

Dental Practice Legal Update

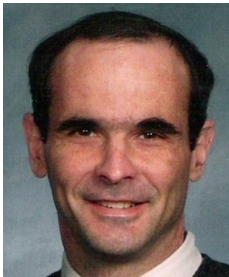
June, 2020

COVID-19 Reopening

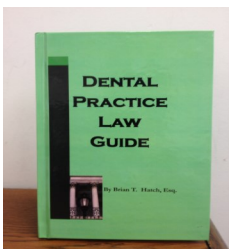
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Hatch Legal Group
8 North Main Street
Attleboro, MA 02703
Phone: (508)222-6400
hatchlegalgroup.com
brianhatch
@hatchlawoffices.com



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



Need to Cut Pay or Terminate Employees During COVID-19?

No one likes to do the dirty work of firing employees or cutting pay during Covid-19. But in the current slashing of income during the pandemic we are going through, it will eventually be necessary just for a dental practice to stay afloat. How do you terminate employees legally you can no longer afford? Or cut their pay?

There have been some life savers thrown to employers to try to save the jobs of employees who otherwise would have been laid off permanently during a business closure. Many employers have furloughed their employees to allow them to collect unemployment benefits but still maintain their positions after the immediate crisis is over. The Paycheck Protection Program allows employers credits if they agree to rehire those employees. But what if you need to terminate those employees because your business just can't keep in business when they come back? Times are slow now, but there is no guarantee business will pick up, especially to Pre-COVID-19 levels. Even with government bailouts there might not be enough help to save all employees' positions.

Terminating these employees can be painful, but it is necessary, and there are legal ways to do it. First the ways not to do it must be stated. There cannot be intentional discrimination on the basis of age or disability or race or another protected class. There can be a fine line to tread when a

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Baker's Phase 2 Allows Most Dental Treatment to Resume

Massachusetts Governor Charlie Baker announced on June 6, 2020 that most dental treatment, including elective, hygiene and preventive treatment, can resume as of June 8, 2020. Excluded from the Phase 2 reopening is elective cosmetic procedures. Under guidelines set out by the Massachusetts Department of Public Health dentists must attest that they:

- Have a current supply of personal protective equipment (PPE) and maintain that supply on an ongoing basis
- Meet public and safety standards in the domains of workforce safety, patient safety, and infection control
- Designate a compliance leader at the highest level of the organization
- Attest to and maintain the attestation form (Reopening Phase 2 Attestation Forms for Non-Acute Care Providers at Mass.gov) acknowledging that they meet all the requirements in PPE, health and safety standards, and compliance standards. These forms must be retained by practices for inspection upon request by the Department of Public Health

The Massachusetts Dental Society (MDS) and its President Dr. Janis Moriarty

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THE ONLY DENTAL PRACTICE SPECIALTY LAW FIRM IN MASSACHUSETTS

MA Phase 2 Includes Most Dental Treatment (continued from p.1)

and Treasurer, Dr. Thomas Trowbridge worked on the Reopening Advisory Board to come up with guidelines for Phase 2 and dental offices. The MDS has recommended that dentists prioritize treatment according to a “focus on the high-priority services (emergency/urgent, emerging needs, and preventive services) that if left untreated could lead to high risk or significant worsening of the patient’s condition if deferred.” This prioritization schedule is listed by the MDS as follows:

1. Emergency or urgent
2. Previously in the middle of treatment or treated during emergency.

Need to Terminate or Employees or Cut Pay During COVID-19? (cont. from p. 1)

governor’s directives caution not to urge older employees to become too active in the workplace because of their increased risk with their age group. For that reason, check with the older employee to see if they have any underlying condition which would make them even more at risk than just because of their age. Perhaps conditions like asthma, diabetes, or some other condition that is not considered a disability (if they do not interfere with an essential life function, especially when fully controlled) under the ADA is a reason other than age to consider telling an employee that they may have greater risk in the workplace to get sick. If it is a condition that has to be accommodated before the virus hit then it shouldn’t be considered as part of a decision to terminate, however.

Along the lines of discussing protected classes for disability law purposes, is a COVID-19 positive test a disability under the ADA? Most likely no, since it is a temporary condition and having it is a

3. Disease management, trauma, compromised function, and frequently cared for patients.

4. At-risk patients to prevent potential dental emergent and urgent care situations.

5. Continuity of Care

6. Recall preventive and routine comprehensive dental care.

It is in the provider’s best judgment as to which treatments are to be scheduled, but elective cosmetic services should be deferred until a future phase.

Massachusetts dental practices, which have experienced some of the highest layoff percentages of any industry, are anxious to reopen for all services and continue to bring back staff as soon as possible. Many dental practice

safety hazard to others in the workplace. Allowing a COVID-19 positive employee or someone who has been in constant close contact COVID-19 positive persons in the workplace could be an OSHA violation and against employer obligations to keep the workplace hazard free. With more and more contact tracing becoming the norm, there are going to be questions of how far removed from the risk of contagion by an employee has to be before they cannot be in the workplace under OSHA regulations. But OSHA is a fallback excuse for employer termination if they are fearful of creating a hazardous workplace, as long as it is not abused.

