



Practical Employment Strategies: Win-Win Solutions for Dentists and Their Employees

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ABSTRACT The profession of dentistry is also the business of dentistry and subject to the same employment laws as any other small business. Wrongful termination, discrimination, and harassment claims are on the rise in large part because dental employers often do not understand their basic employment law obligations. Good intentions do not offset inadequate office policies and documentation. Implementing, communicating, and evenly enforcing employment policies will reduce claims and promote office moral and productivity.

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In this difficult economy, employment claims are on the rise. California dental practices are increasingly seeing more wage and hour, workers' compensation, wrongful termination, and other types of employment lawsuits. Thus, it is especially important for California dentists and employees to communicate and work together to ensure a harmonious, productive practice. Content employees typically work harder, are more reliable, and file fewer employment-related claims, which are distracting, time-consuming, and often very expensive to defend.

Here are some practical ideas for creating office harmony and minimizing your employment-related legal risks:

Be Honest and Upfront

Create a team atmosphere by sharing general information about the state of the practice. If there are specific areas of concern within your practice, communicate them and ask for a group commitment to improve in these areas. If the practice is healthy, reassure nonproblem employees that you have no current plan to reduce staff. Do not, however, make any specific promises of continued employment. The California Labor Code provides that, in the absence of a contract specifying otherwise, employment is presumed to be "at-will."¹

Note, your employees' at-will status should also be acknowledged and con-

TABLE 1

Implementing Your Alternative Work Schedule

- **NOTIFY THE AFFECTED EMPLOYEES.** A written disclosure of the proposed alternative work schedule is required. Only nonexempt employees should be involved as overtime rules do not apply to employees who are correctly classified as exempt.
- **HOLD AN EMPLOYEE MEETING.** The meeting must be conducted at least 14 days before the vote to discuss the effects of the proposed alternative work schedule on the terms and conditions of employment. Remember that employees usually love the alternative work schedule, so be positive and emphasize the benefits, e.g., more days off, but do not intimidate or coerce employees.
- **CONDUCT A SECRET BALLOT ELECTION.** At least two-thirds of the employees in the affected work unit must vote in favor of the alternative work schedule. The “affected work unit” can be the entire office, the front office, the back office, or any other reasonable grouping of employees. Some dentists exclude hygienists or other categories of employees from the work unit. Also, you must make a reasonable effort to accommodate current employees who cannot work the alternative work schedule.
- **REPORT THE RESULTS TO THE DIVISION OF LABOR STANDARDS ENFORCEMENT.** Within 30 days of the vote, you must report the election results to the Division of Labor Statistics Research.
- **POST THE ALTERNATIVE WORK SCHEDULE.** After the alternative work schedule is agreed upon, post the schedule in the office and reference it in your employee manual. Stick to the alternative work schedule, as the law allows very little flexibility in the schedule once an alternative work schedule is formally adopted.

For additional information, refer to the Division of Labor Standards Enforcement Web site: dir.ca.gov/dlse.

firmed by each employee in writing at the time of hire or be included as part of a written offer letter. That document should state that their at-will status cannot be changed except in a writing signed by management. With open and honest communication, you can provide comfort to nervous employees without jeopardizing their at-will status.

Make Wise Hiring Decisions

Many wrongful termination cases can be avoided by careful background/reference checks and wise hiring decisions. Many problem employees have a pattern of poor performance and often have a string of short-term jobs. Also suspicious are unexplained gaps in resumes. When in doubt, don't hire a less-than-ideal candidate. Carefully evaluate each new hire early in their employment, often referred to as an “introductory period.”²

If necessary, extend the introductory period to allow more time to consider whether a new hire should become a regular part of your dental practice. Always document serious performance problems and terminate unsatisfactory employees before they have an opportunity to adversely affect the work environment or your operations.

Update Your Employment Policies

This is an excellent time to clarify policies for your staff. Key issues that directly affect productivity, such as attendance, should be spelled out in writing. Other must-have policies should address discrimination, sexual harassment, sick or well pay, vacations, and leaves of absence. If necessary, update your employee manual. If you do not have an employee manual, create one. Many organizations, including malpractice carriers, provide such manuals via software that allows one to create and tailor a manual appro-

priate for your dental office. A well-drafted and up-to-date employee manual will provide clarity and consistency for both dental practitioners and their employees going forward. Periodic updates should be performed to account for changes in employment law and regulations.

Review Your Payroll Practices

Ensure that employees are properly classified as exempt or nonexempt.³ Pay particular attention to administrative (“front office”) personnel and hygienists, who are often misclassified. All nonexempt employees are entitled to overtime pay, generally after eight hours per day. For this reason, avoid the use of daily rates and pay all nonexempt employees on an hourly basis. In some situations, implementing an alternative work schedule, such as four 10-hour days, provides a mutually satisfactory solution to the overtime issue.

