

Dental Practice Legal Update

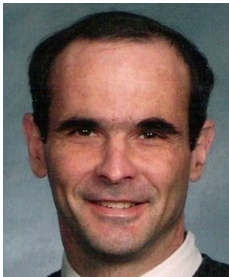
April, 2020

SPECIAL COVID-19 ISSUE

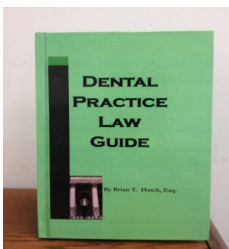
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Attorney Brian Hatch, publisher of Dental Practice Legal Update, has represented dental practices in business, employment, complex litigation and other legal matters. His latest book is "Dental Practice Law Guide" hatchlegalgroup.com



Employment Issues with COVID-19 and Dental Practices

Paying Your Staff During COVID -19 Closures

Closures of a dental practice for elective and non-urgent care can have a major impact both on the cash flow of the practice as well as the income of staff who cannot normally be paid if they are not present. The Commonwealth of Massachusetts has come up with new policies to allow workers to gain unemployment benefits but still not technically be labeled as terminated.

A furlough alternative now exists which allows an employer to mandate that an employee take time off but still be considered an employee of the practice during a time when the practice cannot pay full payroll benefits due to lack of income. Furloughed employees are then allowed to collect unemployment benefits for the allowed state period of time plus the federal 8 week extension period. They qualify under the "No Work Rule" which requires them not to even take phone calls or answer e-mails. Salaried employees who do any work while on furlough are required to be paid their full salary for any week during which they work at least part of the week. Furloughed employees can be permitted or required to take vacation time, though they also can refuse to permit an employee to take vacation time during the furlough. Employees can return to their jobs after the furlough is over and can continue to stay on employer benefits

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MDS Recommends Dental Practice Closures Until May 4, 2020

In an update from recent guidance advising dental practices in Massachusetts to close until April 6, 2020, the Massachusetts Dental Society (MDS) is now advising as of March 31, 2020 all dental offices in Massachusetts to remain closed until May 4, 2020, except for urgent care.. The closures correspond to orders and guidelines set out by Massachusetts Governor Charlie Baker, the Centers for Disease Control (CDC) and the White House.

Major Insurers Issue New Policies Regarding Teledentistry

The two major private dental insurers in Massachusetts, Delta Dental and Blue Cross Blue Shield, have issued updated policies to allow for certain dental services to be covered if done virtually by teledentistry. Delta Dental has issued an interim policy change lasting for 30 days from March 20, 2020 allowing offices and related to a specific dental problem via audio or video technology using an "Oral Evaluation-Problem Focused" code (D0140). These claims will be paid for patients with Delta Dental coverage. Blue Cross Blue Shield has announced that effective March 23, 2020 and until further notice it will cover "virtual consultations" done via telephone or video

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Employment Issues with COVID-19 and Dental Practices

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while on furlough and employers and employees continue to make contributions under individual plans. Employers do not have to bring back all furloughed employees, but can save costs by ensuring that experienced employees return to the practice after the period of absence.

Employees can be **laid off during an office closure**. The employee is considered terminated and eligible for unemployment benefits but not for other benefits of employment, and must be offered a COBRA plan they must pay into when their employer's insurance plan no longer covers them.

Employers can decide that a **reduction in hours** is the best alternative during a complete or

partial closure. The employee loses some unemployment eligibility but may still be eligible for partial benefits. If the employee is salaried or otherwise exempt from hourly work requirements then they may lose that exempt status, particularly if their salary goes below \$684/week. If employees are on-call they are not eligible for unemployment benefits in Massachusetts.

If employees are paid on a collections or production basis, they should still be paid on a W-2 basis, and are still eligible for unemployment benefits based on their average wages. Practice owners are not eligible for unemployment benefits unless they are W-2 employees, and full partners are not eligible at all.

COVID-19 Paid SickLeave Law

The federal Families First

Coronavirus Response Act (FFCRA) was signed into law on March 18, 2020 and requires employers with 500 or less employees to provide a certain amount of paid sick leave or paid leave to employees who are affected by COVID-19. Employers receive corresponding tax credits for these payments. Full-time employees are eligible for 80 hours of paid sick leave and part time employees are eligible for prorated sick leave if they are: 1) subject to a federal, state or local COVID-19 quarantine or isolation order 2) advised by a health care provider to self-quarantine 3) experiencing symptoms of COVID-19 and are seeking a medical diagnosis 4) caring for an individual covered under the above conditions or 5) caring for a son or daughter whose school has been closed or whose day care provider is unavailable due to COVID-19. The compensation is for full pay up to \$511 per day or \$5,100 in aggregate, with circumstances requiring care coverage at 2/3rds pay.

Major Insurers Issue New Policies Regarding Teledentistry

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submitted through the D0140 code with no deductible, copayment or co-insurance. The patients' charts should contain certain details of the consultation, which must be patient initiated and related to a specific dental problem that otherwise would be necessarily treated with an in-office visit. MassHealth also has announced that it will cover certain teledentistry services, as detailed in MassHealth All Provider Bulletin 289. The test for deciding whether a teledentistry procedure can be billed through MassHealth is if it was a covered procedure previously through MassHealth, if it is clinically appropriate to be delivered via telehealth, and if it is medically necessary. All other MassHealth guidelines and directives in Bulletin 289 apply. The rates that are previously paid for these services also apply to services performed by teledentistry. Since teledentistry is a very new phenomenon (and highly controversial in some respects) it is likely that more guidance will follow from both insurers and dental boards regarding its use during the COVID-19 crisis.