Cutting the pay of an employee because of lack of income requires a similar analysis regarding discrimination under other employment laws. But “business reasons” are usually a very legitimate defense to cutting someone’s pay, even if they are a protected class. Other concerns enter in here too, however. If the employee is on leave under FMLA they are protected from termination and must be returned to their previous position or a similar position with similar pay. Massachusetts laws regarding family leave don’t take effect until January of 2021, but they also protect workers who use that state law, which has been funded by both employer and employee contributions for some time now. Remember, however that once FMLA leave is up, those pro-

managers are seeing a surge of patients who are also are seeking to reschedule their postponed treatments. It was unknown how patients would perceive the safety factor of visiting a dental office facility where respiratory droplets, which are the most contagious transmitter of COVID-19, are a key part of normal activities. Clearly the level of trust patients have developed with their dental providers has contributed to their confidence that the dental office setting and treatments will be done in the safest manner possible. Organizations such as the Massachusetts Dental Managers Society have been meeting regularly by Zoom to brainstorm as to the best, safest and most efficient way to welcome back their patient base. Patients must realize that the formal training requirements for infection control the dental industry have long had in place have lent itself well to adapting to the new normal of safety in the pandemic era.

protections disappear. Also, employers who can show legitimate business reasons have some protection as long as they don’t intentionally fire or cut the pay of an employee just because they took an FMLA leave.

Protections under the Families First Coronavirus Response Act (FFCRA) also exist for employees who wish to return to work. But this protection is not absolute, and if it appears that an employee is using that Act not for legitimate COVID-19 related reasons, then they can be terminated. Employees abuse COVID-19 protections and also tend to exaggerate their fears of returning to the workplace without a justifiable reason. If their fears are unjustified or their reasons are not true then they can be let go. The standard is what would a reasonable person think is enough fear to not come back or in the employer’s case, is the employer’s thinking reasonable when they consider the employee’s fears illegitimate? Once again, the subject of disability surfaces if the fear of an employee is related to a mental diagnosis by a physician.

Releasing employees or cutting their pay is an emotionally charged decision that is sometimes tortuous for a good employer to go through. But most employment attorneys will tell you that if there are legitimate business reasons for doing so, there are sometimes excuses, at least legally, to make those tough decisions.

How Does an Employee Handbook Change After COVID-19?

Policies and procedures manuals, if they are used for dental offices specifically, often have sections to inform employees of their responsibilities to conform to OSHA and infection control regulations. But COVID-19 puts some additional and unique responsibilities on all employees, including licensed providers like dentists, hygienists and dental assistants, to follow procedures for preventing spreading the COVID-19 infection. Practices are developing unique protocols for employees and patients to have temperatures checked, for instance, that never would have been in a normal policy manual. But they should be present in a supplement to that manual along with all the other newly developed disinfecting procedures, social distancing requirements and other “new normal” aspects of a workplace like a dental office in the middle of a pandemic. All of a sudden dental procedures may be modified to include even more infection control protections than is usually required or that providers are trained in. For other employees, there will be new rules on how and when to disinfect, how to contact trace patients and employees, and how to teach patients and employees new social distancing techniques. A COVID-19 supplement is the best way to have employees know the rules they now have to abide by.

HIPAA’s Unique COVID-19 Specific Provisions

Did the legislative drafters of HIPAA regulations back in 1996 actually have a premonition that COVID-19 would ravage the globe some 23 years later? Perhaps so, because HIPAA provides specific provisions to deal with the subject of private health information security during a public health emergency like a pandemic. For instance, when there is a public health reason, like the possibility of the spread of a contagious disease why a patient’s protected health information needs to be released, the privacy provisions of HIPAA preventing that release are modified. Private Health Information (PHI) may be communicated to a public health official such as the Department of Public Health if there is a risk of contracting a contagious disease. State law or regulation can also require that release in certain circumstances like a COVID-19 pandemic. Providers like dentists are also under an ethical obligation to report this kind of information to their patients in there is a risk of contagion. This lessening of HIPAA privacy provisions may come into play as more offices and public agencies and affiliates perform contact tracing to find sources of COVID-19 spread. Don’t let patients use HIPAA as a shield to prevent information which is essential to public health from being released.

The COVID-19 Form of Informed Consent

There are always risks involved in an office setting where respiratory droplets, the key to contagion when it comes to COVID-19 are common. But dental offices, regardless of the prevalence of this risk factor, have always been rigorously trained in infection control and mandated to renew that training annually. So how do you make patients acknowledge that risk and yet understand that dental practices are actually one of the safest places to be in a pandemic? A standard “informed consent” form requires patients to acknowledge that there are risks of treatment. However, informed consent forms rarely make this second and key point that dental practices take both required steps for infection control as well as likely are going beyond normal standards to protect their patients just because they understand risks of infection and how to deal with them. One format for informed consent that is becoming popular with health attorneys is a Notice and Acknowledgment Form, which provides notice to the patient that in a pandemic there are going to be risks of transmission by seeking dental treatment. However the “acknowledgement” part of the form also has the patient sign an acknowledgment that there are specific required and unique protocols that are being undertaken just to preserve patients safety and make patients know they care about their overall health as well as provide quality dental care.

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.

HIPAA and OSHA Infection Control Training by Zoom is now available through Hatch Legal Group in conjunction with Dental Compliance of New England.

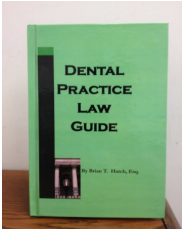
Policies and Procedures Manuals, customized for the dental industry and your office, are available from Hatch Legal Group. New COVID-19 Supplements are available to ensure practice protocols for meeting the pandemic are acknowledged by all employees. b r i a n h a t c h @ h a t c h l a w o f f i c e s . c o m

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 e-mail b r i a n h a t c h @ h a t c h l a w o f f i c e s . c o m.

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

Hatch Legal Group
8 North Main Street
Suite 403
Attleboro, MA 02703

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