded over the past 25 years to four separate certificate programs for commonly delegated tasks, though assistants can legally perform some work without holding any certificate. In fiscal year 2015, the Board issued 50,469 dental assistant certificates – more than all other Board issued credentials combined. The Staff stated State regulation of dental assistants is not needed to protect public safety, noting dental assistants can only work under the delegated authority of the dentist, who remains responsible for patient care and safety. The Staff noted because dental assistants can only perform reversible tasks, they have very low volume of meaningful complaint and enforcement activity, little, if any, of which relates to standard of care. The Staff stated that national credentialing and private market forces can provide any training or oversight of dental assis-

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Sunset Report (cont.) --

tants desired by employers or the public. Removing regulatory responsibility for dental assistants from the Board will allow the agency to focus on licenses that pose a higher risk to patients and the public. The Staff recommended that the Board's dental assistant certificate programs be discontinued, resulting in a loss of revenues to the State of Texas of about \$1.46 million per year. Of course, dental practices and dental assistants will save at least an equivalent amount by not having to pay the dental assistant certification fees.

Issue 3: Enforcement Tools for Anesthesia Concerns. The Board has seen an increase in complaints involving serious patient harm and sometimes death from anesthesia. The Board lacks the authority and resources to routinely inspect the offices of dentists providing some anesthesia services and does not require written emergency action plans for any dentist administering anesthesia. Dentists in other states and Texas doctors administering anesthesia in offices are subject to related routine inspections, and office-based Texas physicians providing anesthesia must maintain written emergency action plans. The Staff recommended authorizing the Board to conduct inspections for dentists administering parenteral anesthesia in office settings and directing the Board to revise rules to ensure

dentists with one or more anesthesia permits maintain related written emergency management plans. The cost for these recommendations could be mitigated by an adjustment to existing anesthesia permitting fees.

Issue 4: Failure to Meet Common Licensing Standards. The Staff noted that the Board's processes need improvement to meet common licensing standards. Staff recommendations are to (1) require the Board to monitor licensees for adverse licensure actions in other states; (2) authorize the Board to deny licensure renewal applications if the applicant is noncompliant with a Board order; (3) authorize the Board to require evaluations of licensees suspected of being impaired and require confidentiality for information relating to the evaluation and participation in treatment programs; (4) direct the Board to make data on the Board's enforcement activity information publicly available on its website. These recommendations will result in a revenue gain of approximately \$45,000 annually, from National Practitioner Data Bank queries, which would not be run for applicants failing to meet standards for licensure.

Issue 5: Continue Board. The Staff recommended continuing the Board's existence for 12 years. ■

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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!