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Caring for Your Employees

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Caring for Your Employees

As if a tight, competitive market didn't give dentists enough employment woes, a rapidly changing legal landscape is adding more complexity.

Lance Plunkett, J.D., LL.M.

Dental hygienists and dental assistants (both licensed and unlicensed assistants) are often the majority of the employees in a dental practice. As such, employment laws are a major issue for this healthcare workforce. The fact that the employment law environment in New York State is rapidly changing for them, makes it imperative that their employers keep abreast of their legal obligations. Let's start by looking at two quite remarkable proposed employment law developments.

The first comes from New York City. New York has always been an old-fashioned, "at will" employment law state. This means that employees serve at the will of the employer and can be terminated for any reason, including no reason at all, except for one that is illegally discriminatory. It also means that employees can quit employment at any time they wish. However, the New York City Council is considering legislation—Bill No. 837—that would end at-will employment and turn New York City into a "wrongful discharge" jurisdiction. As the bill summary notes:

"This proposed bill would prohibit employers from terminating employees without just cause. It would also prohibit, with enumerated exceptions, the use of electronic monitoring in discharging or disciplining employees."

In a wrongful discharge jurisdiction, an employer's ability to terminate an employee is more limited and can be challenged by the employee if the employer has not taken valid action to terminate the employee. It puts more of a burden on the employer to justify the termination than

a pure at-will employment jurisdiction would—and, therefore, presages more employment litigation over improper terminations.

If New York City adopts its wrongful discharge legislation, it would change over 200 years of law in New York State. It would certainly limit flexibility for dental employers in a tight workforce market for dental hygienists and all types of dental assistants. We won't know how the New York City Council will vote on this issue or whether Mayor Eric Adams will sign it into law until after this *Journal* issue goes to print, but NYSDA will be watching it closely.

The End of Non-Compete Agreements?

The second development comes from the Federal Trade Commission (FTC). The FTC has proposed sweeping regulations under its authority to define unfair competitive practices pursuant to Section 5 of the Federal Trade Commission Act to prohibit using covenants not to compete (non-compete agreements) and retroactively canceling existing non-compete agreements. The breadth of these proposed FTC regulations is extraordinary. They would preempt state laws to the contrary and would apply to all employers and to all pay levels for employees and independent contractors, including dentists and their employees and independent contractors. While it tracks what California law already does (as well as law in North Dakota and Oklahoma), it would be a vast change for New York State (and all of the other 46 states—although some states have adopted non-compete restrictions for certain low-wage employees).

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New York was the seminal state for honoring non-compete agreements in a famous court case involving dentists and decided by the New York State Court of Appeals in 1971—Karpinski v. Ingrasci (see *The NYSDJ* from December 1994 explaining New York law subsequent to this case). While New York has more recently floated ideas about legislation aimed at limiting non-compete agreements, the bulk of those discussions have been centered around low-wage earners (and some dental assistants might well fall into that category). In addition, the New York State Attorney General has taken action against several companies for abuse of non-compete agreements, again focusing on low-wage earners. However, no actions in New York remotely parallel the sweeping FTC regulatory proposal.

The FTC proposal creates only one exception in the context of sales of businesses, where purchasers of businesses can enter into non-compete agreements with owners selling the businesses. While that exception might be useful for dental practice sales between two dentists, it would not help dental practice employers in the hiring of employees or independent contractors, including hiring dentists, dental hygienists or dental assistants.

The FTC is in the process of gathering public comments on its proposal, and those comments may help to narrow the scope of the proposed regulations. In particular, the FTC has been interested in comments related to whether earnings of employees should be a factor in applying the prohibition on non-compete agreements and/or whether it should apply to executive level personnel.

The FTC is also interested in hearing comments on the retroactive rescission of existing non-compete agreements—a feature of the regulatory proposal that is drawing much legal attention as to whether the FTC even has the authority under the United States Constitution to enact such a sweeping regulatory prohibition. This is another issue whose fate will not be known as this *Journal* goes to print, but it will also be watched closely by NYSDA.

