

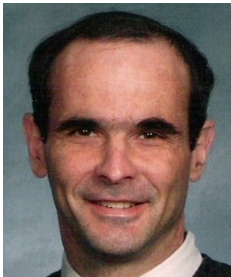
Dental Practice Legal Update

March, 2018

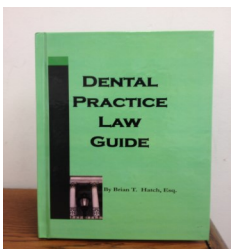
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Will Non-Competition Provisions Become Obsolete Soon in Massachusetts?

The Massachusetts legislature has tried on numerous occasions during the last few years to ban or restrict non-competition agreements for employees, the last time being in 2016 when the only reason there was no bill passed was because the House and Senate disagreed on whether provisions would be limited to 3 months or 1 year period. This legislative session six bills restricting non-competition agreements have been filed in the Massachusetts legislature. 3 of those bills have come up with a new type of provision designed to increase the mobility of employees now restricted from moving to another employer, and in the dental field, taking patients with them to a competitor. The new provision, called a "garden leave" requirement requires an employer who wants to enforce a non-competition agreement or restrictive covenant against a departing employee to pay "garden leave" of either full pay or half pay in exchange for not working for the remainder of the term of the restriction. Since at least one powerful industry group, the Associated Industries of Massachusetts supports the 50% pay requirement, one of these new bills may very well pass and become law by the end of the July term. While there is criticism about details of this type of provision, with the number of bills being introduced so far, it appears that something will pass to restrict non-competition agreements and affect the dental field.

Can Your Employees Claim Protection Because Marijuana is Legal?

While business groups and state local officials "hash" out details about where recreational marijuana users can buy the now legal drug in Massachusetts, how does this affect dental practices and employees who claim they are protected because they are using marijuana legally? The answer is still up in the air and being resolved in the courts, but slowly protections against termination are beginning to appear in court decisions.

First, there are statutory written protections for *employers* written into the legislation. The Massachusetts Regulation and Taxation of Marijuana Act specifically states that employers do not have to "permit or accommodate conduct otherwise allowed by (the act) in the workplace and (the Act) shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees." Employment policies and handbooks can still prohibit use of marijuana in the workplace or working while impaired.

In Massachusetts, because dental practices are a health care provider, case law also supports the reasonableness of a requirement of a drug test if the employee's duties "entail a legitimate risk to health and safety." That would apply to medical marijuana as well. That doesn't apply to non-clinical personnel, though, so the standards for front office personnel who don't treat patients still are an issue.

Can an employer terminate an

(continued on page 2).

Can Employees be Protected for Legal Marijuana Use?

(from p.1)

employee for recreational use of non-medically used marijuana *outside* the workplace? For recreational use, most employees are still employed at-will, and can be fired for any reason or no reason, regardless of whether their off-site activities are legal or not. And there is actually a court decision in Colorado, where the recreational marijuana use was first legalized, which stated that off-site use by an employee of *medical* marijuana can still be part of a basis for termination.

But the tide is turning in Massachusetts and other states, even for off-site marijuana use, if an employee can get a doctor's certification that it is for medical use. In

Barbuto v. Advantage Sales and Marketing, the Massachusetts Supreme Judicial Court decided last year that an employee using marijuana medically was terminated for failing a drug test for marijuana can require an employer to participate in an interactive process to allow accommodation to keep her job. And in Rhode Island, a court ruled that a medical marijuana cardholder could not be refused employment because she could not pass a preemployment drug test. Requiring accommodation for a disability under discrimination laws can be a powerful tool for attorneys to use to protect their clients who can show their marijuana use is for medical use. With more and more acceptance that marijuana use alleviates symptoms of all kinds of medical conditions, the courts will continue to face cases where employees state they must be accommodated. Employers can restrict what "medical conditions" they

can accommodate to "disabilities" or "handicaps," which have more definite limited legal interpretations than just a medical condition. The courts haven't made that distinction part of their decisions yet in Massachusetts, but it would probably be a factor which may benefit employers.

