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Dentist Employment Agreements: A Guide to Key Legal Provisions

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1. Why These Materials Are Important

The ADA has committed to “[p]rovide support to dentists so they may succeed and excel throughout their careers”. This commitment extends wholeheartedly to dentists in every stage of their careers, including new dentists seeking placement, as well as to established dentists seeking to expand their practices.

At the 2012 ADA Annual Session, the House of Delegates adopted Resolution 111, requiring that the ADA:

“ ... establish an educational program to provide assistance and resources to all ADA members with specific reference to senior dental students (D4s) and postgraduate student/resident members who have joined the ADA and are contemplating contracts of employment or associateships, and ... that such assistance and resources include, to the extent permitted legally and ethically, the preparation and distribution of informational and educational materials concerning the evaluation of contracts and particularly relevant contract terms, and the identification of issues to which the applicant should give particular attention when considering the contract ...”

These materials were prepared in response to that resolution.

These materials are designed to assist you in your consideration and review of contracts of employment. They are not, however, a substitute for competent professional advice from a lawyer who is aware of the specific circumstances of your situation and the laws of your state. Employment law can vary from state to state, and there may be particular nuances that will affect your contract. Moreover, it is sometimes difficult for persons unfamiliar with contracts to anticipate their various pitfalls. If you think that the cost of speaking to a lawyer concerning your employment contract is unnecessary, you should consider the possible serious consequences that may result from an unfair, unreasonable, or burdensome contract. While this treatise will provide you with a working knowledge of many provisions of an employment contract, it cannot replace the personal advice of a knowledgeable lawyer.

This is why we urge you to have the contract reviewed by a competent lawyer in your jurisdiction who is aware of the specific circumstances of your situation. And that is why we also provide guidance in selecting an attorney.

We suggest that you review these materials before speaking with your attorney. We hope that these materials will provide a solid basis for your discussions with your attorney; will better enable you to understand the right questions to ask; and to maximize the chances that you will understand the employment contract that you have been offered and save time and money in doing so.

Let’s begin with a discussion of what an employment contract is.



2. What is an Employment Contract?

An employment contract is an agreement by which one party commits to compensate another party for the performance of employment services, and the second commits to perform those services, and to be bound by certain specified restrictions. (The terms “contract” and “agreement” are pretty much synonyms and are often used interchangeably.) Unlike other contracts in which the parties reach a similar agreement, an employment contract creates an employment relationship, which relationship has particular legal consequences (e.g. tax withholding requirements, agency).

An agreement can be oral or it can be in writing. Oral agreements, however, are subject to indefiniteness, incompleteness, and lack of and selective memory of the parties, and disputes over oral agreements may lead to litigation that can be extremely expensive and time-consuming. Agreements in writing, on the other hand, will, if properly drafted, clearly set out the understanding between the parties and their respective rights and responsibilities. Disputes over the terms of written agreements can and do arise, but such disputes are not the norm. Thus, particularly with respect to something as important as your employment, agreements in writing are highly recommended.

An employment agreement sets forth many of the details of an associate dentist’s employment, such as compensation, benefits, and duties; items that pertain to the period during which the dentist is employed. These details are important, and the key provisions that address them are discussed later in this treatise. In addition, however, certain provisions of the employment agreement may impose obligations on the employee that extend beyond the termination of the employment relationship. A restrictive covenant, for example, may prevent the former employee-dentist from practicing in the geographic area of their choice. A non-solicitation clause may prevent the dentist from hiring a proven hygienist, or a trusted office manager. In other words, some provisions of an employment agreement may have long-term impact upon a dentist’s career or ability to practice.

An employment agreement, in short, is worthy of significant consideration, not only because of its effect on dentist’s current employment (which, in and of itself, is a pretty important consideration). It may have a lasting effect beyond the term of employment.

Put down the pen for a minute.

3. Due Diligence and Negotiability of the Employment Contract

If you have reached the stage where you have an offer in hand and are presented with an employment contract, you may already have carefully researched your prospective employer. If you have not, it's still not too late.

Look over the employer's website. Engage in an internet search of the employer. Check comments and ratings of the practice [*Note: Keep these ratings and comments in appropriate perspective, since comments on many ratings sites are often of questionable veracity*]. Check with your state dental association and state dental board concerning the good standing and track record of the practice and its principals.

If you've satisfied yourself that your prospective employer is the type of practice that you want to work for, in terms of professional approach, integrity, patient mix, and financial stability, among other things, you need to determine whether the proposed employment contract is negotiable.

Of course, everything is technically negotiable, particularly if you're willing to risk hearing "no" as an answer. And if you go overboard and try to negotiate every provision of the contract, it's highly likely that you'll hear "no" a number of times. That said, if there are things in the contract that are truly problematic from your perspective, it can't hurt to try to negotiate towards a resolution that you believe to be more equitable. In addition, if you are presented with a one-sided agreement wholly favoring the employer, and are told that nothing is ever negotiable, you may wish to consider what this says about this prospective employer.

So. If there is something in the agreement that troubles you, you should not hesitate to raise the issue with the prospective employer. You should, however, be prepared. Look at it from the employer's point of view. Is this a point on which the employer could realistically be expected to agree?

If there are other employee dentists, it may be harder for the practice to upset their pay scale, or offer you additional paid vacation days, than if you will be the only employee dentist. Consider whether the benefits or concessions you are asking for would place other employees in a disadvantageous position (for example, don't expect to get more paid vacation time than more senior employee dentists at the practice).

Consider compromises — think out of the box — if you encounter seemingly intractable issues. For example, if you truly need more vacation time off than is offered, but the employer cannot provide additional vacation time due to established policy, consider a provision allowing you to take the needed additional time on an unpaid basis. Or consider offering to work additional hours at non-traditional times in exchange for additional vacation.

Finally, when determining what contractual provisions may be worthy of negotiation, think in terms of the provisions that may come into play at the end of the relationship or after its termination. In other words, use your imagination to consider what might ultimately

go wrong with the relationship, or what might create a real restriction on your conduct after your employment ceases. Recruiters advise that the most commonly inquired about provisions for negotiation are (a) the radius and application of restrictive covenants, and (b) the notice period for terminating the employment. You may also wish to see what the contract says about the reasons the contract may be terminated by either party, as well as the obligations that each party undertakes upon termination. These are provisions that may not catch your attention at the outset of what is hoped to be a happy and successful employment, but that may be deserving of some thought.

Prepare. Focus on the few things in the contract that truly are problematic. Understand the employer's perspective as well as your own. To do that, you'll need to understand the contract.



4. Key Provisions of Dentist Employment Agreements

Key Provision: Employee vs. Independent Contractor

What it is: The words “employee” and “independent contractor” are legally meaningful concepts that define the relationship in which one individual or entity retains another to perform certain work. Whether the dentist is an “employee” or an “independent contractor” is a matter of great importance, and mischaracterization of this relationship could result in adverse or unintended consequences, in such areas as tax law. Whether the dentist is characterized in the employment agreement as an “independent contractor” or an “employee”, however, is of relatively little significance — the actual relationship, based on numerous factors, is what will control when the government looks at the relationship. Unless the relationship meets the legal standards for an “independent contractor”, such characterization (and treatment) should be avoided.

- **Independent Contractor.** An independent contractor is a self-employed professional who exercises independent judgment and renders services as specified in a contract. The independent contractor is able to control the means and methods by which the work is performed while the party who retains the contractor is able to direct what work is to be performed but does not control when and how the result is accomplished. Generally, an independent contractor exercises more personal autonomy and carries greater financial and management responsibility than does an employee. In general, the independent contractor will have greater control than an employee in terms of hours, fees, personal work routines, appointment book control, and treatment and planning.
- **Employee.** An employee follows an employer’s directions and supervision as to what and how work is to be performed (e.g., what order or sequence to follow when performing the work, when and where to work, procurement of supplies and equipment, what workers to hire or assist with the work, etc.). In general, the employer controls the details (such as the “when” and the “how”) of the employee’s service.
- **Additional Comparisons/Factors.** Broadly speaking, a worker’s status is based on the engaging entity’s degree of control over the work performed with reference to three general categories:
 - **Behavioral Control.** Does the engaging entity have the right to control the what, when, and how the work should be performed? Similarly, who provides the instruments and equipment and determines whether there is a designated time for when and where to perform the work, what order or sequence to follow, and who can hire workers to assist with the job. An employee has less behavioral control than an independent contractor and is subject to the engaging entity’s direction.
 - **Financial Control.** Does the engaging entity have the right to control fees, payment and collection policies to patients? How is the worker compensated for performance and reimbursed for expenses? To what extent will the worker incur

a financial profit or loss from his or her activities? An independent contractor generally exercises greater financial responsibility and faces a greater risk of financial loss than an employee.

- **Nature of the Relationship.** Are employee-type benefits, such as insurance, vacation pay, or sick pay, provided to the engaged dentist? Is the worker responsible for securing all of his/her own patients, or are patients provided by the engaging entity?
- **State Law Analysis.** In addition to analysis by federal governmental agencies, states also analyze these relationships. For example, in 2020 California enacted a law for determining whether a worker is an employee or an independent contractor. Under this law (sometimes referred to as the “ABC Test”), a worker will be deemed an independent contractor only if each one of the following three elements are satisfied:
 1. The worker is free from the control and direction of the hiring entity in connection with the work being performed.
 2. The worker performs work that is outside the usual course of the hiring entity’s business.
 3. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Under California law, however, there may be some additional flexibility in classification of dentists. See www.cda.org/Home/News-and-Events/Newsroom/Article-Details/abc-test-is-now-the-law-but-its-not-a-free-ticket-for-independent-contractors

Consequences of an Employee or Independent Contractor Relationship

If after analysis the engaged dentist is determined to be an independent contractor, the independent contractor is responsible for individually filing income, employment, and social security taxes and making the appropriate payments to the IRS and state authorities. In addition, the independent contractor is not protected under certain federal and state laws such as antidiscrimination, minimum wage, overtime pay, and unemployment compensation, and may not receive social security credit.

If after analysis the engaged dentist is determined to be an employee, he or she is not responsible for withholding, reporting, and paying over payroll taxes. The employee is only responsible for his or her personal year end return and, as necessary, payments to IRS and state authorities. The employee qualifies for protection under the antidiscrimination law, minimum wage law, overtime pay, and unemployment compensation. If the IRS determines that a dentist who was treated as an independent contractor was, in fact, an employee, the employer may be liable to the IRS failure to withhold payroll taxes, and associated penalties. In addition, the employer may also incur unforeseen liability to the employee under worker’s compensation, unemployment, insurance, antidiscrimination, and other laws and regulations applicable to the employment relationship.

Why the Employer Entity Might Want an Employee or Want an Independent Contractor

- The engaging entity may wish to hire an “employee” if the employer desires to establish this type of (generally longer term) relationship, and to maintain greater control over how and when work is to be performed.
- The engaging entity may wish to engage an “independent contractor” if the engaging entity requires a specialized expert for a particular area of dentistry to enhance the range of services able to be provided within the practice, to replace an employee on vacation or leave, or to increase the utilization of the dental office facility. The engaging entity may also simply want to save on labor costs, as the costs of providing various employee benefits (vacation, health care, etc.) are often a significant portion of overall employee compensation. The engaging entity may also prefer to avoid workers compensation and social security payments. It is likely that in most cases where a mischaracterization exists, it exists because the employer preferred to characterize an “employee” as an “independent contractor”.

