The Basics of Hiring and Firing

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Disclaimer: *This article is not intended to provide the reader with legal advice of any nature. For solutions to specific legal issues, an attorney should be contacted.*

ABSTRACT

Employees are important to the economics of a dental practice. Identifying quality employment candidates, retaining good employees and terminating poor employees will help a dentist maintain a thriving practice. This article addresses the key issues a dentist should consider with respect to hiring, evaluating and terminating the employees to minimize legal and financial repercussions.

A significant element of an economically successful dental practice is the hiring, continual training and retention of quality employees. In addition to their impact on patient relations, employees have legal clout that can be manifested in a variety of ways, including complaints with regulatory agencies and lawsuits. Therefore, it is essential for the dental practice owner to develop and maintain sound employment policies. The greater the number of staff members employed by the practice, the greater the need for a formalized approach to employment matters.[1] This article addresses the key issues a dentist-employer should consider with respect to hiring employees and terminating the employment relationship.

Hiring Considerations

Soliciting Applicants

Before advertising or soliciting applicants for the practice, a dentist-employer should formulate a detailed description of the available position, including all essential duties and required skills. This description should be more than a simple list of tasks; it should include the dentist's expectations of how the tasks will be performed.[2] In addition to minimizing the legal risks of practice ownership, e.g., employee lawsuits, a well-designed job description will enable the employer to effectively evaluate the skills and attributes of a given applicant or candidate and to explain those duties for which the successful candidate will be accountable.

Performance standards should be designed in advance, as well as the manner and method in which the job is performed. This expanded job description concept was introduced to dentistry and is currently taught by Dr. James R. Pride. Beyond a mere listing of tasks, a thoroughly designed job description should set forth and identify the specific results and daily tasks that are expected of employees for each position in the practice.[3] For example, the job description should state that the receptionist should answer the phone in a certain manner, every time. The traditional job description would indicate that the receptionist's duty is to answer the phone but would stop short of providing the specific greeting. This expanded form of job description should be used for all positions in the practice. This will help reduce the frequency of employee terminations for various reasons including lack of training and difficulty in measuring employee performance against ascertainable standards. Additionally, thorough job descriptions allow the dentist to hire quality applicants who may not have prior experience in a dental practice. The best candidate may not be one with experience in a dental setting.

With respect to writing an advertisement for candidates, the dentist should be careful not to use legally impermissible criteria when giving the summary of traits and skills desired. The employ-

er should not ask for photographs (which may disclose protected characteristics) or submissions that could disclose the presence of a disability, such as a request for an applicant to submit a handwritten statement. Instead, the solicitation should be limited to job-related criteria and advertise the dentist as an equal opportunity employer. An example of job-related criteria for the position of a financial administrator would be, "excellent communication skills, both written and verbal, type 65+ wpm."[4]

Employment Applications and Interviews

Employment applications can be structured to provide a substantial amount of useful information, such as education, prior work experience and personal references. However, discrimination laws prohibit certain inquiries by employers. Failure to hire an applicant may give rise to a discrimination claim that is difficult to refute. It is inappropriate to ask questions on employment applications or in job interviews that are not job-related; that invade a person's privacy; that disclose the applicant's membership in a legally protected group; or that unlawfully request information about the applicant's race, religion, age, sex, national origin, disability, ethnicity or other legally protected status. For example, in EEOC vs. Community Coffee Co., C.A. No. H-94-1061 (S.D. Tex. 1995), a federal jury in Houston awarded $45,000 to a job applicant whose prospective employer asked illegal questions about the applicant's disability, despite the determination that the disability did not motivate the prospective employer's rejection of the application.[5] An example of a job-related question on an employment application for the position of financial administrator would be, "Which accounting software are you most familiar with?"[6]

The employer should objectively assess his or her reasons for not hiring an applicant. Statements such as, "You are overqualified for this position" may be interpreted to be age-related or a disguise for another impermissible motive. If an applicant is considered overqualified, then the individual meets the basic requirements of the position.

