

IN PRACTICE

HEALTH LAW

Dental Regulations Have Teeth: What Dentists and Dental Management Companies Need to Know

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Just as regular checkups are essential to dental health, appropriate consultations with an attorney may be essential to the health of a dental practice. This checkup is not only useful for asset protection, but also to assist dentists seeking business expansion in complying with a somewhat arcane set of regulatory issues.

Business Expansion

There is an inescapable tension between what makes business sense and what is legally permissible in the context of a dental health-care transaction. Recently, two issues have come to light that all dentists and management companies should be aware of: (1) whether a dental practice can pay a management company on a percentage basis; and (2) whether it is legally permissible for a management company to lease dental equipment to a dentist or a dental practice. Frequently, in a dental health-care transactional context, if something makes good business sense, it's most likely impermissible. Although this notion often holds true, there are practical

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solutions to seemingly insurmountable regulatory obstacles.

A physician practice management arrangement, whereby a management company provides turn-key services to a physician practice through the provision of equipment, space, billing services and personnel, in exchange for a percentage of the practice's collections, is a popular model within the medical community. Dental regulations, however, are much more restrictive than physician arrangements and do not permit dentists to take advantage of the aforesaid business model.

In New Jersey, a dental practice cannot pay anyone other than an associate on a percentage basis. N.J.A.C. § 13:30-8.13(e) provides, in pertinent part, that:

Dentists shall not participate in any arrangement or agreement, with any person other than an associate, whereby any remuneration received by that person in payment for the provision of space, professional services, facilities, equipment, personnel, marketing or management services used by the dentist is to be determined or calculated as a fixed percentage. ...

Thus, a management company can-

not be paid on percentage basis.

While the foregoing issue has a clear answer, not every issue is so cut and dried. For example, generally, a management company cannot lease equipment to a dental practice. Pursuant to N.J.S.A. § 45:6-19, a person is regarded as practicing dentistry if that person is a manager. The definition of a manager includes a person that places in the possession of any operator, assistant or other agent such dental material or equipment as may be necessary for the management of a dental office on the basis of a lease or any other agreement for compensation of such material, equipment or office. In accordance with the statute, a management company can lease dental equipment to a dental practice; *provided, however*, that the management company is a licensed dentist or dental practice. This provision, along with illustrating a practical solution for a seemingly insurmountable problem, creates a niche market for dentists who want to provide management services or equipment to other dentists.

Many dentists, while not plagued with as many regulatory complications as physicians (e.g., due to a general lack of involvement with federally funded programs), are often saddled with regulatory issues (as set forth above) which they do not even know exist.

And therein lies the rub.

How can a dentist or a management company avoid the pitfalls of regulations they don't know exist? One way is by coordinating with a dental health-care attorney to seek both business and legal advice with respect to the goals of the practice or management company.

Protection From Violation of the Fair Labor Standards Act

“An ounce of prevention is worth a pound of cure.” This statement holds true for dentists in their role as employers of associate dentists, hygienists and administrative staff. One growing area of litigation is based on alleged violations of the overtime provisions of the Fair Labor Standards Act (FLSA). Section 207 of the FLSA requires employers to compensate certain employees for overtime at a rate of one-and-one-half times their regular hourly wage. 29 U.S.C. § 207(a)(1). In order to be entitled to the additional compensation, an employee must have worked more than 40 hours in one week. Because the statute has a provision that grants attorney's fees and costs, liability for violations may be significant even if the salary due to the employee is relatively low. Furthermore, many successful plaintiffs are able to recover double damages under a liquidated damages provision of the statute. Employees may also recover up to three years of back wages.

Here is a brief checklist for dentists:

- *Is a dental practice covered by the FLSA even if the practice employs fewer than 15 workers?*

Yes. Some dentists may assume that because their office staff is small, they are not covered by the FLSA. Unlike most employment laws, however, the FLSA does not depend directly upon the number of employees. The FLSA instead covers individual employees whose work affects interstate commerce, a term so broadly defined by the U.S. Department of Labor (DOL) that it effectively includes all businesses that order equipment or treat clients with a connection to any other state. It is prudent to assume that every dental practice is covered.

- *Are any of my employees exempt from the overtime requirements of the*

FLSA?

A number of employees in a dental practice may qualify for exempt status, limiting the need for the detailed record keeping requirements of the FLSA. For example, under the Federal Wage and Hour regulations, a dental practice may pay dental hygienists either as exempt salaried “learned professionals” or as hourly (nonexempt) employees. Employees, including dental hygienists, are considered “learned professionals” if: (i) they are paid on a salary or fee basis of not less than \$455 per week; (ii) their work requires advanced knowledge — is predominantly intellectual requiring consistent exercise of discretion and judgment; (iii) the advanced knowledge is in a field of science or learning; and (iv) the advanced knowledge is customarily acquired by a prolonged course of specialized intellectual instruction. 29 CFR V Subpart D, section 541.300 and 541.301.

Federal regulations specifically mention dental hygienists in the section on “learned professionals,” where it states: “Dental hygienists who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.” 29 CFR V Subpart D, section 541.301(e)(4).

Note that a practice is not required to classify its hygienists as learned professionals. But if an employer chooses to pay such employees on a salary basis of at least \$455 per week, then such an employee will likely be considered exempt. If the practice pays such employees on an hourly basis, or at a lower salary, then the practice must pay time-and-a-half overtime for any hours worked beyond 40 in a week.

When it comes to administrative or sales staff, the potential pitfalls are greater. There is an exemption for certain salaried executives or managerial administrators. However, simply because a member of a dentist's staff is paid a salary, or has an impressive job title, the employee is not necessarily exempt from overtime pay. Many salaried employees

are nonexempt, including receptionists, secretaries, file clerks and dental technicians. The key to such exemptions is not the employee's title but whether the employee meets certain criteria specified by the DOL.

Calling a dental employee an independent contractor also is not dispositive. While true independent contractors are not covered by the overtime requirements of the FLSA, the focus must be placed squarely on the nature of the person's duties. Generally, only people who control their work in almost all respects will be considered independent contractors. If a dental practice exercises too much control over how a person performs her job and that person works more than 40 hours in a week, then the person will probably be classified as an “employee” who would be entitled to overtime. The IRS has recently modified its “20 factor” test into a somewhat simplified “11 factor test” that divides the inquiry into the degree of behavioral control, financial control and the nature of the relationship.

- *How can a dental practice protect itself from potential suit under the FLSA?*

The importance of proper record keeping cannot be emphasized enough. One particularly bad idea is to allow nonexempt dental employees to maintain their own time records. Part 516 of DOL's wage and hour regulations has detailed recordkeeping requirements, including hours worked weekly by each nonexempt employee. When neither the dental employee nor the employer has records, the litigation may turn on which party a jury finds to be more credible — a risky proposition at best. If the dental employee kept her own records, and the employer did not, the best evidence rule may lead a court to accept the employee's records as valid unless there is substantial reason to doubt her credibility.

In addition to the legal requirements, keeping records of the actual hours worked by a dental staff is simply good business practice. As a dental practice becomes more successful, the practice is likely to take on more staff. As the practice expands, the need for competent legal advice expands as well. And a healthy practice with a legal checkup is in the best position for long-term success. ■