Why a Dentist May Want To Be an Employee or Want To Be an Independent Contractor

- A dentist may prefer to be engaged as an independent contractor if he or she desires greater decision-making, self-management and increased personal autonomy. This dentist may want the ability to build his or her own practice while limiting immediate financial overhead. The engaged dentist may prefer that the employer not withhold taxes (income, social security) and prefer to manage his or her own tax liabilities; however, this may prove a risky strategy if the dentist does not save adequately to pay the un-withheld taxes when they come due.
- A dentist may prefer to be hired as an employee if he or she seeks a stable income stream, benefits (such as health insurance, workers’ compensation, credit towards social security), and less management responsibility. This appears to be the more typical preference.

Consider the Following Questions:

- Do you prefer a steady income or an income more based on your ability to secure patients?
- Are you comfortable seeking patients if the engaging entity does not provide or refer patients?
- How important are employer-provided benefits? Do you have others (spouse, parents) who can provide benefits (such as health insurance) if your employment does not?
- Are you comfortable or experienced in managing, marketing, and exercising financial responsibility?
- Do you want to practice with one practice or have the ability to market to others?
- How comfortable are you in a controlled environment, as an “employee”?

Why Classification Is Important

Engaging Entity. As previously discussed, to the engaging entity, the classification is important in that misclassification of an “employee” as an “independent contractor,” may result in significant penalties and fines. In general, misclassification also carries with it the risk of sanctions for violation of fee splitting prohibitions.

- **Engaged Dentist.** To the true employee, classification as an “employee” is important to avoid losing benefits such as unemployment compensation, paid vacation and potential overtime pay. The true “independent contractor” dentist will want to define his or her status accordingly to make sure to tax plan (withhold, file) accordingly and to structure interactions with the practice to comply with various health care laws.
- **Health Care Compliance Issues.** Both the practice owner and the dentist-employee or independent contractor must avoid even inadvertent violation of federal or state fraud and abuse regulations, such as the federal Anti-Kickback Statute (AKS). For example, if a dentist refers a Medicare or Medicaid patient to an individual or entity with whom the dentist has a financial relationship, this may, depending on the circumstances, constitute an AKS violation. The U.S. Department of Health and Human Services’ Office of Inspector General (OIG) has established “Safe Harbors” to define permissible conduct that will not be viewed as violating the AKS, such as the employee compensation safe harbor. Although failure to meet a Safe Harbor does not automatically make a transaction illegal, in order to come within a Safe Harbor, an arrangement must meet all of the applicable requirements of the Safe Harbor. For more information about federal fraud and abuse laws, visit the Office of Inspector General website at <https://oig.hhs.gov/>.

What an Independent Contractor and Employee Clause Might Look Like

Independent Contractor Designated

It is understood and agreed, and it is the intention of the parties hereto, that the dentist is an independent contractor and that the dentist is not an employee, agent, joint venture, or partner of the Employer for any purpose whatsoever. Both parties acknowledge that neither Contractor nor any of Contractor’s employees or agents is an employee of the Employer for state or federal tax purposes. Neither Contractor nor any of Contractor’s employees or agents is entitled to or eligible for any employee benefits of the dental practice, such as a group insurance, profit-sharing or retirement benefits. Contractor shall retain the right to perform services for others during the term of this Agreement so long as these services are not inconsistent or incompatible with Contractor’s obligations under this Agreement. Contractor has no authority to act, to enter into any contract, to make any commitment, or to incur any liability on behalf of the dental practice, and Contractor must not represent to any third party that Contractor has any such authority.

Employee Designated

The dental practice agrees to employ Employee, and Employee hereby accepts employment with the dental practice, to provide professional dental services at the location or locations identified in Exhibit A attached hereto and, upon mutual agreement, at such

10 *other locations as may be reasonably designated by the dental practice from time to time. Employee agrees to conform to the rules, regulations and policies of the dental practice and to provide professional services to patients in a manner consistent with state and federal law, rules and regulations concerning the practice of dentistry.*

Note: Regardless of the contract language, or how the parties chose to characterize the relationship in the contract, the reality of the relationship (and not the characterization and language of the contract) will control the relationship from a legal perspective.

Some Things to Consider

- **Patient Records.** Upon termination of the relationship, who will retain patient records? Where will the patient records be stored and how long will they be kept in the event of malpractice litigation? Are there any provisions to access the patient records? Can the dentist make a copy of certain patient records? Generally an employee does not own patient records, where an independent contractor may develop his or her own patient pool and possess ownership rights of patients' records unless otherwise stipulated in the agreement. If the independent contractor does not possess ownership rights of patients' records, it is advisable that the independent contractor secure the contractual right to photocopy the records of treated patients to defend in case of a malpractice suit, peer review or dental board action.
- **Liability Coverage.** Typically an independent contractor must provide his/her own liability insurance. The engaging dentist may want the independent contractor dentist to contractually commit to obtaining a level of coverage, and the engaging dentist will likely want to follow-up make certain that the independent contractor dentist has, in fact, secured the required coverage. The employee dentist will likely want to assure that the employer has secured is providing appropriate coverage (it would not seem unreasonable for the employee to ask for and be provided with a copy of the policy), likely with a "tail" (see section on Malpractice Insurance provisions, page 26).
- **Termination.** How long does the contract run? Is there an expiration date for when service must be completed and if so, is it reasonable? An independent contractor is generally obligated to render complete performance for the term of a contract; otherwise, the engaging entity may be entitled to damages. On the other hand, if the independent contractor's contract is early and wrongfully terminated, then he or she may be entitled to damages for breach of contract. For more information, see section on Term and Termination, page 22.

Additional Resources

IRS.gov. *Independent Contractor or Employee?*

www.irs.gov/pub/irs-pdf/p1779.pdf

IRS.gov. *Employer's Tax Guide.*

www.irs.gov/pub/irs-pdf/p15.pdf

PADental.org. *Example: Independent Contractor Associate Agreement.*

www.padental.org/images/onlinedocs/resourcesprograms/practice%20management/contractoragreement.pdf

American Dental Association. *The Federal Anti-Kickback Statute, Promotional Discount Programs, Discounts and Rebates.*

ADA.org/en/member-center/member-benefits/legal-resources/publications-and-articles/fraud-and-abuse/the-federal-anti-kickback-statute-promotional-discount-programs-discounts-and-rebates-faq



Key Provision: Employee's Duties

What it is: A contractual provision addressing “employee’s duties” sets forth the employed dentist’s work-related responsibilities. A section on “duties” may call out specific detailed expectations or may provide responsibilities in a more general manner. There are two distinct aspects that may be addressed in this provision:

- **Technical Requirements of Any Dental Professional.** Such as holding and maintaining a valid dental license, legal (e.g. HIPAA) compliance, etc.
- Specific practice requirements
- **General.** Number of hours to be worked, hours on call, etc.
- **Individual Practice Specific.** Administration duties in the office, collection responsibilities, etc.

Why the Employer Wants It

The employer may want to set clear expectations for the dentist-employee at the outset of the relationship. This may help avoid misunderstandings, and may help the employer defend a wrongful termination (or breach of contract) lawsuit if the employee-dentist does not fulfill contractual requirements.

Why the Employee-Dentist Should Be Concerned

This dentist-employee should also wish to have clearly defined expectations, but should be concerned about what he or she are obligating themselves to perform as well, particularly if there is something in the contract language that does not conform to what was orally stated. If there are references to conforming to policies and procedures, the employee will probably want to review these prior to executing the agreement, and to understand how these might be changed. If the duties stated are contrary to what was discussed, or what the dentist understands his or her responsibilities to be, these should be resolved before the agreement is executed.

Why this Provision Is Important

This provision establishes the job responsibilities. If breached, it could become grounds for termination or a contractual dispute.

What an “Employment Duties” Provision Might Look Like

Position, Duties, and Disclosure. *You will be employed to practice dentistry for [Employer] for the term set forth in this Agreement, on and subject to the terms, conditions, and provisions contained in this Agreement. At all times, you will carry out your duties to the best of your abilities in a professional, competent, high quality manner, in compliance with all applicable legal requirements and standards, and also in compliance with [Employer’s] written policies, practices, and procedures as in effect from time to time and the directions and instructions of the Dental Director. During the initial and any successive term, you will practice dentistry for and on behalf of [Employer] on an exclusive basis, unless otherwise provided in your employment application or agreed to in writing by the Dental Director*

or a [Employer] executive officer. You will practice at such [Employer] offices during the term as may be requested by your Dental Director from time to time, although you will not be required to provide service on a permanent basis at any office where to do so would require travel of a material nature without your prior consent. You will devote such time, interest and effort to the performance of your duties under this Agreement as may be fairly and reasonably necessary to fulfill your obligations.

Some Additional Things to Consider

- Does the employer have the right to assign the employee to another practice location? If so, are there limitations as to this right? See the Non-competition section, page 31, for a discussion of some issues related to such an employer right.
- Is the employee contractually obligated to follow the direction(s) of a non-dentist? If so, is this obligation limited to non-treatment matters? Is the dentist-employee required to act in a manner that might violate the standards of professional responsibility?

Key Provision: Compensation

What it is: The Compensation provision defines when and how much an employee gets paid, in many cases (when the compensation is not a defined salary) also detailing how the amount is calculated and how it might vary.

Why the Employer Wants It

Compensation is a basic term of the agreement, and the employer wants to be clear what the employee is entitled to and, perhaps equally important from the employer's perspective, what the employee is not entitled to. In addition, through the compensation structure, the employer may wish to incentivize certain behavior.

Why the Employee-Dentist Should Be Concerned

As an employee, you cannot seriously be asking that question. Unless your parents are Bill and Melinda Gates, and if they are, congratulations! If not, you already know why you, as the employee, should be concerned and why the manner and amount of compensation are significant issues.

In addition to the obvious, however, there is another reason why the dentist employee should be concerned. Dental employment contracts can frequently be more complicated than a straight salary arrangement. Details about pay models, deductions and other seemingly complicated compensation-related terms can be easily overlooked in the negotiation and language of an employment agreement, but these fine points can significantly impact the employee dentist's income.

Why this Provision Is Important

Because some payment models are more complex than a straight annual or hourly salary, it is important to understand all the details and possible permutations of the compensation formula before executing the employment agreement.

14 Understanding the Details

Examples are given in italics. Sample numbers and scenarios do not express industry standards or expectations.

Salary is the amount an employer pays based on a fixed monetary amount.

- **Annual.** Amount is a flat sum for all work performed in a year.

Qwerty Dental pays Adam \$100,000/year.

- **Per Week (or Month).** Amount is a flat sum for each week (or month) the employee–dentist works.

Qwerty Dental pays Adam \$2,000 per week (or per month).

- **Per Diem.** Amount is a flat sum for each full day the employee–dentist works.

Qwerty Dental pays Adam \$500/day.

Commission is a compensation arrangement under which the amount of compensation is based on the employee–dentist’s production. The amount of the employee–dentist’s payout can be based, for example, on his/her gross billings or net collections. The calculation might even vary by whether the patient is a pre-existing patient or a patient brought to the practice by the dentist–employee. The contract should clearly describe upon which amount commission will be based.

Methods of Calculation

- **Straight Commission.** The employee–dentist’s pay is a flat percentage of the agreed upon the revenue generated, or the number of patients treated or procedures performed, by the employee–dentist (i.e., “commission–base”).

Qwerty will pay Adam 33% of his commission–base. Adam’s commission–base is the total amount billed for his work, which in this example has amounted to \$30,000. Adam receives \$10,000.