Because there may be several applicants who appear equally qualified for a particular position, a dentist should consider the use of applicant testing procedures for all positions. Applicant testing can provide the dentist with a formal analysis from which to make his or her hiring decision. The hiring decision should be based upon all relevant, job-related factors, including technical and interpersonal skills.[7] For applicant-testing to be a useful tool, it must be job-related and should be applied to all candidates. In the event that a skill or language test was brought into contention, it would be the employer's burden to prove that the tested skills are reasonably necessary for the position sought.[8] Some examples of applicant tests for the position of financial administrator would be for the applicant to: mathematically calculate the financial arrangements of a fictitious case; add up a day sheet; take a typing test; and compose a thank you note (for the interviewer to measure the applicant's composition skills and grammatical ability).[9]

Releases

It is a good practice for a dentist to include a release on the written employment application or in a free-standing document. The release obtains the applicant's permission to contact former employers, educational institutions and references, which should always be done. Additionally, a statement should be included that all information provided by the applicant is true and that no promise of employment is being made by the practice. Falsification of a job application or resume is grounds not to hire an applicant or to discharge an employee even if the falsification is not discovered until after the individual is hired. If included on the employment application, the release language should be in conspicuous print just above the signature line.

Committing the applicant to a release serves three purposes. First, it refutes any allegations at a later date that the applicant was guaranteed employment or specific terms and conditions of employment. Second, the certification of truth and completeness provides a specific reason not to hire, or later fire, an applicant who lied on the employment application. Third, the applicant expressly authorizes release of information by prior employers, schools and references, which refutes a later claim of invasion of the applicant's privacy rights or other claim related to these inquiries.

References

Because of fear of being sued for defamation, prior employers are reluctant to discuss a former employee's qualifications (especially negative traits) without a release from the employee. Even with the release, some employers will only confirm dates of employment, otherwise sticking to a policy of silence. There are some things an employer should keep in mind when asking for or giving references.

- An employer who has a reference policy of silence cannot provide favorable recommendations on behalf of quality former employees.
- From 1985 to 1990, of 8,000 employees who sued their former employers for giving them poor job references, 72 percent won their cases, with an average jury award of $375,000.[10]
- An employer can say almost anything about a former employee, as long as it is true and is backed up with documentation, such as written annual

performance appraisals or written records of tardiness or absenteeism.[11]

Termination of Employment

Written policies and procedures should be formalized through an employee manual, which will assist the employer in treating all employees in a consistent manner and, thus, reduce exposure to lawsuits by terminated employees. An employee manual can be drafted by an attorney or obtained for do-it-yourself preparation through sources such as the American Dental Association. The employee should sign an acknowledgment that the employee has received the manual and accepts its provisions. The acknowledgment should be placed in the employee's personnel file, as well as acknowledgments regarding updates of the manual. Additionally, the employee manual and job description for a particular position allows the dentist to continually assess excellent and substandard performance against predetermined performance goals and standards.

Written policies can assist an employer in maintaining legal compliance, workplace efficiency and good employee relations. One potential pitfall is the inadvertent creation of a contract between the employer and employee(s) through a written policy, which provides the policy greater legal significance than the employer had intended. Employees have successfully sued for wrongful discharge by arguing that the policies contained in a particular employee manual were guarantees of employment. For example, courts have viewed employee manuals as an employment contract where there is a reference to tenure or continued employment. That is, if the employee manual appears to create an expectation of continued employment or termination only under limited circumstances, it may be treated as an employment contract.[12] To avoid this potential problem, the employer should include disclaimers in written policies as to their legal effect. For example, an employee manual should include a statement that it shall not be construed as a contract; that it does not modify the at-will employment relationship in any way; and that the employer, at his or her sole discretion, may change the policies at any time without notice.