Employees are typically very happy to work longer hours, without overtime, in exchange for the extra time off that an alternative work schedule provides.

In California, there are specific requirements for implementing an alternative work schedule (**TABLE 1**). If you adhere to these requirements, your employees will enjoy more time off, while your practice minimizes its overtime liability.

In addition, require that all nonexempt staff record their hours worked (and meal periods taken) using a punch clock, computerized timekeeping software, or by filling out and signing time cards. Review these time records periodically to ensure that your nonexempt employees are not working unauthorized overtime. By law, employees cannot waive their right to overtime pay.

Also check the itemized statements that accompany your employees' paychecks; do not blindly rely on your payroll service. There have been many claims filed (and significant penalties awarded) against unsuspecting employers over this seemingly hypertechnical issue.

The California Labor Code requires that the paystubs for all nonexempt employees include: 1) gross wages earned; 2) total hours worked; 3) any piece (or daily) wage rate; 4) all deductions; 5) net wages earned; 6) the applicable payroll period; 7) the employee's name and the last four digits only of his or her Social Security number; 8) the employer's legal name; and 9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked by the employee at each rate.⁴ Ensure that your itemized pay statements are compliant with these requirements.

Schedule Meal Periods

Providing employees with regular rest periods and a daily meal period is beneficial for all. Employees need respite from their work in order to provide

proper care for patients. In doing so, dental practices not only comply with California labor laws, but increase the standard of care and professionalism provided to patients. While the law in California regarding employee breaks is currently unsettled, dentists should strive to provide a minimum of two 10-minute paid rest breaks (one in the morning and one in the afternoon) and a 30-minute unpaid lunch period to nonexempt employees by the end of the fifth hour of work.^{5,6}

IN SOME LIMITED situations, meal periods can be waived, but only in writing signed by the employee.

Because they are often difficult to monitor given the demands of a busy practice, meal periods should be built into the schedule. In addition, rest and meal period policies should be put in writing, reviewed with employees at regular intervals and enforced. In some limited situations, meal periods can be waived, but only in writing signed by the employee. A sample meal period policy is provided (**TABLE 2**).

Minimize Workers' Compensation Claims

Even though workers' compensation benefits have been significantly reduced due to recent government reforms, California dentists have seen a rise in workers' compensation claims recently. Many claims are, of course, legitimate. But there

has also been a rise in frivolous and, in some cases, even fraudulent claims. Often these bogus claims are for work-related "stress" and other amorphous injuries.

Also, claims have been instigated by a disgruntled worker as a perceived means to stave off an impending disciplinary action or termination. The lessons learned from many such recent Workers' Compensation Appeals Board filings are that dentists need to document performance problems on an ongoing basis, respond immediately to employee strife or hostility and correct workplace dysfunction before such situations trigger claims. If an employee reports a workplace illness or injury, all such claims must immediately be reported to your workers' compensation insurer for adequate response and investigation. Never terminate an employee on a workers' compensation leave without careful consideration and legal advice.⁷

Understand Unemployment Claims

Laid-off employees are generally entitled to unemployment benefits. However, employees who resign or who are terminated for "misconduct," such as theft, extremely poor attendance, or job abandonment, may not be eligible to receive unemployment benefits.⁸ This is another reason to carefully and consistently document employee performance issues.

Maintain Employment Practices Liability Insurance

Protect your practice by purchasing Employment Practices Liability Insurance, EPLI. This coverage can protect you and your practice in the event of an employment-related lawsuit. Since such lawsuits are, unfortunately, commonplace in California, EPLI coverage should be

TABLE 2

Sample Meal and Rest Period Policy

This dental office is committed to providing proper rest breaks and meal periods for all employees. Each employee is entitled to take a rest break of 10 consecutive minutes for each four-hour period worked. Rest breaks are counted as time worked and therefore are paid. Each employee shall also take a meal period of not less than 30 minutes and no more than 60 minutes for a work period of more than five hours per day. It is the employee's responsibility to follow this policy and take the breaks as described above. Employees must clock out for meal periods. If at any time an employee is unable to take the rest breaks or meal periods as described, it is the employee's responsibility to immediately notify management.

Reduced Schedule Meal Period Waiver

I understand, acknowledge and agree that this dental office may occasionally operate on a reduced schedule of six hours or less. On those reduced schedule days, I voluntarily choose to forego my meal period as a convenience to me. I understand that I may take a meal period in conformance with the above policy if I wish to do so on the reduced scheduled days, and that I must take a meal period if my work exceeds six hours.