- **Salary Plus.** The employee–dentist’s pay is a combination of a salary plus a commission.

Qwerty will pay Adam \$7,000 plus 10% of his commission–base. Adam’s commission–base is \$30,000. Adam receives \$7,000 plus \$3,000 in commission for a total of \$10,000.

The Commission–Base May Be Based On

- **Production.** The total amount billed for the work that an employee–dentist performs in a pay period.

The amount billed to Adam’s patients for his work during the pay period is \$15,000. His production is \$15,000.

- **Collection.** The gross amount collected from an employee–dentist’s patients for work he/she performed in a pay period.

The value of bills presented to Adam’s patients for the pay period is \$15,000, but 10 of his patients, each with a bill of \$100, have not paid yet. Adam’s commission–base is \$14,000.

Putting All the Pieces Together

Here's a simple formula to determine the level of production required for a practice that pays on collection to generate a target income. In this example, the associate wants to earn \$84,000 (before taxes) for the year at a practice where the compensation rate is 33% and the CP ratio* is 98%:

$$\text{Production} = \frac{\text{Desired Income}}{(\text{Compensation Rate} \times \text{CP ratio})}$$

$$\text{Production} = \$84,000 \div (0.33 \times 0.98)$$

$$\text{Production} = \$259,740$$

In order to earn \$84,000, this associate will need to produce \$259,740. Obviously, any one of these variables affects the equation.

* *CP (Collection to Production) Ratio:*

To calculate CP ratio, divide the amount collected for a service by the fee for that service. For example, if the fee for a prophylaxis is \$10, and the practice ultimately receives \$9, the CP ratio is 90%.

- **Net profit.** The amount collected on the dentist's billings less any delineated expenses (which may be direct (such as lab fees) or indirect (such as overhead) in performing the work.

Adam performs procedures on both Betty and Charlie. He runs lab work on Betty that costs \$500. Charlie receives a 10% discount. He bills them each \$5,000. His gross production is \$10,000, but the practice incurred \$500 in costs from Betty and \$500 in a discount (deduction from the billing) for Charlie, for a total deduction of \$1,000. Adam's net production is \$9,000.

16 Other Considerations

- **Advance.** A type of “loan” that the employer may make to the employee-dentist against the employee’s future earnings; a commission plan which provides a “guarantee” that the employee-dentist will be paid at least a certain (base) figure. If the employee-dentist’s production during a specific pay period is not enough to bring his or her commission to this guaranteed amount, the employer will still pay the employee-dentist the guaranteed amount, but the amount of the difference between (i) the amount that the employee-dentist earned on commission and (ii) the amount that was guaranteed will be treated as an “advance” against future commission earnings. The employee-dentist will have to repay this deficit when his/her commission earnings are in excess of the guarantee amount. Some employers might even require payment of interest on the advance.

Qwerty Dental pays Adam 33% of his net collections and Qwerty guarantees, by advance, that Adam will receive \$5,000 per pay period. Qwerty pays its employees once a month. When Adam’s net collections are \$15,000, he makes \$5,000 on commission. In any month in which Adam’s net collections are less than \$15,000, Qwerty will still pay him \$5,000, but the difference between \$5,000 and what he earned will be an advance and will be deducted from his commission when his net collections are more than \$15,000.

In January, Adam’s net collections are \$12,000. He earns \$4,000 in commission. Qwerty still pays Adam \$5,000. Because Adam only earned \$4,000, the \$1,000 Qwerty added to his commission in order to pay him \$5,000 is an advance. When Adam brings in \$21,000 in net collections in February, his commission of \$7,000 is reduced by \$1,000 to repay Qwerty and he receives \$6,000.

- **Cap.** An employer may set a maximum amount an employee-dentist can earn in commission.

Qwerty Dental will pay Adam 35% of his net collection up to \$150,000 in a calendar year.

- **Bonus.** An additional payment to the employee-dentist in reward for some achievement, such as bringing in an amount above a certain benchmark in collections. It may be used in addition to a salary or commission computation method.

Qwerty will pay Adam \$10,000 a month for an annual salary of \$120,000. For each quarter in which Adam’s net collections exceed \$125,000, Qwerty will pay Adam a bonus of \$2,500.

What the Compensation Section of the Contract Might Look Like

A **straight salary model** is the least complicated compensation model.

Salary. *Adam shall be paid as a practice employee. Qwerty will pay Adam a salary of \$125,000 per year over the course of 26 bi-weekly pay periods.*

A **commission model** will require more details about what figure is being used for the commission-base.

Compensation. *In consideration for Adam's services, Adam shall receive 32% of Adam's net collections.*

A **salary plus model** should always clearly set numbers for each compensation element.

Qwerty shall pay Adam for services during the Employment Period a base salary at the annual rate of \$75,000 per year and a 15% commission based on the Adam's net production.

A **commission compensation model** that implements an advance should be clear about how the employee-dentist is receiving a guarantee (or merely an "advance") and, if an advance, whether repayment of such will require interest.

Compensation. *During the term of your employment, Qwerty will pay Adam 30% of his net collections. Adam will be guaranteed \$8,000 per month, secured by an advance from Qwerty. Repayment of this advance shall be made from Adam's future commission earnings and shall be automatically collected by Qwerty, along with a 3% annualized interest rate.*

Some Additional Things to Consider

- **The compensation model should be understandable.** It is strongly recommended that the employer and employee each run at least a few sample numbers through the compensation model to be certain that each can use the formula to calculate how much the employee will earn based on his/her work during a given pay period.
- **While pay is important, it is not the only incentive employers provide to employees.** The various benefits offered should be carefully considered, as (i) an offer in which the pay elements (salary, commission, etc.) are lower, may provide a higher level of financial compensation through a superior benefits package, and (ii) an individual employee may place greater emphasis on certain benefits (such as vacation) based on his/her personal opinions about the work-life balance. See Benefits discussion, on page 19.

Additional Resources

Department of Labor. *Glossary of Compensation Terms.*
www.bls.gov/ncs/ocs/sp/ncbl0062.pdf

Bureau of Labor Statistics. *Occupational Outlook Handbook: Dentists.*
www.bls.gov/ooh/healthcare/dentists.htm#tab-1

National Association of Colleges and Employers. *NACE Job Seekers Salary Calculator.*
www.jobsearchintelligence.com/NACE/jobseekers/salary-calculator.php#

Key Provision: Benefits

What it is: Benefits are non-wage compensation that an employer provides to an employee (sometimes referred to as “perks”). Benefit packages often include health insurance, life insurance, paid vacation, sick days, 401k contributions, and bonuses. A dentist employment contract may also provide for professional liability insurance, tuition reimbursement, profit sharing, and continuing education.

Why the Employer Wants It

An employer provides benefits primarily to attract and retain skilled employees and to set forth clear expectations.

Why the Employee-Dentist Should Be Concerned

Salary (wages) is only one portion of the compensation that an employee earns; benefits are often a significant part of overall compensation. Thus, the combination of compensation and benefits is sometimes referred to as “the compensation package”. In many cases, a robust benefits package offered by Employer X can provide a greater level of overall compensation than offered by Employer Y, even where the salary component offered by Employer X is lower than offered by Employer Y. A potential dentist-employee should carefully review and understand the benefits package being offered by a potential employer.

Why this Provision Is Important

Benefits are important for the same reason that salary is important — they represent a significant portion of the employee’s overall compensation. In addition, the benefits may have a strong influence on the employees’ “lifestyle” — potentially affecting whether the employees can afford to choose their physician, attend a course, whether they have sufficient vacation time to travel, whether they are saving for their retirement.

What the Provision Might Look Like

Certain or all of the benefits may be expressly enumerated in the contract, or the main body of the contract may reference attachments to the contract providing details on these benefits, or the contract may merely refer to the practice’s policy (or employment) manual. The employee-dentist should carefully review the benefits being offered.

Fringe Benefits. *As additional compensation for Dentist’s services under this Agreement, the Practice shall provide Dentist with fringe benefits defined by the Practice and offered to the Practice’s healthcare providers in accordance with the Practice’s fringe benefits policies and procedures. The Practice retains the right to change or restructure fringe benefits provided to its employees at any time. A summary of current benefits is attached to this Agreement as Exhibit X. The terms and conditions of benefit plan documents will control the specific rules and procedures for eligibility and participation.*

Note that it is standard (as above) for the employer to reserve the option to change or restructure a benefits program; for example, to change medical plans to obtain cost savings. With respect to the referenced exhibit that summarizes the benefits, it will likely

spell out all benefits the employer is offering in detail and may contain provisions such as:

- **Retirement Plan.** *Employer matches employee contributions up to X% of employee salary to a tax deferred Simple IRA Plan. Consistent with the terms and limitations of the plan, employee may contribute more than X% if they wish. Employee directs all investments. Plan documents and provisions govern all eligibility and contributions.*
- **Worker's Compensation and Unemployment Insurance.** *Premium paid by employer.*
- **Health Insurance.** *Insurance Company pays X% of single or family premium on the standard basic HMO or PPO plan coverage with employee contributing Y% of premium cost. Expanded or indemnity coverage plan options are available at employee expense.*
- **Prescription Plan.** *Current employee co-pay is no more than \$X for generic (Tier I), formulary drugs. There is an X-day employment requirement before and employee is eligible for this coverage. Professional clinicians and other contract employees are exempt from this waiting period.*
- **Health Services.** *One half of out-of-pocket obligation for medical and dental services received by an employee, spouse, or children at Insurance Company is discounted as an employee fringe benefit.*
- **Life Insurance.** *Employer paid premium provides coverage for X times employee's annual salary up to a maximum of \$XXX,XXX. Additional coverage is available at employee expense for maximum total coverage up to \$XXX,XXX.*
- **Paid Time Off (Vacation and Sick Combined) and Holidays.** *X days are paid holidays when the center is closed. Employee accrues additional paid time off at a rate reflective of Employee's time with the Practice; for the first year, Employee receives X hours per month; for years X through X, Employee receives X hours per month; and for employment of more than X years, Employee receives X hours per month based on regular 40-hour week. This benefit is pro-rated for regular part-time staff members.*



- **“Cafeteria” Plan.** *Supplemental insurance (i.e. disability, accident, cancer) and flexible spending accounts (i.e. medical, dependent care) are available to employee through Insurance Company, a qualified Section 125 plan that makes employee deductions tax exempt for health insurance, some supplemental insurances, and flex spending accts.*
- **Bereavement Leave.** *Up to X paid days annually for Dentist to arrange and/or attend the funeral of members of Dentist’s immediate family. “Immediate family” includes parents, step-parents, spouse, domestic partner, children, step-children, siblings, grandparents, grandchildren and in-laws.*
- **Professional CE and Tuition Reimbursement.** *Up to X paid days and \$X for dentists for Practice approved continuing education expenses or library references annually. On approval, expense benefit can be applied to professional organization dues.*

The employer may expressly state that it is not providing certain benefits:

You will not receive reimbursement (including automobile mileage or fuel) for your driving to our other office(s). You will also not be allowed any expense reimbursement for your cellular phone or wireless handheld device.

Employer-provided benefits are discretionary for the employer; other than certain “benefits” that are required by law (such as freedom from sexual harassment, family medical leave in certain situations) the employer is not required to provide any benefits whatsoever — not paid sick days or holidays, not vacation. If it is not specifically stated that a benefit is provided, you should not assume that it is. If there is a benefit that you, as the employee, believe should be provided (or that you believe you have been promised), it is best to raise it at the contract stage and to get it in writing.