Employers have a tendency to postpone performance appraisals of their employees. However, performance appraisals should be conducted in writing at least annually for two reasons. First, the performance appraisal creates a paper trail of the employee's performance, particularly when the employee's performance must improve to avoid termination. If an employee challenges or sues based upon an employment decision, the documentation retained by the practice will provide important evidence to substantiate the decision. Second, employees want to know how their employer grades them, with respect to strengths and weaknesses. The employer should use a written form with a rating scale (such as one using excellent, very good, acceptable, marginal and unacceptable, or one based on numbers) to evaluate components of performance based upon the employee's job description. Some areas that the performance appraisal may also assess are quality of work, quantity of work, attitude, punctuality, ability to deal with patients and ability to work well with other staff members. The performance appraisal would further provide for the interviewer's positive comments, constructive assessment in areas where improvement is needed, and specific action for obtaining the desired improvement. When the performance interview is conducted, the employer should review and discuss the form with the employee and the time frame for future evaluation and follow up. The employer and employee should sign the form as an indication that it has been read. A space should be provided for the employee to add comments. Thereafter, the form should be placed in the employee's personnel file.

Substandard work or unacceptable behavior on the part of the employee should be addressed immediately. If an employee is not doing well according to the job requirements or office policy, the employer should not wait until the formal performance review to address the problem. Progressive counseling or discipline for improvement can help the employee achieve the desired performance or behavioral results. After the employer discusses the performance or behavior with the employee, he or she should document the discussion and the fact that he or she has requested specific improvement within a predetermined time. Such documentation should be kept in the employee's personnel file for further reference. Termination of employment or an unfavorable performance appraisal should not come as a surprise to any employee where poor performance or behavior is addressed through the performance appraisal, progressive counseling or progressive discipline process, as the employee would have been provided a reasonable opportunity to correct unacceptable work.[13]

Contract Issues

Practice owners should preserve an "at-will" employment relationship with their employees. This means that either the practice owner or the employee can terminate the relationship at any time, without notice or cause. In general, if the employment relationship is for an indefinite term without an employment contract of a specific duration, the relationship is presumed to be at-will. However, the employment at-will doctrine is subject to a growing list of limitations. For example, California has allowed causes of action challenging dismissals of at-will employees based upon the employer's actions being contrary to public policy.[14] For example, in Gould vs. Maryland Sound Indus. Inc. 39 Cal. Rptr. 718 (Cal. Ct. App. 1995), it

was held that an employer could not discharge an employee in retaliation for reporting overtime violations where the discharged employee was not affected by or a beneficiary of the alleged violations.[15] Additionally, employers may abandon employment at-will without intending to do so by making verbal or written promises to employees, e.g., by inappropriately making a promise of continued employment through an employee manual.

Employment at-will may be limited or preserved by contract, e.g., an agreement between the employer and employee regarding the terms and conditions of the employment relationship. Additionally, employment at-will is preserved only in contracts of indefinite term. A contract for a specific term, such as an associate agreement for one or two years, may be terminated prior to its expiration only for causes specifically enumerated by contract or, if no specific events are set forth, possibly for "just cause," usually employee misconduct.

In associate agreements, events other than just-cause termination are typically terminations by the employer (or employee) upon the expiration of a predetermined notice period (30 or 90 days), the death or permanent disability of the employee, or loss of professional status. Just-cause termination may include termination upon the employee's failure to perform any obligations, duties, promises or representations under the agreement. Examples include the employee committing a crime against the employer; the employee committing any other crime involving fraud or dishonesty; or the employee failing to follow any employment directive, order or employment policy issued by the employer.

Promissory Estoppel

Either at the time of hiring or during the course of an otherwise at-will employment relationship, an employer may make a statement that the employee interprets to be a promise, upon which the employee relies to her or his detriment, thereby limiting the employer's ability to terminate the relationship for only just cause. This is the concept of promissory estoppel. For example, a San Diego practice owner hires a Houston resident. The employee is told to report to work on March 1. The employee resigns from a position in Houston and moves to San Diego. On the day before the employee is to report to work, the practice owner states that the job is off. It is very possible that the employee will recover damages based on promissory estoppel.

