

Are *You* Ready for the Changes to the *Dental Hygiene Act?*



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As a dentist, you probably know by now that important changes are pending to the *Dental Hygiene Act* that will give hygienists considerably more independence and will have important implications for your practice. This article looks at what employment law issues arise for you out of the amendments and what you should be doing about them.

Background

As this article is going to print, the amendments to the legislation have been passed by the legislature but have not yet been proclaimed into force, which is necessary before they become law. The proclamation is expected at any time. The amendments allow qualified hygienists to self-initiate scaling teeth and root planing (including curetting surrounding tissue). This is subject to a contraindications regulation which outlines a number of circumstances in which the hygienist would first need to obtain clearance from a dentist (or physician or specified nurse). Many details are yet unknown. However, the prudent dentist will address the following issues with an employment lawyer as soon as possible.



Issue 1: Contractually Requiring the Hygienist to Work Under Your Order

You will want to consider your personal preference: it may be that you feel comfortable and appreciate the convenience of having a hygienist who can self-initiate. On the other hand, you may be concerned about potential liability or you may not feel your hygienist has the technical skills necessary to self-initiate. If you would prefer to control the process, you may accomplish *contractually* what will no longer happen via legislation. In other words, while the legislation, once passed, will remove the requirement for a dentist's order, nothing in the amendments prevents you from using a written contract with your hygienist that still requires her to work under your order. We always advise dentists to have written contracts with all their staff and this is yet another excellent reason to do so. If you already have a written contract with your hygienist(s), then the contract will govern how changes need to be made. A quick call to your employment lawyer should give you the advice you need. If you do not already have a written contract, speak to your employment lawyer as soon as possible to have written contracts prepared.

Issue 2: Exclusive Services

One of the terms we always offer dentists when preparing contracts with their staff is called a "Full Time and Attention" clause. As the name implies, it means the employee cannot work elsewhere without your permission. Given the further move toward independence that results from the amendments to the *Dental Hygiene Act*, the stakes are now higher and you would be wise to discuss this option with your employment lawyer. This clause will generally be a viable option for full-time employees.

Issue 3: Liability

As an employer, you will generally be held vicariously liable for the acts of your employees within the scope of their employment. You will want to contact your insurer and satisfy yourself that you are covered for such potential liability.

Issue 4: Competition

Most of our dentist clients consider at least one of their hygienists to be a competitive risk. With further hygienist independence, that risk is naturally



magnified. (We hear anecdotal reports of hygienists opening their own offices.) You should speak to your employment lawyer about what restrictive covenant you are able to implement in your contract with your hygienist. A non-competition agreement (which prevents competition for all patients, actual and potential) is much broader than a non-solicitation agreement (which merely prevents the solicitation of actual patients). A non-competition agreement is very difficult to enforce against a mere employee (as opposed to another dentist from whom you bought a practice, for example). In many cases, however, the dentist would be able to obtain a non-solicitation term for a set amount of time post-termination vis-à-vis a hygienist.

Issue 5: Condition of Employment

Given the amendments to the *Dental Hygiene Act*, it is even more important that you have a written contract with a hygienist which states that if she or he loses their qualifications or entitlement to practice, or is found guilty of professional misconduct, that you are entitled to terminate their employment.

Summary

Given the changes to *Dental Hygiene Act*, you would be well-advised to speak with an employment lawyer today about the above issues and how to protect your business.

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