Some Additional Things to Consider

The employee would be well advised to fully understand the benefits that are being offered (including any limitations and restrictions, such as waiting periods) and consider the value to the employee (including work-life balance issues). Some benefits to think about as you review what is (and is not) being offered: insurance (health, dental, vision, disability, life), vacation, pension/profit sharing, professional liability insurance, educational (tuition/travel expenses/time off), professional organization membership dues, license fees, relocation expenses, sick leave, and paid holidays.

- **Vesting.** When the employee has the right to a benefit (e.g. paid sick leave may be part of a benefit package, but the employee’s right to such leave does not “vest” in the employee until he/she has worked for employer for X number of days); thus, the employee is not entitled to the right to be paid for sick days until having worked for the employer for the required X days).
- **Rollover.** A policy in which an employer allows an employee to transfer unused vacation days from one calendar year to his/her vacation time in the next year; an employer may set a limit on how many days may be transferred (“rolled over”) this way.

- **Professionalism: Licensing, Continuing Education And Memberships.** Most states have continuing education (CE) requirements for dentists seeking to remain licensed. CE classes take time and cost money. An employee dentist will want to know if his/her employer will cover the cost of any such classes and if the employer will allow paid time off to attend such classes. Also, some employers may wish (or even require) that employee-dentists to be members of certain professional organizations or associations; the employee should want to know whether the employer will subsidize or pay such membership fees.
- **Malpractice Insurance.** An employee-dentist should know whether the employer will pay for (or contribute to an employee's payments to maintain) malpractice insurance, this assistance may be counted as part of the benefits package. More information can be found in the section on Malpractice Insurance, page 26.

Additional Resources

For information about health insurance:

U.S. Department of Labor. *Consumer Information On Health Plans.*

www.dol.gov/general/topic/health-plans/consumerinfhealth

U.S. Office of Personnel Management. *Healthcare Plan Information.*

www.opm.gov/healthcare-insurance/healthcare/plan-information/plan-types/

For information about life insurance:

ADA Members Insurance Plans

Insurance.ADA.org

Kofcknights.org. *Understanding Life Insurance: A Lesson in Life Insurance.*

<http://kofcknights.org/Photos/Understanding%20Life%20Insurance%20%282013%29%2811%29.pdf>

Insurance Information Institute. *Life Insurance.*

www.iii.org/insurance-topics/life-insurance

For information about disability insurance:

ADA Members Insurance Plans

Insurance.ADA.org

Insurance Information Institute. *What are the Types of Disability Insurance?*

www.iii.org/articles/what-are-the-types-of-disability-insurance.html

For information about paid leave programs:

World at Work. *Paid Time Off Programs and Practices.*

www.worldatwork.org/docs/research-and-surveys/Survey-Brief-Survey-on-Paid-Time-Off-Programs-and-Practices-2016.pdf

For information about retirement plans:

IRS.gov. *Types of Retirement Plans.*

www.irs.gov/Retirement-Plans/Plan-Sponsor/Types-of-Retirement-Plans-1

U.S. Department of Labor. *Retirement Plans, Benefits and Savings: Types of Retirement Plans.*

www.dol.gov/dol/topic/retirement/typesofplans.htm

U.S. Department of Labor. *What You Should Know About Your Retirement Plan.*

www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/our-activities/resource-center/publications/what-you-should-know-about-your-retirement-plan.pdf

Key Provision: Term and Termination

What it is: In the absence of an employment agreement, employment is generally (state laws vary) on an “at will” basis, meaning that either the employer or the employee may terminate the employment at any time, with or without notice, so long as the termination is not otherwise unlawful under state or federal antidiscrimination or other state or federal law. An employment agreement usually alters this relationship, by providing for a fixed term of employment and providing that during the fixed term the employer may only terminate the employment for certain reasons (such termination is generally referred to as “for cause” or “for good cause”).

- **Term.** The “term” of an employment contract is the stated period during which the employment contract is intended to last. Some employment contracts are for indefinite terms (no end date is stated) and continue until terminated by one of the parties or by the occurrence of some event. However, in many cases, the duration is stated in the contract.
- **Termination.** “Termination” addresses the rights that a party may have to end the agreement, other than by the agreement’s natural expiration. Two different termination scenarios are often addressed: termination without cause (simply within the discretion of one or both of the parties) and termination for cause.
- **Termination without Cause.** This allows a party to end an agreement for any reason (or for no reason at all). Advance notice is sometimes though not always required, and the agreement is terminated at the end of the specified notice period. Depending on what the agreement provides, the employer invoking the termination may be required to pay the terminated employee as if the contract had continued to the end of the term.
- **Termination for Cause.** Many employment contracts define the conditions under which it is possible to terminate the agreement prior to the end of the term, as where the termination is justified by the conduct of the employee. Typically, these “for cause” provisions permit termination when the employee engages in egregious conduct or simply fails to perform the employee’s required duties under the contract. For example, an agreement may provide that the employee — dentist may be terminated if he or she is found guilty of a felony or loses his or her license to practice dentistry. Some contracts may provide a certain time period during which the employee has an opportunity to “cure” correctable infractions, such as not meeting the practice’s standards or reinstating a lapsed dental license.

Why the Employer Wants It

- **Term.** An employer may want a set term for an employment agreement so that the employer can rely (barring termination for cause) on the employee-dentist having a contractual obligation to remain with the practice for a set period of time (given the training effort and expense that the employer will be investing in the employee) and that the employee has a contractual obligation to provide sufficient notice when the employee wishes to leave.
- **Termination.** The employer will want to establish its right to terminate the agreement if the employee-dentist acts in a manner detrimental to the practice, such as loss/suspension of license, failure to follow the practice’s procedures, misuse of the practice’s information, etc.



Why the Employee–Dentist Should Be Concerned

- **Term.** The inclusion of a defined term is also beneficial to the dentist–employee. This is particularly true if the employee–dentist is taking significant action in reliance on the offer (such as relocating a family, entering into a long-term residential lease, or leaving an existing position). The employee–dentist might be concerned about the lack of job security if there is no set term of employment, so that the employment could be terminated by the employer “at will” (i.e. without cause).
- **Termination without Cause.** If the agreement expressly provides for termination without cause, or fails to state a definite employment term, the employee may be concerned if there is not a notice period that would give the employee income from the date of notice until the effective termination date.
- **Termination for Cause.** The employee may be concerned if the specified “causes” are too general (such as “failure to follow practice procedures”). In some circumstances, termination “for cause” may be immediate (e.g., loss of license to practice, un-insurability) or it may provide for an opportunity to cure the reason for the termination (for example, to get the license reinstated). If the agreement provides the employer a broader right to terminate, the employee might try to negotiate a requirement of a written warning and time to cure prior to the employer being able to invoke such a broad termination right.

Why this Provision Is Important

This provision is important because it sets out the answers to three important questions regarding contracts — (a) how long does the contract last, (b) when and how can the parties terminate the contract, and (c) what happens if a party invokes a termination right?

24 What “Term” and “Termination” Provisions Might Look Like

Term (with Automatic Renewal)

The Dentist’s employment with the Qwerty Dental pursuant to this Agreement shall begin on January 1, 2014 and shall end on the first anniversary of the Commencement Date, unless sooner terminated pursuant to Section X of this Agreement. The term of this Agreement shall renew automatically for successive one-year periods after the Initial Term, unless and until terminated pursuant to Section X of this Agreement. When permitted by the context, any reference in this Agreement to the “term of this Agreement” shall include the Initial Term and all Renewal Terms, if any.

Automatic Renewal

The promises and obligations herein contained shall commence as of October 1, 2014, for a term of (1) year therefrom, and shall be automatically renewed under like terms for (1) year periods thereafter, unless either party gives the other party written notice of intent not to renew this Agreement at least ninety (90) days prior to the expiration of the initial term, or the then-existing renewal period, subject, however, to termination under Section X herein.

Termination without Cause

During the Initial Term, Employee and Qwerty Dental may, without cause, reason, or justification, terminate this Agreement by providing written notice to the other party on not less than ninety (90) days’ notice to the other party. Notices pursuant to this paragraph must comply with Section X.

Termination for Cause

Your employment may be terminated by Qwerty Dental for “cause” (defined below) or without cause at any time before expiration of the Initial Term or any Subsequent Term without any liability on Qwerty Dental’s party and without any claim by you therefore or as a result thereof. For purposes of this Agreement, “cause” shall be defined to mean



each and any of the following: (a) your conduct or activity that constitutes a breach of your duty of loyalty to Qwerty Dental; (b) your conviction of a crime of dishonesty or breach of trust or other crime leading to incarceration for more than 30 days; (c) embezzlement or theft by you or with your knowing participation with regard to any assets or property of Qwerty Dental; (d) negligent or willful misconduct on your part in performing any dental procedure on a patient; (e) the inability to obtain, or any loss, suspension, revocation, surrender, expiration, or termination of your degree from an accredited dental school; (f) the inability to obtain, or any loss, suspension, revocation, surrender, expiration or termination of your license to practice dentistry in the state in which you perform dental services for Qwerty Dental; (g) any breach of this Agreement by you, any violation by you of Qwerty Dental's employee manual in effect and as it may be updated from time to time, or any violation by you of any of Qwerty Dental's policies, procedures, or requirements relating to the practice of dentistry or delivery or patient care; (h) or if, at Qwerty Dental's discretion, the quality of care or dental services rendered by you fails to meet the general, ethical or professional standards required for the profession of dentistry.

Some Things to Consider

Expiration of the Term

Consider what happens where an agreement is for a set (definite) term. What happens if the term expires and the parties do nothing other than continue the employment? This likely happens with some degree of regularity. It may be best to consider — and address — this scenario in the initial agreement. Thus, consider what the parties wish to happen at the expiration of the term. Should the agreement automatically renew (an automatic renewal provision is sometimes referred to as an “evergreen” provision)? If so, for how long a renewal period — for the same period as previously, or for some briefer period (such as month to month)? Consider the implications in each case. Also, where the parties want the contract to automatically renew, consider whether a party should have to provide advance notice (and how much notice) of intent not to renew prior to the termination date to avoid the automatic renewal.

Mutuality

If the agreement provides that the employer may terminate the employee dentist's employment without cause after some specified amount of time, the employee should consider requesting that this right of termination without cause run both ways.

Post-Employment Access to Patient Records

A dentist's post-employment access to patient records may depend on state and federal law as well as the employment agreement. It's prudent to start with state law, which may expressly provide whether the doctor can access the records, and for what purposes, then determine whether any federal law applies. For example, HIPAA may require patient authorization before a covered practice discloses patient information in response to a given request for access, depending on the purpose of the request. If the law does not provide, the contract may. The employee might request that the employment contract permit post-employment access (to the extent legally permissible) to patient records for the purpose of peer review and malpractice defense, and that the employer make good faith efforts to secure any required patient consent for such access.

Key Provision: Malpractice Insurance

What it is: In an employment contract for a dentist, a section regarding “insurance” typically concerns dental professional liability insurance (malpractice insurance), and specifies which party is responsible for securing insurance coverage for the employee. In some agreements, the employee–dentist may be required to purchase his or her own insurance, while in others, the employer will provide the insurance (sometimes through a group policy that will cover the employee–dentist). If the employee is responsible for procuring the insurance, this provision will also likely dictate the type and amount of the policy that the employee is responsible for procuring.