Another situation may arise with a current employee who is not newly hired. For example, the practice owner learns that an employee is interviewing for a position elsewhere. The practice owner discusses the situation with the employee and makes a statement that the employee has a position as long as the employee is able to work. Assuming that the employee gives up the job search and remains, the employee may later argue, if fired, that there was reliance upon the practice owner's promise of job security. This type of claim may succeed in at least going to a jury, who will decide whether the promissory estoppel claim has merit and, if so, whether the employer had a legitimate or just-cause basis for terminating the employment. This type of situation could be very costly for the practice owner, both from an economic and emotional perspective, as are most lawsuits. Alternatively, it may be appropriate to positively reinforce the employee's value to the employer with a statement like, "Your efforts in our practice allow us to provide quality care to our patients" rather than make a statement similar to the one referenced above.

Unlawful Practices

The employment at-will doctrine will not be an effective defense to a claim of discharge for an unlawful reason. Under federal and state discrimination laws, it is unlawful for an employer to discharge an employee on the basis of race, national origin, religion, gender, age, a disability, veteran status, military status, or any other group or status protected by law. Laws also prohibit discharge of employees who are "whistleblowers," reporters of unlawful employer conduct, or employees who have asserted legal rights in the course of their employment. For example, it is unlawful to terminate an employee because the employee has reported a perceived violation of OSHA's blood-borne pathogens regulations, has filed a worker's compensation claim, has filed a discrimination claim or has filed a claimed wage and hour violation. Alternatively, where the employee commits an act or acts in violation of federal or state standards, e.g., OSHA violations, such violations would arguably constitute termination for cause and the employee would be discharged, assuming that the situation warranted discharge.

Just-Cause Discharge

Just cause has been defined as a cause that must be based on reasonable grounds, and there must be a fair and honest cause or reason, regulated by good faith.[16] Examples of just cause for discharges are: absenteeism, theft, antisocial behavior with co-workers or patients, insubordination, on-the-job drug or alcohol use, and violation of safety and other work rules. Documentation of such events, through consistent record-keeping and disciplinary action, will serve the employer well in the event that a former employee challenges the discharge decision.

The Termination Interview

A termination interview should always be conducted with the departing employee, irrespective of whether the employee was fired or resigned. It is a good practice to conduct such an

interview with a witness from management — e.g., another owner, dentist or office manager (assuming that such a position exists in the particular practice) — not a co-worker of the employee. The purpose for the witness from management is to document and preserve what was said during the termination interview for a later date, if necessary. At a minimum, a written summary of the interview should be placed in the employee's personnel file.

Conclusion

To maximize compensation as a practice owner and minimize the legal risk associated with the employment of others, dentists should consider the following suggestions:

- Do not engage in legally impermissible practices;
- Prepare job descriptions for every position in the practice that address specific daily tasks, performance standards and specific results;
- Use applicant testing procedures, based upon all relevant, job-related factors, including technical and interpersonal skills;
- Obtain a written release (which should contain a certification of truth and that no promise of employment is being made) from the applicant to contact former employers, educational institutions and references and always take the time to complete the background check;
- Formalize practice policy and procedures through an employee manual;
- Conduct written employee performance appraisals at least annually;
- Immediately respond to and document unacceptable performance or behavior;
- Implement and provide documentation of progressive counseling and discipline in the practice;
- Preserve the at-will employment relationship with employees in the practice to the extent possible; and
- Always conduct a termination interview with any employee who leaves the practice for any reason, preferably in the presence of another owner or the office manager.

A dentist cannot practice alone. To the extent that a dentist hires, continually trains and retains quality employees, his or her practice and life will be more rewarding than otherwise. CDA

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