Given the controversy brewing over this proposal, it may well have been a strategy of the FTC to make a pitch for a giant change of law in order to at least end up with a more reasonable change of law. Keep in mind that California is the model for the FTC proposal and that, too, will likely be a factor in where this proposal ends up. Also, in a recent FTC public comment forum held in February, it was remarkable that medical groups were among the biggest supporters of the FTC proposal, frequently arguing that it would help healthcare providers against private investment interests that were interfering with health care. Antitrust law can make strange bedfellows.

New Laws Keep Coming

What about New York employment items that are already law? We covered quite a few in the November and January *Journals*, but late December saw even more items enacted that will affect how dental practices deal with their employees. Those items include all the following laws.

New York State Pay Transparency Law

New York State enacted a pay transparency law as Chapter 723 of the Laws of 2022 (New York City and Westchester County already had their own local laws on this). The law takes effect statewide on Sept. 17. It amends the New York Labor Law by creating a new Section 194-b that requires all private sector New York employers with four or more employees to list compensation ranges in job advertisements or postings for all positions to be performed, at least in part, in New York State. The law applies to advertisements for jobs, promotions or transfer opportunities. Advertisements for jobs, promotions or transfer opportunities paid solely on commission must disclose generally that compensation is based on commission, but not the commission formula.

The law also requires that employers post a job description for a position if such a job description exists. The law further requires that employers keep records to show compliance with the law, including, but not limited to, “the history of compensation ranges for each job, promotion, or transfer opportunity and the job descriptions for such positions, if such descriptions exist.”

It should be noted that in February, the Legislature passed amendments to the law that would eliminate this recordkeeping requirement, but the legislation has not yet been sent to the governor for action as of the writing of this article. It was expected the governor would sign these amendments into law, as she had indicated the law needed amendments in order not to be excessively burdensome for employers. However, relations between the governor and the Legislature cannot be described as a love fest right now.

Expanded New York Paid Family Leave Law

Quite some time ago, New York State also amended its Paid Family Leave Law in Chapter 550 of the Laws of 2021 to expand the definition of a family member to include siblings with a serious health condition. This includes biological siblings, adopted siblings, stepsiblings and half-siblings. The law took effect Jan. 1, over a year after it had passed.

Protection Against Lawful Absences from Work

Gov. Hochul signed into law, as Chapter 604 of the Laws of 2022, amendments to Section 215 of the New York State Labor Law that protect employees who take legally protected time off from work from retaliation, discrimination or discipline. The law protects absences from work protected by federal, state or local law,

and took effect on Feb. 19. While this seems like simple common sense, it makes it difficult for employers who used a “no-fault” work attendance policy. A “no-fault” attendance policy is one that assesses points, demerits or penalties for absences or tardiness regardless of the reason. That type of policy would now clearly violate Section 215 of the Labor Law and would need to be either discontinued or rewritten to adapt to the newly revised Section 215.

Workplace Posters

Gov. Hochul signed into law, as Chapter 693 of the Laws of 2022, amendments to Section 201 of the New York State Labor Law requiring employers to provide electronic copies of mandatory workplace postings to employees. Employers must also provide notice to employees that documents that are required to be posted physically are also available electronically. The electronic posting requirement took effect on Dec. 16. Employers are also still required to continue posting physical copies of all required posters and other documents in conspicuous locations on each floor of their workplaces. Failure to comply with the electronic and physical posting requirements could result in monetary fines and penalties, the amounts of which vary based upon the posting or document the employer failed to post.

Nursing Mothers’ Breastmilk Expression

Gov. Hochul signed into law, as Chapter 672 of the Laws of 2022, to take effect on June 7, a requirement that all employers in New York State provide nursing employees reasonable break time to express breastmilk at work for up to three years following childbirth. Upon request of a lactating employee, employers must designate a room or other location to express breastmilk. Such location must be close to the work area, well lit, shielded from view and free from intrusion. Absent undue hardship on the employer due to significant difficulty or expense, the room or location must also have a chair, a working surface, nearby access to clean running water and an electrical outlet. The room or location provided by the employer cannot be a restroom or toilet stall.