Generally, malpractice insurance protects dentists against potential liability risks arising out of the rendering of professional services to patients, or the failure to render such services. Malpractice insurance ordinarily provides for the cost of legal defense, including attorneys’ fees (which may be a significant component of the purchased coverage), amounts paid in settlement of any claims, and/or awards for damages resulting from professional liability claims.

A Brief Background Regarding Dental Professional Liability Insurance

Malpractice insurance is required in order to practice dentistry in many jurisdictions. It is important to remember, however, that regulations and specific minimum requirements for malpractice insurance may vary by state.

There are two types of dental malpractice policies: occurrence and claims–made policies. Each policy has benefits and disadvantages; these should be discussed with a qualified insurance agent when the employee–dentist purchases his or her own policy.

- **An occurrence policy** provides coverage against allegations of malpractice for dental services which were rendered while the policy is in force, regardless of when the actual claim is filed or reported.
- **A claims–made policy** requires that both (i) the incident giving rise to the malpractice claim and (ii) the report of the claim occur while the policy is in force (although these may not occur in the same policy year). However, if a claim is filed after the dentist’s policy has expired (or properly terminated), no coverage would be provided unless the dentist purchases an extension of the policy known as “tail” coverage.

The malpractice insurance will also have “limits of liability” which stipulate the total amount of losses for which an insurer will provide coverage. There are two different limits of liability in a policy. The first limit is the maximum amount an insurer will pay for a single malpractice claim. The second limit is the total amount an insurer will pay for all claims incurred within a single year. For example, a policy providing a \$1 million/\$3 million limit of liability will provide coverage for up to \$1 million for any single claim and not more than \$3 million for all claims in a single policy year. In some instances, a policy’s limit of liability includes only amounts paid in damages to the plaintiff. In other instances, the limits may include the insurer’s expenses in defending the claim or reaching a settlement. In all instances, the policy should specify which limits apply.

Why the Employer Wants It

The employer wants to make certain that malpractice insurance is in effect because it protects the employer (often the practice owner) against liability that may arise from allegations of the employee-dentist's negligence.

Additionally, malpractice insurance is required in some jurisdictions to practice dentistry. By assuring that malpractice insurance is in place, the employer is ensuring compliance with laws and regulations in such jurisdictions.

Why the Employee-Dentist Should Be Concerned

Failure to have adequate (in amount and type) insurance in place can be in violation of applicable state law in some jurisdictions and, should a malpractice claim arise, be financially disastrous.

Additionally, the employee-dentist should be aware of the costs associated with providing his or her own insurance, should the employer not provide the insurance.

Why this Provision Is Important

Because malpractice insurance is required by law in many states, failure to have the required coverage in place may be a violation of law, and grounds for discipline.

In addition, lack or insufficiency of coverage could be financially ruinous in case of a malpractice claim. Each dentist should make sure that he or she has the appropriate amount and type of coverage.



28 What Provisions for Malpractice Insurance Might Look Like

When Employer Provides Coverage

Employer shall provide liability insurance to cover Employer and all employees, including Associate, as well as fire/casualty insurance coverage for the equipment and materials kept by Associate on Employer's premises.

When Employee-dentist Is Required to Provide Coverage

During the Term of the Agreement, Associate shall carry and maintain professional liability insurance with XXXX Insurance Company, as follows:

- (i) The policy limits shall be no less than \$X,000,000.00 for each claim, and \$X,000,000.00 for all claims during any policy year. These amounts may be adjusted upward at the sole discretion of Employer.*
- (ii) If XXXX Insurance Company refuses coverage of Associate, Associate agrees to execute during the Term of this Agreement, and at any time thereafter, any release or consent reasonably necessary to allow disclosure by Associate's present or future insurer of all relevant insurance information to Employer. In addition, the Associate's insurance policy shall provide that the insurer shall give Employer 30 day's written notice before the policy may be altered or canceled.*
- (iii) If Associate carries a "claims made" style insurance policy, Associate shall furnish Employer with satisfactory evidence that "tail" or "claims form" coverage is in force, at least thirty (30) days in advance of the policy's expiration or lapse date, for all possible claims arising out of Associate's actions while associated with Employer.*
- (iv) If Employer, in its sole discretion, determines that Associate has failed or is likely to fail to secure or maintain any malpractice insurance including "tail" or "claim form" coverage, Employer may pay the premium for such coverage on Associate's behalf and Associate shall reimburse Employer therefore not more than thirty (30) days following the premium payment date. If Associate fails to reimburse Employer by this deadline, Employer may proceed with collection actions against Associate, including a legal suit, and may recover its collection costs from Associate, including all attorney fees (see paragraph 20 below).*
- (v) Proof of current policy coverage must be kept on file with Employer. It is the Associate's responsibility to maintain proof of coverage with Employer as a condition of continued employment.*

During the Initial term or any Renewal Term of this Agreement, Associate shall provide and pay for, at Associate's own expense;

- **Professional Liability Insurance.** *The Associate shall carry and pay for professional liability insurance, which must be with the same company as the corporation insuring the Associate for professional errors, omissions, negligence, incompetence and malfeasance. Associate shall indemnify and hold harmless the Employer and D.D.S., LLC for any and all damages and expenses for which Employer and/or D.D.S., LLC may become liable as a result of any alleged act of negligence or professional malpractice on the part of associate to the extent such damages and expenses are not paid or reimbursed under a policy of insurance carried by Associate. Associate shall, at the request of Employer and D.D.S., LLC, furnish Employer and D.D.S., LLC with a copy*

of the liability insurance policy and shall maintain coverage of at least \$500,000 per occurrence, with a cumulative coverage of \$2,000,000. The policy shall also have a rider protecting the Employer and D.D.S., LLC as additional insured.

- *Employee agrees to maintain maximum allowable malpractice insurance with coverage limits comparable to Employer (\$X,000,000 per claim/\$X,000,000 aggregate) and agrees not to terminate or cancel Employee's malpractice insurance during the term of this Agreement. Employee shall obtain and pay for Employee's own malpractice insurance.*

Some Additional Things to Consider

- **Consult with a Qualified Licensed Insurance Agent.** When considering malpractice insurance, employee-dentists should consult with a qualified insurance agent for information on what type(s) of insurance and appropriate limits are needed to adequately protect a dentist's legal and financial interests.
- **"Consent to Settle".** A key feature to look for when purchasing (or agreeing to be covered under) an insurance policy is whether the insured dentist-employee has the legal right to "consent to settle" a claim. This, in effect, allows the dentist to participate in defending claims, as well as the disposition of the case. This provision defines the conditions, subject to any policy limitations, under which the insurance company can settle a malpractice claim made against the insured dentist. The "consent to settle" provision will stipulate that the insured dentist has the right to refuse any proposed settlement, except that such refusal may make the insured dentist liable for any amounts in excess of the proposed settlement offer in case of a finding against the dentist. An employee-dentist who will (under the employment contract terms) be covered under the employer's policy might wish to assure that, as the covered employee, he/she has the right to consent to a settlement of malpractice claims.
- **"Tail" Coverage.** Because claims-made policies do not cover claims made after the expiration or termination of the policy (even if the incident giving rise to a claim occurred while the policy was in effect), dentists can purchase "tail" coverage. Termination of the policy can occur for many reasons, such as a dentist leaving practice, entering a practice that provides a group policy, or relocating to a state that will not cover the practice from the prior state. "Tail" coverage is generally expensive, but some insurance policies may provide free "tail" coverage in the event of death, disability, or retirement. An employee-dentist who will (under the employment contract terms) be covered under the employer's policy might wish to assure that, as the covered employee, he/she has the right (and at what cost) to procure (or have the employer procure) "tail" coverage with respect to his/her tenure.
- **No Set Guidelines for Limits of Liability.** The ADA does not offer set guidelines as to appropriate limits of liability for dentists; the risk factors vary based on location, type and scope of practice, procedures and use of anesthesia, employer requirements, employee's financial situation, etc. However, based on recent national trends, it appears that many leading insurers for dental malpractice insurance market policies of \$1 million per occurrence and \$3 yearly million aggregate limits to general dentists.
- **Be Sure that Patient Records are Accurate and Complete.** Accurate and complete patient records written at the time of treatment are critically important to the successful defense against wrongful allegations of dental malpractice. Effective

risk management includes well-documented patient record keeping techniques, using clear and concise language to document patient communications, and regular training sessions with the entire dental team to ensure consistency in practice management and risk management protocols.

- **Claims Made After Employment Has Been Terminated.** Sometimes a dental malpractice claim is made after the employment has been terminated. Thus, the employee-dentist may desire that the employment agreement establish a process for accessing patient records post-termination (and in accordance with applicable law, such as HIPAA and state privacy law).
- **Updated Copies of the Insurance Policy; Verification.** The employee may wish that the employment agreement provide that the practice owner, on an annual basis, provide evidence that the group practice policy has been renewed and the coverage is in force, and that the employee-dentist be provided with a copy of the updated policy.
- **Where the Practice Will Provide the Coverage.** The employee should ascertain whether malpractice insurance in the form of a group policy was offered as part of the employment agreement. The employee-dentist may wish that the employment agreement provide that the employer provide a copy of the employer's group policy so that the employee can confirm that coverage is underwritten by a highly-rated insurer, preferably with a good reputation in dental malpractice litigation. In such instances, the employee will likely wish to ensure that the policy reflects any terms (e.g. policy limits, insured's rights) that may have been agreed upon in the employment agreement.
- **Where the Employee Will Be Responsible for Providing their Own Coverage.** If the contract stipulates the types of coverage, specific limits, and terms and conditions that the employee-dentist must procure, before executing the employment agreement the employee should make certain that insurance meeting such requirements is obtainable at a reasonable cost.

Additional Resources

Dental Economics. Insurance for the New Dentist: Doctor, Protect Thyself.

www.dentaleconomics.com/articles/print/volume-98/issue-10/features/insurance-for-the-new-dentist-doctor-protect-thyself.html

American Dental Association. List of insurers from the Council on Members Insurance and Retirement Programs. The list provides information about insurers in each state, with links to their websites.

ADA.org/en/member-center/member-benefits/insurance-resources/directory-of-professional-liability-insurers

Key Provision: “Non-Compete”, Also Referred to as a “Restrictive Covenant”

What it is: A non-compete (or a “restrictive covenant”) is a mechanism that purportedly prevents an employee¹ from engaging in the same (or similar) business, whether independently or for another employer, at the end of the employment relationship. The non-compete, in order to be valid, will almost certainly be limited to (i) a certain period of time following conclusion of the employment relationship, and (ii) a certain geographic area.

A non-compete provision may be:

- a specific section of the employment contract, or
- incorporated as part of a separate section of the employment agreement (generally the section addressing confidential or proprietary information), or
- a separate agreement that the employee–dentist is required to sign as part of the hiring process.

Why the Employer Wants It

The employer wants to protect the practice from an employee–dentist who utilizes the contacts and experience gained through the employment to establish a competing practice. The justification for requiring the post-employment restriction is that the employer has invested energy, time, and money in building the practice and therefore needs the restriction to preserve its business and avoid helping “create” a competitor through the employment.

Why the Employee–Dentist Should Be Concerned

Upon termination of the employment relationship, the employee–dentist may be prohibited from working in the dental profession in the contractually-specified geographic area for a significant time period. A contractual prohibition of this sort would likely cover any practice of dentistry in the geographic area — whether starting a practice, working as an employee, or even purchasing another practice.

Why this Provision Is Important

Depending on the duration, the geographic scope, and the reason for termination of the employment relationship (which may be at the whim of the employer), such a restriction would impose a substantial constraint upon the dentist–employee’s post-employment career (and, in many instances, even residential) options.