So how do dental practices avoid the arguments employees use to say they are protected for their use of marijuana for medical or recreational purposes? The key is the literal use of the statute regarding this area. Employers should document their policies in an employee handbook, signed by all employees prohibiting marijuana use which affects their workplace activities. Massachusetts statutory law will likely protect an employer in that case. Letting employees claim protections which would not hold up in court can be prevented by documentation, just like every other action by an employer which an employee states is unjust, even though it may not be illegal.

Hygienist Steals Patient Data, Dentist has No Legal Case

A dental hygienist in Michigan stole patient information from her employer dentist over a period of five years and funneled it to her new employer, costing the original employer about 150 patients and almost \$1,000,000 in revenue. The first dentist filed suit to obtain lost compensation for the stolen patient lists, claiming that the theft of patient information was a violation of the Michigan Trade Secrets Act. The Michigan judge disagreed, saying that the patient lists were not protected trade information under that Act. It is possible that the dentist could file a complaint under HIPAA, which would allow the Department of Health and Human Services to charge the hygienist and fine her for what seems like an egregious HIPAA violation. But HIPAA is not a civil damages statute, and the dentist has no cause of action for damages there either. Other states have different statutes protecting against this specific type of theft, and other judges might interpret this issue differently, but contractual provisions allowing for breach of contract damages might be the best answer, at least in Michigan.

Dental Management Company Allowed to Sue Out of State Dentist for Breach of Contract

Tralongo, a dental management services company, signed a contract with Dr. An Q. Le merging the company with one of his Texas dental practices with a contract that required any lawsuit between the two parties to be filed in Georgia, where the contract was signed. However, Tralongo performed many of its services for Le from Florida, so a Florida Court was used after Le refused to obey a contractual buyout clause when Tralongo tried to buy out his Texas practices. The federal 4th Circuit Court of Appeals agreed that the contract required main legal actions to be filed in Georgia, but also said that Tralongo's suit in Florida could not be dismissed because Le had sufficient business contacts with that state for the suit to proceed in Florida under a more vague clause which allowed suits to be brought in Florida for actions which were performed there. The case represents a victory for dental management companies which have disputes with out-of-state dentists who try to evade contractual provisions signed when they were located in a different state. Long term contracts with dental management companies should not be assumed not to be valid merely because a dentist moves out of state.

Dentist Sues Police for Sexual Assault, Loss of Income After Roadside Altercation

Dr. Simona Tibu, an Alberta, Canada dentist was stopped by Sergeant Robert Bethiels in 2013 and asked for her identification approximately 10-12 times during 44 seconds while Tibu was expressing irrational worries about her car. An altercation ensued and eventually both parties accused each other of assault, with Tibu alleging sexual assault when Bethiels landed on top of her during the scuffle. The two parties filed actions against each other for loss of income and damage to reputation from the nationwide publicity that resulted, and eventually the criminal charges against Bethiel and his civil suit against Tibu were dropped. Tibu's counterclaim continues, and added provincial authorities, claiming she has had to change her name because of Bethiels' actions.

Provide your employees required HIPAA training and present to them an employee manual customized for the dental industry and your office.
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Non-Profit CEO Accused of Bilking Clinic for \$20K in Dental Work

An interim CEO of the Heritage Health and Housing non profit entity, which runs a dental clinic in Harlem, NY, Sandra Alexander, has been accused of receiving more than \$20,000 in free dental work and services from the entity's Healthcare Center when she repeatedly ordered the staff to reduce her balance owed to zero. Alexander, who has a salary of \$200,000 a year, was turned in through a whistleblower suit by a former employee of the Healthcare Center, Arthur Smith, who says he was fired after complaining about Alexander's actions to a Heritage board member. The Heritage administers the Healthcare Center, which is mainly used by the poor and also provides housing for the mentally ill. Heritage is funded almost exclusively by government grants and Medicaid funds. Smith's claim states that Alexander took over as interim CEO when a previous CEO resigned because he claimed untruthfully he had a doctorate.