Employers also must provide a written policy on breastmilk expression developed by the New York State Department of Labor to employees upon hire and annually thereafter, as well as to employees who return to work after childbirth.

New York State Vaccination Leave Law

Gov. Hochul signed into law, as Chapter 234 of the Laws of 2022, legislation extending paid novel coronavirus (COVID-19) vaccination leave under Section 196-c of the New York State Labor Law for another year, through Dec. 31, 2023. The law requires employers to provide employees with a “sufficient period of time, not to exceed four hours” for each COVID-19 vaccination and booster dose. Employees must be paid at their regular rate of pay for their leave time.

The vaccination leave cannot be charged against any other leave to which the employee is entitled, including paid sick leave.

All employees working in New York State are eligible to take such leave. Employers should update their policies and inform their employees responsible for managing employee leave of the law's extension through the end of 2023. The completely separate New York State Paid COVID-19 Sick Leave Law also remains in effect.

New York State Sexual Harassment Hotline

Gov. Hochul signed into law Chapter 138 of the Laws of 2022 that amended the New York State Human Rights Law (Section 296 of the New York State Executive Law) to require the establishment of a toll-free, statewide, confidential hotline for reporting workplace sexual harassment complaints. The hotline number is (800) 427-2773 (800-HARASS-3) and was launched on July 19, 2022. The hotline is managed by the New York State Division of Human Rights, operates during normal business hours, and is staffed by a team of pro bono attorneys who can also give callers legal advice. Employers should update their sexual harassment materials and policies provided to employees to include information about the new hotline.

Veterans' Benefits and Services Poster

Although this item would affect very few dental practices, it's worth mentioning that Gov. Hochul signed into law, as Chapter 584 of the Laws of 2022, a requirement that all employers with more than 50 full-time employees conspicuously display a Veterans' Benefits and Services Poster. The law took effect Jan. 1.

While not many dental practices have more than 50 employees, the poster is free and can be downloaded and printed from the New York State Department of Labor website. This makes it a nice thing to do to support veterans even if not required for smaller dental offices—and it is probably one of the better regulatory wallpaper items.


New York City Artificial Intelligence (AI) Automated Employment Decisions Tool Law

Finally, New York City has postponed enforcement of New York Local Law Int. 2021/144 (which makes it unlawful for New York City employers to use AI automated employment decision tools to screen job candidates for jobs or promotions unless the employer conducts an independent bias audit). New York City held extensive public hearings on the law and concluded that although it was slated to take effect on Jan. 1, that effective date needed to be postponed until April 15. There was mass employer confusion over what constituted an acceptable AI bias audit and how it should be conducted. As one legal wag put it, "What if there is bias in the AI bias audit?"

Stay Tuned for More

2023 will likely see more employment law developments in New York State. It is the fastest changing field of law in New York right now. All of this complicates the ability to hire and retain dental hygienists, dental assistants and all other employees in a very tight, competitive job market. Many of these new laws expand worker opportunities and rights, giving them an advantage in seeking out varying job opportunities. This lends added urgency to NYSDA's own efforts to make improving the employment landscape for dental offices a top priority. This employment landscape will bear constant watching lest it turn into an employment desert for dental practices. //

The material contained in this column is informational only and does not constitute legal advice. For specific questions, dentists should contact their own attorney.

 **University at Buffalo**
School of Dental Medicine

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June 29 - 30, 2023
New schedule! Thur AM & PM and Fri AM
New venue! Chautauqua Harbor Hotel

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Oral Surgery in General Practice, Dr. David Todd
Case Based Approach to Oral Surgery Complications
Dr. Kevin Lee

Thursday afternoon June 29
Saving Teeth - Perio Role in Team Approach to Complex Multidisciplinary Cases
Dr. Anna Paritsky

Friday morning June 30
One Day Jaw Rehabilitation for the Head/Neck Cancer Patient: Prosthetic & Surgical Considerations
Drs. Mike Markiewicz & Vladimir Frias

Lectures Thur 9am-12pm & 1-4pm / Fri 9am-12pm
CE Credit Hrs: 12 ADA/CERP
Dentist \$225 / Team Member \$125