# SAALFELD GRIGGS DENTAL INDUSTRY TEAM WHITE PAPER: KEY EMPLOYMENT ISSUES FOR OREGON DENTAL PRACTICES

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## I. Introduction

When working with dentists, we have found that many experience similar employment law challenges. This will discuss some of the common traps that dental practices fall into.

## II. Failing to Properly Pay Wages (Including Working Interviews)

Almost no employer pays all of their employee's right all of the time. Many wage and hour laws were conceived over 100 years ago and were written for a workplace that looks nothing like the modern dental practice. For example, rest breaks were made with the thoughts of factory floor where employers have rigid control over the employees' time. They were not made with the thought of a dental assistant who can sneak off to a backroom and spend 20 minutes on Facebook while patients sit in your waiting room.

Plus, plaintiff attorneys love wage and hour claims because the statutes require employers to pay for the (former) employee's attorney fees. So, even a small amount of unpaid wages can result in big liability for practices.

Most wage and hour mistakes are accidental. Maybe a practice doesn't pay a last check timely or doesn't pay for travel time as required by the law. One area of great potential liability for practices is the "working interview". Many practices will have a prospective employee perform some work to prove that he or she is competent or has the skills that the resume claims. However, allowing someone not actually employed by you to do work for the practice is dangerous. On top of the fact that the person likely isn't covered by your malpractice or workers' compensation insurance, the person has performed "work" for the practice and is entitled to be paid for it. While the amount of wages would be minimal, the liability becomes much bigger when you add penalties, interest and attorney fees. So, a $30 claim of unpaid wages can quickly turn into thousands of dollars of liability.

Many dental practices pay prospective employees for their time in working interviews, but give these individuals cash or treat them as independent contractors. Neither method provides practices with real protection. In almost every case, these prospective employees become employees when doing productive work for the practice. While practices may avoid some of the consequences for failing to pay wages, they will remain liable for penalties to the IRS, Department of Revenue, Employment Department, and other federal and state agencies.

## III. Continuing Education Classes

Some practices have employees attend these classes regularly. It can be expensive to send your staff to CE classes – especially if the practice is paying their hourly rate to be there. So, rather than pay for the employees to be there, some practices have told employees that it will not pay for the time spent in CE. Other dental practices have agreed with employees that the practice will pay tuition and the employee takes an unpaid day off. But, are these arrangements legal?

The answer can be easy. If the practice is requiring the employee to be at the class, the class is considered "working time" and employees should be paid. If the class is optional, then the practice may not be required to pay.

If the practice is not requiring the employee to be at a class and the practice requires an employee have a certificate in order to do her job, then the practice doesn't have to pay for the class time if the training relates to maintaining that certificate.

For employees without certificates or employees getting training unrelated to their certificates, the analysis gets even more complicated. However, as a rule of thumb, if the employees are getting a benefit out of it which benefits the practice, the time likely needs to be paid.

Many practices we work with have decided to pay for CE time and not deal with the nuances of the law in this area. But, in order to have some cost-savings, some practices have decided to pay employees attending continuing education classes at a lower rate of pay.

The law allows employers to pay employees at different rates for different tasks if you provide your employees notice of those rates. For example, you can pay a dental assistant $18/hour for dental assistant work and minimum wage (or some other rate) for attending continuing education classes. Some practices worry that the logistics of that kind of variable rate of pay is too burdensome, while others conclude that the savings justify the additional administrative burden.

Questions regarding when to compensate employees can be extremely difficult to answer. Moreover, Oregon employers need to be cautious of internet research since they have to comply not only with federal law, but Oregon's wage and hour law as well. Many websites will advise you about Connecticut or New Jersey law without actually notifying you about which laws are applicable for your state.

The rules are arcane and often hard to administer. So, if you have a question, contact a member of our employment team. After all, just as it is in dentistry, prevention is always easier and cheaper than the cure.

## IV. Noncompetition Agreements and Restrictive Covenants in Oregon

Many practices at some point consider whether to hire an associate dentist. Frequently, these employees are expected to handle a large patient load or are hired as a potential future purchaser of the practice. The risk in allowing any other dentist into your practice for any length of time is that they begin to develop relationships with your patients and staff. The concern is that this associate may be able to walk out the door with a large patient base and set up shop across the street, perhaps also taking some of your key employees. How do practices best protect against this risk?

The most frequent answer is by requiring the employee to sign a non-compete agreement. When done properly, these agreements are legal and enforceable. This kind of agreement prohibits the dentist from opening up a competing dental practice within a certain radius of your practice (usually approximately 25 miles) for a set period (usually two years). It can also restrict him or her from soliciting your patients and hiring your employees.