Limiting Liability During the COVID-19 Crisis

In spite of the fact that dental offices are always required to maintain strict infection controls, during the COVID-19 crisis there are special considerations that must be taken into account when treating patients on an emergency basis, or after elective procedures are resumed after closures are over. After all, an anxious patient base might be doubly concerned about visiting an office where there is possible exposure to others who may have COVID-19, either knowingly or unknowingly, and who might contract the virus as a result. The best solution is to have all staff not only be knowledgeable of current infection control standards, but are aware of the helpful guidance the American Dental Association has for treating patients in the COVID-10 crisis. The Coronavirus-Frequently Asked Questions detailed guidance is available both on the Massachusetts Dental Society and ADA websites. This information is extensive, but there are a few key topics which are of immediate concern. The use of single-use masks are still the rule the CDC has in place, and use of N-95 masks or other types of masks is required when treatment is more inclined to involve exposure. The ADA considers that dental offices are not usually designed to carry out Transmission-Based

Precautions exiting for hospital and ambulatory care settings when it recommends that dentists coordinate with other medical providers if there are concerns about treatment of patients for emergency care when they may have symptoms of or have possibly been exposed to COVID-19. The best defense against allegations by patients that they obtained the virus in a dental office is to make sure all the guidelines of the MDS and ADA are followed completely. Additionally, informed consent forms particularly designed to be used during the COVID-19 crisis should definitely be used. Communicating to patients at the front door, by e-mail, and as part of a voice mail greeting of the risks of COVID-19 is important. A consent form should be signed that advises patients of the emergency circumstances of the crisis, that there are risks in being in the proximity of dentists, patients or staff, and that in spite of the precautions that the practice is taking, there is still a possibility of transmission.

Employment Manuals, customized for the dental industry and your office, are available from Hatch Legal Group.
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Hatchlegallgroup.com

How Dental Practices can Survive the Financial Turmoil of COVID-19

How does a dental practice make it through an extended period of closure when no treatment is being provided, and thus no payments are coming in to continue cash flow and pay overhead costs?

One of the largest parts of overhead for a dental practice is payroll. This is where the government has stepped in wisely and has an available program in the \$2 trillion plus stimulus package passed by Congress to allow employees to retain their jobs as well as allow businesses to continue to pay them without normal cash flow. The "forgivable loan" program (Paycheck Protection Program-PPP), funded with \$350 billion by the federal government, allows a practice to borrow, most likely by Friday, April 4th up to \$100,000 per employee to pay them up to 8 weeks. Lenders will hopefully have applications ready by then. The loans can cover salary, hourly workers' paychecks, and health, retirement, family, medical and sick leave benefits. Businesses which could suffer substantial economic harm can apply, and all or most

employees need to be working. 25% of the loan must go towards payroll costs.

Many dental practices may be closed, at least until May 4th, and many employees will be furloughed or laid off and collecting unemployment benefits. Another program which benefits small businesses which are closed and thus have significant negative economic impacts can obtain low interest economic injury disaster relief loans covering through the Small Business Administration. Grants up to \$10,000 can also be applied for. Businesses that have less than 50% of revenue from a comparable period last year are eligible if they keep employees on their payroll. Another similar program for businesses that don't take these SBA loans may be eligible for a tax credit through the IRS.

It is good for practices to keep up with news on state legislation as well, since legislation is proposed that may provide business interruption insurance. If dental practices are required to make emergency services available, other programs can provide economic relief as well. Legislation that has been proposed on an emergency basis in Massachusetts, SD 2888, proposed by state Senator James

Eldridge would mandate that insurers cover claims on business insurance policies that are made because of the COVID-19 crisis. Under the bill, the claim could not be denied even if the policy excludes viruses from coverage and even if there is no physical damage to the insured's property.

All dentists and their dental practice staffs are encouraged to call Attorney Brian Hatch with their questions on how the COVID-19 affects your practice and your employees. Call 508-222-6400 or email brianhatch@hatchlawoffices.com.

Attorney Brian Hatch Assists Clients in the Dental Practice Purchase and Sale Process from Valuations to Letters of Intent to Drafting and Review of Documents Necessary to Complete the Sale.

Allowed Non-Elective Treatment:

- Toothaches-Fractured teeth with associated pain, severe decay
- Symptomatic endodontics
- Completion of cases that are in temporary stage (at the doctor's discretion)
- Periodontal and endodontic abscesses
- Suture Removal
- Orthodontics limited to trauma from orthodontic appliance (wire/bracket)
- Fractured prosthesis and limited adjustments
- Extractions of symptomatic teeth that likely do not require surgical intervention

Non-Elective Procedures to be Postponed Until May 4, 2020

- Routine fillings that do not address or prevent pain or restore normal oral functioning
- New crown and bridge cases that do not involve severe decay or pain
- Recall exams/cleaning
- Dentures
- All orthodontic procedures (including aligner therapy) that do not address infection, restore oral function, are related to trauma, or relieve pain
- Cosmetic/aesthetic dentistry, teeth whitening.

(Interim Guidelines issued by the Massachusetts Dental Society March 15, 2020)

DPH Request for N95 Respirator Masks and/or Surgical Masks

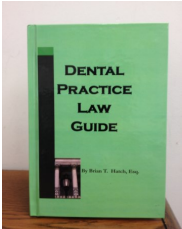
On March 19, 2020, Marylou Scudders of the Executive Office of Health and Human Services issued this request to the Massachusetts dental community:

We need your help. I am asking all Massachusetts dental providers to consider donating existing supplies of N95 respirator masks and/or surgical masks to the Massachusetts Department of Public Health

Attorney Brian T. Hatch has practiced law in Massachusetts since 1985 and has concentrated on the dental industry for 25 years.

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