What a “Restrictive Covenant” or “Non-Compete” Might Look Like

Direct Restriction/Non-Compete

Dentist agrees that, during the term of this Agreement and for the twelve (12) months following the expiration or termination of this Agreement, Dentist shall not directly

¹ For the purpose of this section, the term “employee” is meant to include an “independent contractor” or any associated dentist who might be asked to enter into such a contractual relationship.

or indirectly engage in, manage, operate, join, control, or participate in the ownership, management, operation or control of, or be employed or engaged or act as a consultant to or in any manner by, any business competing in the Same or Similar Business within a five (5) mile radius of the Dental Office (the "Restricted Territory"). The "Same or Similar Business" means any business that is engaged in the provision of dental care and services including, but not limited to, the practice of general dentistry, orthodontics, periodontics, endodontics, pediatric dentistry, and related dental care services, the management of such services or practices, or the management of or consulting with dental practice management companies or insurance companies.

During the Period of Noncompetition (defined below) Dentist may not, directly or indirectly, on his own behalf or on behalf of any other person, firm or organization (other than Employer) own, operate or engage in a dental practice, or perform dental services, anywhere within the Area of Noncompetition (defined below). For purposes of this Agreement, the term "Period of Noncompetition" means the period commencing with Dentist's employment under this Agreement and continuing for the period after termination of this Agreement equal to the length of Dentist's employment with Employer, but not to exceed 18 months. For purposes of this Agreement, the term "Area of Noncompetition" means the geographic area within 25 miles of Employer's dental service site where Dentist provided general dentistry services for Employer.

Indirect Restriction/Non-Compete (generally tied to Confidentiality/Non-Disclosure obligations, to increase the chances of legal enforceability, and often referencing "inevitable" disclosure)

Immediately upon Dentist's execution of this Agreement, Employer shall provide Dentist with Confidential and /or Proprietary Information. Ancillary to (i) Employer's agreement to provide Confidential and/or Proprietary Information to Dentist, and (ii) Dentist's agreement not to disclose such Confidential and/or Proprietary Information, and in order to protect the Employer's Confidential and/or Proprietary Information, Employer and Dentist agree to the following non-competition provisions. Dentist agrees to refrain for a twelve (12) month period following the termination or expiration of this Agreement (for any reason) from becoming involved in any manner, within a two (2) mile radius of any Employer office (or an office operated by any Employer affiliate) at which office Dentist has actually performed professional services, in the business of providing and/or performing any services as a dental practitioner, employee, agent, consultant, partner, proprietor, or in any other capacity.

Dentist agrees that Dentist's work for any Employer competitor during the twelve month period after termination of this Agreement inevitably would lead to Dentist's unauthorized use of Employer Confidential and/or Proprietary Information, even if such use is unintentional. Because it would be impossible, as a practical matter, to monitor, restrain, or police Dentist's use of such Confidential and/or Proprietary Information other than by Dentist's not working for or as a competitor, Dentist agrees that restricting such employment as set forth in this Agreement is the narrowest possible way to protect Employer interests, and the narrowest way of enforcing Dentist's consideration for Dentist's receipt of Employer Confidential and/or Proprietary Information (such consideration being Dentist's promise not to use or disclose that Confidential and/or Proprietary Information).

Some Things to Consider

Substance

What is the substance of the prohibition? (i.e., what exactly does the agreement prohibit)?

- **Geographic scope.** What is the geographic area/scope of the restriction?
Important Note: Read the contract language particularly carefully! Does the restriction apply only to one single location (dental office), or does the employer have *additional locations* around which the same geographic restrictions would also apply? What if the employer opens — or subsequently acquires — additional office locations — would these be covered?
- **Duration.** For how long (duration)? Does the clock stop for any periods of violation, and begin again?

Length of Employment

Is there a probationary period during which, if the employment was terminated, the post-employment restrictions would not take effect?

- Are the post-employment restrictions in effect immediately upon the start of the relationship?
- If the employee is employed for only a brief time (for whatever reason), a significant post-employment restriction might be unfairly burdensome when weighed against limited competitive advantage gained by the employee. Similarly, should the restrictive covenant be conditional upon the length of the employee's actual service?
- Is the covenant progressively more restrictive during the beginning term of the employment?

Potential Liability/Damages/Remedies

- What are the consequences if the employee violates this agreement?
 - The employee may owe damages to the employer if they can be defined.
 - More likely, the employee may be enjoined — i.e., prohibited — from engaging in a competitive practice in violation of the agreement.



- Does the agreement attempt to define the damages for which the employee would be responsible if he/she violates the agreement?
- Does the agreement specify the remedies available in case of a breach of the provision?

Dental Specialties

- Where restrictive covenants are enforceable, an employer with a specialty practice may urge that the covenant should be permitted to encompass a greater geographic area than those used for general dentists.
- Because there are usually fewer specialists in a particular region than there are general dentists, the geographic pool from which the general dentist may acquire patients is necessarily larger.
- Moreover, fewer patients need to see dental specialists than general practitioners, so that a court may see the logic of enforcing a larger geographic radius for a non-compete agreement with respect to dental specialists.

34 State Law/Enforceability Issues

- Courts have generally determined that non-competes are enforceable to the extent necessary to protect the employer's legitimate interests. Because the law does not favor restrictions on an individual's ability to earn a living, however, a non-compete provision is generally only enforceable to the extent that it is reasonably limited in time and geographical scope. The rules of enforceability vary from state to state.
- Some courts will weigh (i) the interests of the employer (in protecting its investment, its legitimate business interests and/or confidential information) (ii) the burden of restriction on the employee-dentist's freedom to work in the field and location of his/her choice, and (iii) the impingement on the public's interest in receiving the services of its preferred provider. In such jurisdictions, the more limited the restriction, both in duration and territory, the greater the likelihood that a court will enforce it.
- One should not execute an employment agreement on the assumption that a court will not enforce the restrictive covenant, even though there seems to be a legislative and judicial trend disfavoring enforcement of non-competition agreements. If properly limited in scope, a court might enforce it, or may even elect on its own to modify the scope or duration if it finds the covenant overly burdensome.
- A further danger from agreeing to a covenant not to compete, even one that is ultimately held to be unenforceable, is that the existence of such an agreement might cause concern on the part of a potential employer. That potential employer, upon learning (whether through the interview process or through receipt of a "lawyer letter" from the prior employer) of the restrictive covenant (even if ultimately unenforceable) may be "chilled" from making an offer, (wishing to avoid the potential complications with this candidate), or even rescinding an offer.
- **Trade Secrets.** Particularly in states where a restrictive covenant is unenforceable, an employer's agreement may attempt to achieve a similar result via a contractual provision whereby the employee acknowledges that the employee will have access to the employer's trade secrets, and prohibit the employee's future use of those trade secrets. This is another area where your attorney's review of the proposed contract may help you avoid problems down the road.
- In any event, a contractual dispute over the enforceability of a covenant not to compete will be costly and time-consuming, and any employee dentist should thus think long and hard before executing a contract in reliance that a court will ultimately refuse to enforce the contractual provision, no matter how burdensome.

Key Provision: Non-Solicitation of (1) Employees and (2) Patients

What it is: A non-solicitation clause (or provision) is designed to prevent the employee from actively soliciting employees, customers, suppliers or patients of an employer away from the employer. Often, a single provision of the employment agreement will cover non-solicitation of both employees and patients.

Why the Employer Wants It

The employees and patients of a practice are valuable assets of the business, and an employer wants to protect the practice's assets. The employer will especially wish to stop an employee from using the relationships he or she has developed through the employment to misappropriate some of those assets.

With respect to employees, the employer has invested time and money in training the employees — they presumably have insider knowledge of the practice, know how the practice operates, and know the individual patients. The departure of this asset would be disruptive to the practice. The employer believes that an attempt at “poaching” of its employees by the departing employee-dentist (who was likely introduced to these employees and learned of their talents only by virtue of the dentists' employment) would be an unfair attempt to take away a practice asset.

With respect to patients, the employer's motivation is the same — to protect assets of the practice. That the practice's patients are an asset of the practice is apparent when you consider that the valuation of a practice is based in large part on the number of patients.

Why the Employee-Dentist Should Be Concerned

An employee-dentist who intends to open a practice, or to purchase an existing practice, may wish to hire particular employees of his or her current employer who are known to be trustworthy and competent. Likewise, the departing employee dentist may hope that publicizing his/her new practice will entice some patients to follow him/her to the new practice. The non-solicitation provision may prevent the departing dentist from bringing along either these dental team members or these patients — *even if the new practice is beyond the geographic reach of the restrictive covenant.*

Why this Provision Is Important

To the employer, it is important because it protects valuable practice assets — (i) the personnel and their knowledge and training, and (ii) the existing patients.

To the employee-dentist, it may be important because starting one's own practice might be made more difficult if he or she is prevented from (i) bringing along a trusted, competent team member with whom he/she has been working, or (ii) attracting some of the patients that he/she has been treating. These prohibitions would be effective even if the new practice will be established beyond the geographic reach of the restrictive covenant.

What the Non-Solicitation Clause Might Look Like

Often the non-solicitation of both employees and patients will be addresses in the same provision:

During the Period of Noncompetition [Note: “Period of Noncompetition” is defined elsewhere in this agreement], Dentist may not, directly or indirectly, on his own behalf or on behalf of any other person, firm or organization (other than Employer), solicit (i) any patients or referrals from within the Area of Noncompetition; or (ii) the services of any of Employer's employees or any of the employees of Employer's affiliates.

Here also the non-solicitation of employees and patients are addresses in the same provision:

Associate will not, directly or indirectly, either for Associate, as an independent practitioner or for any other person, firm, company, partnership, or corporation call upon, solicit, divert, or take away, or attempt to solicit, divert, or take away any of the patients, employees or associates of Employer.