While legal and enforceable, Oregon law has a number of pitfalls intended to trip up employers. First, you can only enter into non-competes at initial employment or upon a legitimate

and significant promotion. For most practices, there are no promotion opportunities for an associate dentist other than buying the practice, thus making it imperative that they are set up at the outset of employment.

Next, you must communicate that you will require the employee to sign a non-compete in a written offer letter at least two weeks before the person starts working. The non-compete must also be in a written agreement; oral agreements are not enforceable. Finally, the person's gross income needs to exceed the median income for a family of four (which was about $64,000/year in 2012).

If you already have an associate working for you or think that non-competes are too heavy-handed, there is another option. Oregon law allows for another type of restrictive covenant called a non-piracy agreement. A non-piracy agreement allows employers to enter into agreements that prohibit the employee from soliciting or serving your patients after termination from the practice. A non-piracy agreement can also prohibit an associate from taking your other employees to another practice.

Non-piracy agreements are easier to put into force than non-competes. In fact, you can enter into a non-piracy agreement with a currently employed associate. You just need to give the person "consideration" (i.e., a bonus, additional paid leave, or – perhaps – just allowing the person to continue working for the practice). When used in conjunction with a non-compete, non-piracy agreements can provide practices a great deal of peace of mind.

Anytime you hire an associate dentist, you should consider whether some form of restrictive covenant is appropriate. If, after reading this paper, you have concerns about your agreements (or lack of an agreement); contact one of our employment attorneys. We can help you protect the value of the practice.

## V. The Other ADA: Disabilities in the Workplace

For most readers of this article, you have a different definition of "ADA" than we do. For you, likely it means the American Dental Association. For lawyers, it refers to the Americans with Disabilities Act.

If you have six or more employees (typically the practice owner doesn't count as an employee), then you must reasonably accommodate your employees' "disabilities". The legal definition of a disability is very broad and encompasses almost every impairment. Examples of things that may be disabilities include back pain, depression, alcoholism or drug dependency, epilepsy, and even migraines.

Your obligation (again, assuming that your practice has six or more employees) is to accommodate employees with disabilities, so long as the accommodation doesn't become an undue burden. But take care; what you consider to be an "undue burden" may be considered reasonable and required under the law.

First off, most requests for accommodation don't reference a disability and will come in the form of requests for time off, requests for changes to work schedule, or a request for a particular item (new keyboard, chair, etc.). In fact, in many instances, you as the employer may have trouble recognizing an employee's request as one for "reasonable accommodation".

Your job, as employer, is to accommodate the employee when the assistance to the employee doesn't become too great. For most employers, a good rule of thumb is: If it's cheap and easy, give your employees what they want. If complying with the request is going to be expensive, cause too much disruption, or isn't practical, engage with the employee about how to accommodate them. Sometimes, there may be no accommodation you can provide.

For example, if you have a receptionist complaining of back pain who wants a new chair, it's probably best to just get the employee a new chair. You don't need a doctor's note nor do you need to determine if the back pain is a "disability". On the other hand, if instead you have a dental assistant with back pain who wants extra breaks to stretch or the patient's chair raised higher, you may have to accommodate or discuss with the employee how you can best work together as the result of the back pain.

You may get medical certification, but practices need to be careful not to get too much information and to limit certification requests to only information that they need to evaluate how that employee can effectively do his or her job. Practices should get legal review before getting these kinds of certificates.

## VI. Conclusion

Employment laws are complex and often don't make sense. To make matters worse, many practices assume that if they and an employee can agree on something, it's fair – and therefore legal. Practices should get updated personnel manuals and have their wage and hour practices audited to ensure that they are legally compliant and avoid costly litigation down the road.

Saalfeld Griggs has a long history of representing dentists with employment issues. Firm members have worked extensively with practice consultants, lenders, practice brokers, accountants, investment advisors and other professionals who handle these matters. The result of this experience is a Dental Industry Team that is skilled in handling the unique needs of dentists. The Team's representation spans from the date a new doctor graduates from dental school to the date he or she sells the practice and moves on to new ventures. Please contact us if you would like our assistance on employment issues in your practice.

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Saalfeld Griggs P.C. is a business law firm that represents dental and medical practices throughout Oregon and the Northwest. We have more than twenty attorneys that specialize in different areas of the law, including health law, business, transactions, employment, litigation, estate planning, real estate, and employee benefits. You can find more information about our firm at www.sglaw.com or call us at (503) 399-1070.