Employee Signature:	Date:
Employer Signature:	Date:

On-Duty Meal Period Waiver

I understand and agree that the nature of my work in this dental office may occasionally prevent me from being relieved of my duties during the normal meal period. On those occasions, I voluntarily agree to forego my meal period. I understand that I will be paid my normal wages for the time that I am required to work through my meal period.

I understand that I may revoke this On-Duty Meal Period Agreement at any time by submitting my request in writing. This agreement will remain in effect unless and until revoked.

Employee Signature:	Date:
Employer Signature:	Date:

TABLE 3

Sample Harassment Policy

All employees of this practice are entitled to work in an environment that is free from harassment of any kind, including sexual harassment and harassment based on pregnancy, childbirth or related medical conditions, race, religious beliefs, gender, sexual orientation, color, national origin or ancestry, physical or mental disability, medical condition, marital status, age, political beliefs, or any other basis protected by federal, state, or local law ordinance or regulation. Harassment may be visual, verbal, or physical, and may consist of threats or demands to engage in specified behavior deemed harassing or retaliation for reporting such harassment.

It is against the law and strictly against office policy for any employee, patient, volunteer, visitor, or vendor to, in any way, discriminate or harass an employee of this office.

As an employee, you have a role in keeping this office free from harassment. If you believe you have been harassed or if you become aware of an incident of harassment, immediately report the matter to the office manager. The complaint will be promptly investigated in a discreet manner with information disclosed only on a need-to-know basis. The investigation of a complaint will normally include conferring with the parties involved and any named or apparent witnesses. The office will take all appropriate steps, including disciplinary action, to stop the offensive or inappropriate behavior. Harassment complaints are taken very seriously and the practice wants the opportunity to resolve any problems.

An employee found to have violated any portion of the employer's policy against harassment may be subject to disciplinary action, including termination. Patients violating our policy will be asked to cease the harassing behavior and may be asked to leave the practice and continue treatment elsewhere.

The office will not tolerate any retaliation against an individual for complaining about harassment or participating in the investigation of any such complaint.

considered a vital and necessary part of your insurance portfolio. EPLI coverage is typically available from malpractice carriers and comes in various coverage limits, \$100,000 is the minimum recommended for most dental practices with less than 10 employees; higher limits are usually appropriate for larger employers. EPLI coverage is typically triggered on a “claims-made” basis, although some policies may provide for coverage based on when the employment incident occurred. Always report an actual or threatened employment claim to your EPLI carrier as soon as possible to maximize coverage benefits.

Protect Against Sexual Harassment

California law requires that employers take affirmative measures to prevent sexual harassment in the workplace.⁹ At a minimum, your practice should have a sexual harassment policy in place (TABLE 3), which ideally should be included in your employee manual, posted conspicuously in the workplace and reviewed upon hire and annually thereafter with your staff. This is the first step in protecting your employees and your practice from sexual harassment risks. The next step is to take seriously and respond immediately to any harassment concern, however slight it may be, raised by an employee.

Dentists must investigate fully and respond promptly to harassment and discrimination claims, even claims that involve vendors or patients. This investigatory process is typically accomplished by reviewing your sexual harassment policy with and interviewing the complaining employee, the accused harasser and all witnesses. California law also prohibits retaliation against employees who have complained or opposed harassment in the workplace.¹⁰ Because of the sensitive nature of these claims, practitioners are well-advised to seek advice from counsel

immediately if a sexual harassment issue arises prior to beginning your interviews.

Accommodate Pregnant Employees

With the prevalence of female employees in dental offices, it is not surprising that dentists are often faced with the sometimes difficult task of accommodating pregnant workers. But even well-meaning employers can make mistakes, especially as they struggle to find qualified replacements and otherwise balance the needs of their pregnant employees with their practice.

PAID FAMILY LEAVE

does not
extend an
employee's
right to
reinstatement.

Some Rules of Thumb for Handling Employee Pregnancies in California

If you have five or more employees (but less than 50), you are required to provide up to four months of unpaid “pregnancy-related disability leave” and then reinstate the worker to the same or a substantially similar job.¹¹ You are not required to continue medical benefits during this leave, although many supportive employers do so. If you do, you must provide such benefits to all disabled employees and not discriminate.

During the period of disability, as certified by a physician, your employee may receive state disability insurance benefits. Thereafter, your employee may apply for benefits from the California Paid Family Leave Insurance Program. Paid family leave

does not extend an employee’s right to reinstatement. Both disability and paid family leave benefits are administered by the Employment Development Department. The EDD expects employers to provide notices to pregnant workers regarding their rights to disability insurance and paid family leave benefits. (These notices and additional information can be found at the EDD Web site: www.edd.ca.gov).