Alexander had been the Heritage board's treasurer, but did not step down from that position when she took over the CEO job, which is required by federal guidelines. Smith claims that board chairman David Rosenthal asked him to backdate board documents and minutes to show that a letter of resignation of Alexander as board treasurer was submitted before her salary was set at \$200,000 by the board. Although Alexander stepped down as CEO in September when a new officer was hired, she replaced the newly hired woman within two weeks and continues as interim CEO at the present time.

UConn Dental and Yale In Over Their Heads on Corpse Photo Selfies

A UConn Dental School orthodontics professor and two graduate dental school students took a selfie with two severed heads used for medical research at a training program hosted by Yale University, and Yale and UConn are now feeling the heat after the selfie went viral, and eventually the Associated Press obtained a

copy. Dr. Flavio Uribe, the orthodontics professor said someone took the photo when he was teaching students how to put screws in the corpses' heads. The mishandling of anatomical parts is often the subject of lawsuits claiming trafficking or illegal selling of body parts, and so both schools are calling the actions "disturbing" and "inexcusable."

Attorney Brian Hatch is presenting a seminar with other dental practice professionals in banking, accounting and practice transitions on practice purchases and sales to take place on June 5, 2018. Further details will be available soon.

Looking to Buy or Sell a Dental Practice? Hatch Legal Group can provide legal work and also match up prospective buyers and sellers. 508-222-6400 brianhatch@hatchlawoffices.com

Improprieties and "Blatant Favoritism" Alleged in Awarding of Children's Dental Contract

MCNA Insurance Co., which is based in Florida, has sued the Michigan Department of Technology, Management and Budget over its decision to award a \$237 Million contract for its Health Kids Dental program to Blue Cross Blue Shield of Michigan, representing the largest share of the total \$659 Million funds allocated. The company claims that the state bidding process favored Blue Cross with actions constituting "blatant favoritism" because of its political clout. Improprieties alleged include secret discussions held between state officials and Blue Cross allowing it exclusive ability to change its bid. The Senior Vice President of MCNA accused the state Administrative Board's actions approving the decision as a "rubber stamp"

of the contract "despite strong evidence of improprieties and illegalities during the bidding process." He said that his company never had a chance to appear before the Board to challenge the rejection of his company's bid, and that the process was rushed to approve an unqualified bidder which planned to subcontract the services. The state's budget department spokesman denied that there was any lack of due process in the bidding procedure resulting in the contract.

Dentist Accused of Illegally Prescribing Drugs to Woman Who Overdosed Seeks to Suppress Evidence

Wyoming County, Pennsylvania dentist Christopher G. Bereznak is accused of unlawful delivery and distribution of a controlled substance when he prescribed the muscle relaxant carisoprodol to a woman who later died of an overdose of heroin and fentanyl. 25 year old Ashley Gammon died in 2016 of the heroin and fentanyl overdose and

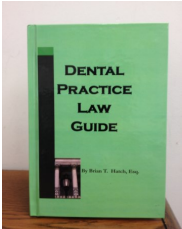
connection to her death, which was not related to the drug he prescribed for her. However, after Gammon died her parents turned over her cellphone, which had over 1,000 text messages between her and Bereznak concerning their romantic relationship, to police. Bereznak claims the evidence cannot be used in the unlawful distribution case against him because it was seized without a warrant in connection with the charges facing him.

Court Finds Pay Cut to CA Hygienists Illegal

A California court has ruled that the decision by the state's Department of Health Care Services to cut hygienists pay in the state's Medicaid program, Dental-Cal was illegal because they did not obtain federal approval. The rates for special cleanings were cut 58% and a new preauthorization process was ordered for the cleanings and other dental procedures. The payments for cleanings following infections went from \$155 to \$55, which hygienists say was not enough to let them meet costs.

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