In some contracts, separate provisions may address non-solicitation of employees and non-solicitation of patients. Here is one example from a contract where non-solicitation of employees and non-solicitation of patients are addressed separately

Non-Solicitation of Employees. *You acknowledge that important factors in Employer's business and operations are the loyalty and goodwill of its doctor and non-doctor employees. You agree that during your term of employment and for a period of one year following your termination with Employer for any reason or no reason, you will not encourage, solicit, recruit, hire or facilitate the hiring (whether you solicited the Employer employee or that employee, on his/her own initiative, sought employment with you), or participate in any plan or arrangement to cause any of Employer's employees to terminate their employment with Employer, or solicit any of such employees in connection with a business initiated by you or any other person, firm, business or entity with which you are affiliated/employed or that competes with Employer (hereinafter "solicit"). You and Employer agree that the damages that would be sustained by Employer would be impracticable or extremely difficult to fix if you solicited an Employer employee in violation of this paragraph. Accordingly, you and Employer agree that it is fair and reasonable to provide for liquidated damage in such instance as set forth herein. If you solicit an Employer employee prior to the termination of your employment with Employer or within one year thereafter, you shall pay to Employer as liquidated damages the sum of \$XX,XXX for each doctor and \$XX,XXX for each non-doctor solicited by you in violation of this paragraph.*

Non-Solicitation of Patients. *During the term of your employment and for a period of one year immediately following your termination with Employer for any reason or no reason, you agree not to make known to any person, firm, or entity, directly or indirectly, the names, addresses, telephone numbers, or email addresses of any of Employer's patients or any other information pertaining to them, or to call on, solicit, take away, or attempt to call on, solicit, or take away any such patients.*

Below is another example of an agreement where non-solicitation of employees and non-solicitation of patients are addressed in separate provisions:

- (i) *Associate agrees that for a period of two (2) years after termination of Associate's employment with Employer, Associate shall not in any way, directly or indirectly, solicit Employer's patients for consultation, treatment, diagnosis, or care; engage such patients in consultation with or without treatment, diagnosis, or care; or, contact such patients by any means for any purpose whatsoever related to Employer or the employment relationship established herein.*
- (ii) *Associate agrees that for a period of two (2) years after termination of employment with Employer, Associate shall not in any way directly or indirectly solicit for hire or employ personnel or former personnel of Employer.*

Some Additional Things to Consider

- **Different from a Restrictive Covenant.** Non-solicitation provisions in an employment agreement are separate from, and in addition to, any restrictive covenant in the agreement. The former employee may be in compliance with the restrictive covenant and yet still violate the provisions concerning non-solicitation.
- **The Restriction May Be Broader than Just “Solicitation”; Restriction on Hiring.** Non-solicitation provisions must be read carefully to determine what is prohibited; such provisions may prohibit more than just “solicitation”. For example, some of the above prohibitions on soliciting employees (of the employer’s practice) not only prohibit *soliciting* these employees for hire, but expressly prohibit the *hiring* of such employees, whether or not the former dentist-employee initiated the contact. Note also whether the agreement prohibits the hiring of *former* employees. It would seem that the longer that the former employees have been separated from the practice, the less interest that the practice should have in the departing dentist hiring the former practice employee.
- **Sometimes the Restriction May Be Broader than Just “Solicitation”; Restriction on Accepting Former Employer’s Patient.** With respect to patients, understand whether the agreement just prohibits “solicitation” of the practices’ patients, or whether it seeks to prohibit the servicing of those patients even if they themselves seek out the departing dentist.
- **Tenure of employment may be a consideration in enforceability.** As with a restrictive covenant, it would seem that if the employee is employed for only a brief time (whether due to either party’s dissatisfaction with the arrangement), a significant post-employment restriction (such as a non-solicitation) might be unfairly burdensome when weighed against limited damage to the practice of the former employee’s competition.

Key Provision: Dispute Resolution

What it is: A “dispute resolution” provision establishes the process, or processes, for resolving disputes between the dentist-employee and the employer. When the provision defines a process other than litigation, it is generally referred to as “alternative dispute resolution” (“ADR”). ADR mechanisms that one may encounter in an employment contract are:

- **Arbitration.** Probably the most common dispute resolution provision in employment agreements. A neutral “arbitrator” or panel of arbitrators hears the disputants’ arguments and renders a decision. This decision is enforceable by the courts and is almost always considered final. Some employment agreements may require all disputes to go to arbitration, while others mandate arbitration for only certain issues.
- **Mediation.** A process by which a neutral third party attempts to help the disputants reach agreement (generally a compromise between their differing positions). The mediator does not render a decision or opinion, but merely attempts to help the parties reach their own resolution. Unlike arbitration, mediation is usually not binding, but merely serves as a requirement before another means of dispute resolution.
- **Mediation then Arbitration.** The parties begin with mediation in an attempt to reach their own agreement. If the parties cannot agree, they proceed to arbitration.

38 Why the Employer Wants It

The employer often prefers the certainty of a fixed process for resolving disputes. If the employer has chosen arbitration, the employer likely believes arbitration to be a less costly, more expeditious, less risky, and less disruptive of the workplace process than litigation, each of which may or may not be true in any individual dispute.

Why the Employee–Dentist Should Be Concerned

The employee should be concerned that he or she may be relinquishing certain rights, such as the right to adjudication by a judge or jury and the right to appeal an adverse decision. On the other hand, arbitration may sometimes be less costly and less time consuming, thereby resulting in a more expeditious resolution.

Another concern should be that a poorly drafted dispute resolution provision could raise as many questions as it would answer (How will the arbitrator(s) be selected? Where will it be held? When? What rules will apply to the arbitration?), thereby adding delay and cost.

Why this Provision Is Important

From the perspective of both parties, but particularly from that of the employee–dentist’s, an agreement to engage in alternative dispute resolution may involve the relinquishment of basic and important rights (such as the right to a jury trial) if a dispute should arise that the parties cannot resolve.

What a “Dispute Resolution” Might Look Like

A “Binding Arbitration” provision makes arbitration the only option for any and all disputes. Beyond requiring arbitration, a binding arbitration provision details how the arbitration hearing will proceed, which rules will apply, where it will take place, which party will be financially responsible and that the winning party can seek a judgment for the award:

Binding Arbitration. Any and all disputes, controversies, claims, or demands arising out of or relating to this Agreement or any provision hereof, or in any way relating to the relationship between Employer and Dentist–Employee, whether in contract, tort or otherwise, at law or in equity, for damages or any other relief, shall be resolved by binding arbitration pursuant to the Federal Arbitration Act. No claim may be arbitrated on a class–action basis, and neither Dentist–Employee nor Employer shall have the right to participate in the arbitration as a representative or member of any class of claimants or any person or entity not a party to this Agreement. Any such arbitration proceeding shall be conducted in Essex County, New Jersey. In any arbitration the parties shall be responsible for their own costs and expenses of arbitration, including their own attorneys’ fees. This arbitration provision shall be enforceable in either federal or state court pursuant to the substantive federal laws established by the Federal Arbitration Act. Any party to any award rendered in such arbitration proceeding may seek a judgment upon the award and any federal or state court having jurisdiction may enter that judgment. Notwithstanding the foregoing, nothing shall prevent either party from seeking temporary injunctive or other equitable relief to maintain the status quo until the matter in controversy is arbitrated or to determine arbitrability or to enforce arbitration hereunder.

A specific “Dispute Resolution” provision likely specifies a single form of dispute resolution. In the below example, the dispute resolution procedure is binding arbitration where the parties must use the employer’s established ‘Dispute Resolution/Mediation and Arbitration Procedures’; however, there is no further description of what those procedures are and no mention of where they might be found or how they might be changed. This should concern a potential employee:

Dispute Resolution. *The undersigned hereby agrees that if he/she pursues any claims against Employer or any affiliated or related entity, involving either acts or omissions, or both, because of any occurrence regarding any one or more of my hiring, employment, promotion, failure to promote, working conditions, employee benefits, or my employment’s termination, that all such claims shall be resolved by final and binding arbitration before a neutral arbitrator. Such claims include, but are not limited to, claims under federal, state and local statutory or common law, including, but not limited to, claims under Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act, the Americans with Disabilities Act, any claim arising under any employee benefit plan or program, whether based on federal or state law, and any claims based on contract law and/or tort law. The undersigned further acknowledges that he/she must use Employer’s established Dispute Resolution/Mediation and Arbitration Procedures to resolve any disputes under this Agreement.*

An American Arbitration Association (“AAA”) provision — this requires binding arbitration that is governed by the AAA rules²:

Any dispute, claim, or grievance arising from or relating to the interpretation or application of this agreement shall be submitted to arbitration administered by the American Arbitration Association under its Labor Arbitration Rules. The parties further agree to accept the arbitrator’s award as final and binding on them.

A provision that designates arbitration as the sole resolution method and the parties specifically waive any right to litigation regarding the provisions enforceability:

*The Agreement provides for **arbitration** of all past, present or future disputes arising out of employment with [Employer], including claims for discrimination and claims for violation of any federal law. The **Arbitrator**, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.*

Some Additional Things to Consider

- A well drafted arbitration provision should include more than merely directing that disputes are to be settled by arbitration. It should also address:
 - Where arbitration will take place.
 - Which rules will govern the arbitration process.
 - Which disputes are governed by arbitration — all or only certain types.

² The AAA is a not-for-profit organization in the field of alternative dispute resolution, providing services to individuals and organizations who wish to resolve conflicts out of court and actually administers arbitration proceedings. The AAA also administers mediation and other forms of alternative dispute resolution.

- An “entry of judgment” provision (making clear that the arbitrator’s decision may be entered in a court).
- Whether a single arbitrator or panel of arbitrators will decide the matter.
- When agreeing to mandatory arbitration, the parties should be aware that they are waiving their right to have a court (and also a jury) resolve any dispute that may arise.
- This dispute resolution section may not always be a standalone provision and can sometimes be found under a differently titled section, such as “Governing Law” or “General” or “Miscellaneous”.
- If the provision references the dental practice’s own policies and procedures as the governing rules for the resolution method and it is separate from the employment agreement, the employment agreement governs the dispute, should there be any conflict between the two documents.

Key Provision: Liquidated Damages

What it is: A “Liquidated Damages” provision in a contract has the effect of defining or specifying the amounts that a breaching party will be required to pay if he or she is found to have breached the contract, without the need for the injured party to show actual damages. Such a provision should only be allowable in cases where the damages are not easily calculable or susceptible to quantification.

- Generally, a party suing for breach of contract is required to prove the damages caused by the breach, and the demonstration of those damages is sometimes fairly simple. If one party breached a contract obligating you to sell a hundred shares of stock at the market close on September 1 at \$1.00/share, a court could merely look at the price of the stock at market close on September 1 and calculate the damages that the purchaser suffered due to the seller’s breach. In this example, if the price at market close was \$2.00/share, the damages resulting from the breach would be \$100.00 (100 shares x \$1.00/share).
- Sometimes, however, the damages the non-breaching party suffers might be difficult to calculate. For example, if a former employee–dentist breached a contractual obligation to not hire the former employer’s hygienist, how would one calculate the damages suffered by the employer due to the breach? One component might be the cost of hiring a new hygienist — advertising the position, perhaps the need to bring in a “temp” or pay the other hygienist overtime, or the need to pay the new hygienist at an increased rate. But other damages might not be so easily quantifiable — such as disruption of the practice, interviewing time and effort, retraining and ramp-up time.
- In such circumstance the parties may set “liquidated damages” to eliminate the need for a showing of the amount of actual damages. Courts will generally enforce contractual liquidated damages provisions where the damages due to a breach are difficult to calculate and the damages specified in the contract bear a *reasonable relationship* to the foreseeable loss due to a breach. If the liquidated damage amount

has no relationship to the foreseeable actual damages, it may be seen to be a penalty, not compensation for anticipated damages, and a court will not enforce a transparently punitive provision.

- The parties may agree in the contract on a set amount of liquidated damages for breach of a number of provisions — such as restrictive covenant, non-solicitation of staff, non-solicitation of patients, confidentiality, or term of the contract.
- A provision titled “liquidated damages” may, but is not likely to, appear as a stand-alone provision or clause in an employment agreement. More likely, if “liquidated damages” is mentioned in the agreement, it will be mentioned in some other provision, such as the “restrictive covenant”, “non-solicitation” or the “confidentiality” section of the agreement. But the words “liquidated damages” will almost certainly appear if this concept is being invoked in the contract.

Why the Employer Wants It

Setting the amount of damages due to breach of a provision in the contract (such as restrictive covenant, non-solicitation of staff, non-solicitation of patients, confidentiality), where proof of actual damages would be difficult to calculate, relieves the employer of this heavy burden in litigation. If the amount of liquidated damages is high enough, as will usually be the case, it provides a strong disincentive to the employee who may be considering breaching.

Why the Employee-Dentist Should Be Concerned

The employee should do the math. Generally, the liquidated damages will be a significant sum of money. A court may not regard the amount to be so high as to constitute an unenforceable “penalty” as a matter of law, but it will likely be so significant a sum that it will feel like a penalty to the former employee.



