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# WELCOME ABOARD

## Successfully onboarding an associate

William P. Prescott, JD, EMBA

**ONCE YOU MAKE THE DECISION** to hire an associate, it is of utmost importance to authorize preparation of the associate employment contract and, if future ownership is contemplated, the anticipatory ownership agreements.

### THE ASSOCIATE CONTRACT PROVISIONS

The associate contract provisions are based on whether an associate will be full- or part-time, private or corporate, a future owner, or a permanent associate. For worker classification, the Internal Revenue Service standard states that if the employer has control over the activities of the worker, regardless of whether that control is exercised, the worker

is an employee and not an independent contractor.<sup>1</sup> This standard is true for associate dentists and postretirement employment of the selling dentist.

**Restrictive covenants**—While you may think that the most important provision in the employment agreement is compensation, it is not. It is the restrictive covenant, which considers radius, duration, nondisclosure of confidential information, and nonsolicitation,

direct or indirect, of staff, patients, or referral sources. No party should agree to unacceptable provisions that do not protect your practice or that are onerous to the associate. The restrictive covenant should be precise. Otherwise, the dentists may end up in costly and time-consuming litigation. Remember, restrictive covenants are state-specific.

**Compensation**—Compensation is obviously important, given the associate's need to earn a living to pay debt and possibly for a future practice interest. General dentists should consider the greater of a monthly, daily, or hourly rate against a percentage of

adjusted production rather than collections, usually on a quarterly basis. Adjusted production means the employee's production, less insurance and other write-offs, courtesy and family discounts, refunds, laboratory remakes, and uncollectible accounts. Draws that need to be repaid against future commissions should be closely monitored so that the associate does not receive more compensation than he or she is entitled to. If so, the associate may not recover and may not be able to repay the draw should the employment terminate.

Consider making bonuses discretionary based on the associate's overall performance and on the cash and financial position of the practice. Productivity-based bonuses do not consider overall performance or practice cash flow.

**Notice and other termination provisions**—Notice provisions are almost always included in the employment agreement. The rationale is that it is difficult to find a replacement dentist or specialist if the associate leaves. However, lengthy notice provisions can lead to problems for either party. If the practice does not want the associate to continue to work, the associate is paid during the notice period. On the other hand, some associates are unable to pursue other opportunities due to the notice period. If the notice period is being revised or waived, it should be done so in writing and signed by both parties.

Other termination provisions are for cause (e.g., failure to follow an employment directive or committing a crime), death, disability, or loss of license.

**Expenditure of time**—The employment agreement should designate whether the schedule is full- or part-time. It should say whether it may be increased depending on the demand for a second dentist or whether it may be decreased if the associate is working or will work elsewhere.

**Benefits, insurances, and direct business expenses**—To the extent that the associate works on a full-time basis, benefits and insurances are paid in accordance with plan terms and eligibility, and direct business expenses are paid as approved in advance by the practice. If the associate works more than 19.5 hours per week on a regular basis, he or she will be eligible for

the practice retirement plan, typically after one year of employment. If the employment is part-time, compensation can be reduced and offset by the costs.

**Liability insurance**—Liability insurance with defined coverage limits is necessary for the associate, and the practice should be the named insured on the policy. The insurance can be provided by the practice or the associate. If it is provided by the associate, the associate should be required to periodically provide the practice with evidence that the policy is in full effect. Tail coverage should be in place if the policy is on a "claims-made" basis.

**Vacations and other time off**—To the extent that the employment is full-time, the base pay may continue, along with accrued commissions, for a specified number of vacation days in each 12-month period. For part-time employment, vacations and other time off are unpaid. Also consider illness, personal days, emergencies, as well as unpaid maternity/paternity leave. All time off should be with as much advance notice as possible for scheduling purposes.

**Indemnification**—Each party should indemnify the other from any claims causing liability of any nature not covered by liability insurance.

**Re-treatment**—While re-treatment of patient provisions is standard in complete purchase and sale agreements, the inclusion of a re-treatment provision is relatively recent for associate employment. When re-treatment provisions are included in employment agreements, there is a tendency by practice owners not to mentor and evaluate the work done by the associate, which can lead to patient complaints and costly re-treatment. If a re-treatment provision is present, the employment agreement should specify a peer review committee of a dental society or association to decide the dispute if the dentists disagree on the necessity of the alleged defective work.

**Survival provision**—This should say that certain provisions will continue following termination of employment, e.g., the restrictive covenant.

**Changes to contract**—A provision should be included whereby the employment contract can only be changed or amended in writing and signed by both parties.

## ANTICIPATORY OWNERSHIP AGREEMENTS

If the associate position will lead to future ownership, as practice owner you should present the associate with a confidentiality letter, a release to contact references, an associate employment agreement, the practice valuation, a detailed letter of understanding based on your exit choice, and the corresponding agreements. The agreements should include any postretirement employment agreement between you and the new owner. While the practice value for future ownership may be recalculated one year after the associate begins full-time employment, including the formula for replacement or mutually agreed upon new equipment, it is important to have a baseline value at the commencement of the associate's employment. The advance preparation of partnership or other ownership items and agreements is essential because the business and tax structure, date of value, and agreement terms are very difficult to negotiate a year or two after the associate employment begins.

It is not enough to agree upon the employment provisions. The future ownership considerations are also crucial to a successful long-term relationship and, hopefully, future ownership and your retirement. **DE**

## REFERENCE

1. Prescott WP. Worker classification: A continuing problem. *Dental Economics* website. <https://www.dentaleconomics.com/practice/human-resources/article/16389617/worker-classification-a-continuing-problem>. Published October 1, 2017.



**WILLIAM P. PRESCOTT, JD, EMBA**, of Wickens Herzer

Panza in Avon, Ohio, is a practice transition and tax attorney, and former dental equipment and supply general manager and representative. His most recent

book is titled, *Joining and Leaving the Dental Practice*, and is available through the ADA Center for Professional Success. American Dental Association members can download the e-book for free at [ada.org/prescottebook](http://ada.org/prescottebook). Visit [prescottdentallaw.com](http://prescottdentallaw.com) for Prescott's publications. He can be contacted at (440) 695-8067 or [wprescott@wickenslaw.com](mailto:wprescott@wickenslaw.com).