A pregnancy leave can be continuous or intermittent (up to a total of four months) and may be prolonged by virtually any pregnancy-related health condition, including morning sickness, edema, preeclampsia, premature labor, Cesarean section births, or other delivery complications, postpartum depression, etc. If an employee exceeds the four-month time frame, you may legally replace the employee. Some dentists will, however, provide longer leaves, especially when a key, long-term employee would be difficult to replace. It is best to treat all employees consistently in order to avoid discrimination claims.

Employers must make reasonable accommodations to protect pregnant workers and their unborn fetuses.¹² Pregnant employees should not be required (or allowed) to take X-rays, administer nitrous oxide, or work around other potentially hazardous conditions. Upon learning of an employee’s pregnancy, dentists should take action to implement any preventive measures and avoid undue risks. Depending upon her job duties, it may be advisable to request that an employee provide a physician’s release for continued employment during pregnancy.

Finally, celebrate your employee’s good news. Be encouraging and supportive and your valuable employees will be more likely to return to work.

Conclusion

In summary, by focusing on the foregoing strategies, proactive California dentists can significantly reduce their employment-related risks now and in the future. In doing so, they can not only save the time, money and considerable aggravation that almost always comes hand-in-hand with employment claims, but they can also increase the level of employee satisfaction and workplace harmony within their dental office. ■■■■

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REFERENCES

1. California Labor Code section 2922 provides that "an employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month" Deering's Annotated California Codes, Labor Code, vol. 2, §2922, 2009.
2. Do not refer to the introductory or training period as "probationary," as that may lead to confusion regarding the employees' "at-will" status. Deering's Annotated California Codes, Labor Code, vol. 2, §2922, 2009.
3. Every California employee is classified as "exempt" or "non-exempt" from daily overtime compensation and other benefits, such as rest periods, meal periods, reporting time pay, etc. The three primary exemptions are for executive, administrative, and professional workers who are paid a salary that is at least two times the state minimum wage (currently \$8 per hour) for full-time workers. In order to qualify for one of these exemptions, an employee must spend the majority of his or her working hours engaged in exempt duties. For additional details, see Industrial Welfare Commission Wage Order 4, which sets forth the applicable wages, hours and working conditions for dental practice employees. California Administrative Code title 8, §11040 or go to www.dir.ca.gov/IWC/IWCArticle4.pdf
4. Deering's Annotated California Codes, Labor Code, vol. 1, §226, 2009.
5. Two important meal period cases are currently pending before the California Supreme Court: *Brinker Restaurant Group v. Superior Court of San Diego* and *Brinkley v. Public Storage*. These cases address compliance issues under California law relating to meal periods, rest periods, and off-the-clock work, as well as procedural issues raised in class action lawsuits based on these types of claims. The most significant issue for the court to resolve is whether the California Industrial Welfare Commission Wage Orders and the California Labor Code require an employer to guarantee that its employees actually take their meal and rest periods, or must the employer merely offer the employees the opportunity to do so. Since an employer may currently be held liable for one or more hours of penalty pay for failure to provide such breaks, and since such financial exposure can be substantial, the Court's ruling may have a significant financial impact on all California employers. Deering's Annotated California Codes, Labor Code, vol. 1, §226.7 & §512, 2009.
6. See California Industrial Welfare Commission Wage Order 4 §11 (Meal Periods) and §12 (Rest Periods), California Administrative Code title 8, §11040.
7. California Labor Code section 132a prohibits discrimination, including termination, against workers who are injured in the course and scope of their employment. For that reason, employers must proceed with caution before discharging injured workers so as to avoid 132a claims. Deering's Annotated California Codes, Labor Code, vol. 1, §132a, 2009.
8. California Unemployment Insurance Code section 1256 provides that an employee is disqualified for unemployment benefits if he or she has been discharged for "misconduct" connected with their work. Misconduct is a substantial breach of an important duty or obligation owed to the employer. Mere inefficiency, unsatisfactory conduct, poor performance, ordinary negligence, inadvertence or good-faith errors in judgment do not constitute misconduct. Deering's Annotated California Codes, Unemployment Insurance Code, §1256, 2009.
9. California Government Code section 12940(k) states that it shall be an unlawful employment practice for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." Deering's Annotated California Codes, Government Code, §12940(k), 2009.
10. Deering's Annotated California Codes, Government Code, §12940(h), 2009.
11. Deering's Annotated California Codes, Government Code, §12945(a), 2009.
12. Deering's Annotated California Codes, Government Code §12945(b), 2009.