42 Why this Provision Is Important

To the employer, the provision will be an assurance that various provisions of the contract have sufficient teeth to be practically enforceable by eliminating the need to prove damages in situations where monetizing the damages suffered would be difficult to prove in court. To the employee, it may be a significant, and perhaps disproportionate, financial disincentive to breaching the contract.

What a Provision Invoking Liquidated Damages Might Look Like

Damages. Associate agrees that for any violation of the provisions of this Paragraph X, a restraining order and/or injunction may be issued against Associate in addition to any other rights Employer may have. Additionally, because of the difficulty of estimating the damages that may be incurred by Employer through a breach of this Paragraph X, and the difficulty in proving such damages in the event of any such breach, Associate agrees to pay Employer, as liquidated damages, the sum of Fifty Thousand Dollars (\$50,000) for each violation of this Paragraph X.

Liquidated Damages. You and Employer agree that the damages that would be sustained by Employer would be impracticable or extremely difficult to fix if you resigned your employment with Employer prior to the completion of the Initial Term or Subsequent Term of employment or if you failed to give the required notice to Employer as set forth in paragraph 2(a), above. Accordingly, you and Employer agree that it is fair and reasonable to provide for liquidated damages in such instance as set forth herein. If you resign your employment with Employer prior to the completion of the Initial Term or Subsequent Term of employment or if you fail to give the required notice to Employer as set forth in paragraph X(i), above, you shall pay to Employer as liquidated damages the sum of: \$10,000 plus each and all of the following items, as applicable to you:

- (i) signing or any other bonus, if any, paid to you in connection with entering into this Agreement;
- (ii) full amount of moving expenses paid to or for you by Employer;
- (iii) full amount of legal expenses as permitted by law (excluding malpractice defense and legal expenses related to the preparation or filing of an application for permanent labor certification), if any, paid by Employer on your behalf for any purpose during the time you rendered services on behalf of Employer;
- (iv) full cost to Employer of any professional development courses paid for you;
- (v) the aggregate sum of any raise given to you at the time you execute this Agreement, that Employer was not otherwise required to pay, but agreed to pay in connection with you entering into this Agreement.

One more example:

The commitments made by Dentist in the above paragraphs of this paragraph are hereafter referred to collectively as 'Dentist's confidentiality obligations.' During Dentist's employment, a violation of Dentist's confidentiality obligations will result in termination and any other legal redress Company deems appropriate to protect Company's Confidential and/or Proprietary Information. Company will vigorously enforce its rights against Dentist if Dentist breaches Dentist's confidentiality obligations after termination

of his/her employment with Company. Dentist and Company acknowledge that it is difficult to ascertain precisely the amount of economic damage to Company that will be caused by a breach by Dentist of Dentist's confidentiality obligations, but the parties agree that \$25,000 is a reasonable estimate of the damages that Company would suffer were Dentist to breach Dentist's confidentiality obligations, and Dentist shall be liable to, and shall be obligated to pay as liquidated damages, Company the sum of \$25,000. Company is authorized to deduct this sum from any amounts, including compensation, otherwise payable to Dentist after the date of the breach, exercise any other rights to offset available to Company to collect its damages, and to pursue remedies including, but not limited to, actual damages, compensatory damages, attorneys' fees, interest, and/or equitable relief. Company's collection of damages as set forth herein, whether through a court proceeding or otherwise, shall be without prejudice to its right to pursue equitable or other relief in a court of law to redress its injuries and to prevent further breaches of Dentist's confidentiality obligations.

Some Additional Things to Consider

- **Injunctive Relief.** An "injunction" is a court order requiring a person to do something, or to refrain from doing something. A person subject to an injunction is said to be "enjoined." In addition to seeking the liquidated damage amount, a contract may give the employer the right to injunctive relief in some instances of breach. For example, the former employer may have the right to sue to enjoin the former employee from any further breach.
- **Understand What Breaches Are Subject to Liquidated Damages.** Breaching a contract is not always that difficult, and in some instances might happen inadvertently (for example, unwittingly soliciting a former patient through a mass mailing in violation of a contractual prohibition), and in most instances is unlikely to be covered by professional liability insurance. The employee-dentist should have a good understanding of what actions might cause potential liability and the potential financial consequences. This is yet another reason that the employee should obtain professional legal assistance before signing an employment agreement, and again before taking action that might constitute a breach.
- **Understand Duration of Restrictions.** The employee-dentist should make certain to understand for how long the various restrictions (such as non-solicitation of employees or former patients) apply.
- **Indemnity.** An indemnity is a provision requiring a party (generally in this context, the employee) to indemnify (or to "indemnify and hold harmless" or to "indemnify, defend and hold harmless") another party (generally, in this context, the employer) to compensate the other party for any financial costs and losses suffered as a result of the acts or omissions of the indemnifying party. It is generally recommended that, where the other party (typically the employer) insists on retaining such a provision in an employment agreement, the indemnifying party ascertain whether their insurance will cover such contractual obligations.



5. Hiring a Lawyer to Review Your Employment Agreement

Throughout these materials we have periodically advised that you consult with your own attorney regarding your specific circumstances and agreement. Some of you may not already have a trusted attorney, and may want some guidance on how to select an attorney. The following materials are designed to provide some guidance on retaining an attorney to review your proposed employment agreement.

Why Do You Need an Attorney?

The threshold question is: Why do you need the attorney? Some attorneys practice as generalists, while some practice in more specialized fields of law. Just as you would not go to a podiatrist if you were having migraines, you would not go to an attorney specializing in antitrust matters to review an employment agreement.

Thus, here you would ideally prefer an attorney who has some experience with employment law agreements in the health care arena, though the right generalist attorney (one who does not necessarily specialize in health care or in employment law) may, in some instances, be the right attorney for you. Depending on the complexity of the circumstances and your situation, the generalist attorney who coaches your daughter's soccer team or your old college roommate who is now a lawyer will in many instances be just fine.

Sources for Referrals

Personal and Professional Referrals

A simple way to start your search is to ask friends, relatives, coworkers, or other members of your community for recommendations of lawyers with whom they have worked, especially if those people have had similar legal concerns to yours. Professionals with whom you have a business relationship, such as health care professionals, can also be helpful. Keep in mind that even if a recommended lawyer does not specialize in employment or health care law, s/he might be able to direct you to another lawyer who does. Be careful, however, not to make your decision based solely on another person's recommendation; the lawyer that is right for someone else might not be right for you.

Organizations

- **Lawyer Referral Services.** Your state or local bar association may have a lawyer referral service. The American Bar Association's directory of lawyer referral services can be found here: www.americanbar.org/groups/lawyer_referral/resources/lawyer-referral-directory/.
- **State Dental Association.** Your state dental association might be able to recommend an attorney. For example, the New York State Dental Association provides an approved referral list of attorneys and law firms who specialize in dental matters: www.nysdental.org/member-center/legal-resources.
- **Online.** If you are unsuccessful in obtaining a personal or organizational recommendation for a local attorney in who has some experience with employment law agreements in the health care field, you may be able to locate such an attorney through an online search.
- The ADA Center for Professional Success offers a free downloadable resource for members titled *A Dentist's Guide to Selecting a Lawyer*. Success.ADA.org/en/regulatory-legal/a-dentists-guide-to-selecting-a-lawyer.

Interview

Where you do not have a pre-existing relationship with the attorney, you will likely want to meet and "interview" him or her before engaging them as your attorney. Many if not most attorneys will be willing to meet with you at no cost to discuss the possible engagement, but make sure to address the issue before the meeting takes place to avoid any possible misunderstanding. Depending on your comfort level, you may even conduct this interview by phone.

Things to Consider as You Prepare to Interview the Attorney

- **Fees.** Be sure you know whether the attorney will be charging you on a flat fee basis or by the hour, and whether the fee includes other costs (such as photocopying and fax charges). You may wish to have a written engagement agreement with the attorney that details the engagement, including fees.
 - Be aware that some lawyers charge for an initial interview, or charge for an initial interview if you ultimately engage him or her. As previously noted, you should know ahead of time whether there will be a charge for this initial visit. The initial meeting with the does not mean you have committed to hire the attorney.
- **Practice Record.** Though online reviews can be misleading, there are several ways to check an attorney's reputation online. One method is to check your state bar association's website, which may provide information as to whether any complaints, misconduct charges, or malpractice accusations have been filed against the attorney.
- **Experience.** For what is basically a contract review matter (although you may want additional help from the attorney if there are any negotiations), you may not always need the most experienced attorney. However, some experience in reviewing employment contracts specifically may reduce the amount of time the attorney needs to spend in review and might result in more nuanced recommendations.

- **Personality.** An attorney's personality may be important to you in that you should feel comfortable in his/her presence and working with him/her. You may need to openly share private information so that he/she can effectively represent your interests to achieve the best outcome.

Preparing for the Interview

When you go to the meeting with the attorney, it may be helpful to bring the following:

- **A written summary of the issues.** For review of the employment agreement, this may be a summary of what you believe should be the terms of the agreement (what you have been orally promised), concerns that you have with the proposed agreement (e.g. with what is stated, or even omitted, from the proposed agreement), your future plans, and any other questions or concerns about the agreement or related to the employment generally.
- **All documents related to your matter.** For review of an employment agreement, you would bring the proposed employment agreement. General note: Attorneys usually charge by the hour. The more focused and well organized (e.g. all documents supplied to the attorney and well organized) you are, the less work for the attorney and the smaller your legal bill.

You should also prepare some questions to ask the lawyer. You are essentially conducting a job interview. Some or all of the following may be helpful questions:

- Are you experienced in this kind of matter?
- Will you be the lawyer handling this matter, or will an associate be handling this?
- How long do you estimate it will take to complete this matter?
- What is your fee structure?

Your Trusted Counsel

If you have found an attorney with whom you can work well and whom you trust, you have likely found a valuable business advisor on whom you can rely in the future to help with legal problems that may arise. This includes any problems that may be beyond that attorney's expertise — a good attorney will advise you when a matter is beyond his/her (or the firm's) area of expertise, and likely be able to recommend another attorney with that type of expertise.

Thus, spending the time to carefully choose the right attorney to work with you on this matter may pay dividends beyond merely receiving sound advice concerning your employment agreement. Select carefully.

6. Negotiating

If you are going to attempt to negotiate the terms of the employment agreement, understand that the key to negotiation is preparation (and also understand that some things may not be negotiable). If you are not willing to spend some time preparing for the negotiation, you are much less likely to succeed.

Some Keys to Preparing

Process

- Be positive, friendly and non-adversarial.
- Try to frame the negotiation (and your position) as a “win-win”.
- Understand that some items may not be negotiable from the other sides’s perspective.

Substance

- Know specifically what it is that you want to achieve, be able to clearly and succinctly articulate your position (and already have considered possible compromises that still achieve your minimum goal).
- Be prepared to state why what you’re asking may help, or won’t hurt, the practice.
- Understand what you are uniquely bringing to the practice (and understand why the practice sees you as the right person; e.g. maybe you’re particularly adept with the office’s new software).
- Be prepared to respond to each of the most likely counter-arguments (e.g. “if we do this for you, we will need to do this for everyone”), and be prepared with a well-reasoned response to each likely counter-argument (e.g. “my employment situation is different from everyone else because... and therefore it would benefit the practice to make this allowance”).
- It may help to have a “bottom line” position in your head that, if you are not able to achieve, is your “walk away” position.
- If you are unsuccessful in achieving the desired result, be gracious. You never know when paths will cross again.
- Good luck!



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