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IRS Information Useful in Planning For Your Dental Practice **By Natalie Heath**

The Internal Revenue Service recently issued household income tax statistics categorized based upon zip code, and further broken down by each household's adjusted gross income ("AGI"). These statistics, which provide a detailed glance into the socioeconomic statuses of taxpayers in specified areas of the U.S., are powerful tools in the hands of a dentist. Broken down and grouped based upon each household's AGI, the statistics provided include details such as: (i) number of dependents; (ii) number of returns filed per zip code; (iii) number of taxable individual retirement arrangement distributions; (iv) number of exemptions; and (v) number of returns filed with ordinary dividends. Each category, such as number of dependents, is further sub-grouped based upon each household's AGI.

For example, the IRS' statistics indicate that there were 4,479 households in Hilliard, Ohio that made between \$100,000 and \$200,000 in 2011. Of those 4,479 household returns, 3,825 were filed jointly, and 5,712 dependents were claimed. That is, 85% of the returns were filed by married couples, with an average of 1.5 children per return. From a business perspective, this demographic information is extremely useful. If an owner was researching various counties in Ohio in search of an ideal location to open a business geared toward children, such as a pediatric dentistry practice, then Hilliard, Ohio would be a great option.

Because of the manner in which the statistics are categorized, dentists are able to determine not only the number of dependents claimed in relation to the number of returns filed, but also the potential disposable income of

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each subgroup. Please see the below excerpt from the IRS' statistics regarding Hilliard, Ohio.

As detailed below, the statistics on the IRS' website are broken down by each household's AGI for each county in the United States. The below details, as well as several more factors, are available for review at [http://www.irs.gov/uac/SOI-Tax-Stats-Individual-Income-Tax-Statistics-2011-ZIP-Code-Data-\(SOI\)](http://www.irs.gov/uac/SOI-Tax-Stats-Individual-Income-Tax-Statistics-2011-ZIP-Code-Data-(SOI)). Because of the myriad uses for the below data, particularly as it relates to and may effect new and ongoing businesses, Nardone Law Group recommends that all business owners and participants review the 2011 statistics in relation to the location of their business.

<u>AGI</u>	<u>No. of Returns</u>	<u>No. of Joint Returns</u>	<u>No. of Dependents</u>	<u>Taxable Individual Retirement Arrangement Distributions</u>	<u>Pensions & Annuities in AGI</u>
\$1 - \$25K	8,621	822	3,072	455 at \$2,601	893 at \$7,376
\$25K - \$50K	86,243	1,312	3,675	456 at \$4,148	962 at \$17,139
\$50K - \$75K	4,461	1,858	3,269	387 at \$4,785	827 at \$19,874
\$75K - \$100K	3,393	2,281	3,271	340 at \$5,672	623 at \$16,434
\$100K - \$200K	4,479	3,825	5,712	431 at \$9,015	877 at \$26,323
\$200K or more	767	669	1,065	115 at \$4,919	158 at \$9,082

Starting a Dental Practice: Compensating Associate Dentists

By Tanya Nardone, Esq.

One component critical to the success of a growing dental practice is taking on associate dentists. This article will discuss the different ways your dental practice can compensate associate dentists: straight salary, compensation based on production, or compensation based on collection. It is important to negotiate a compensation package that is fair both to the dental practice and the associate dentist.

Three Ways to Compensate Associate Dentists

I. Straight Salary: The simplest compensation package is straight salary, based on the number of hours or days an associate dentist works at your dental practice. To determine a fair number for the salary, you should consider, among other things, your overhead costs, fringe benefits, the cost of dental supplies, the cost of additional staff to assist the associate, additional lab costs, and how much revenue the associate dentist is likely to produce.

NLG Comment: Although a straight salary is simple, it does cause the practice some concerns and risks when it comes to the associate dentist's production. As an example, what if the practice does not have a sufficient patient base to keep the associate busy, yet we have to continue paying that associate? Or, what happens if the associate simply is not productive, even though there are sufficient patients to keep that associate busy? Thus, compensation based on the associate dentist's collection or production is another way that your dental practice could pay associate dentists. When compensation is linked to the work an associate dentist actually performs, it gives your dental practice the security of not over-paying and gives the associate dentist the ability to make more money than he would have made on a straight salary.

II. Collection-Based Compensation: This compensation is beneficial to the dental practice because the dental practice only pays the associate dentist after the practice collects money from clients or insurance companies for services performed by the associate. A collection-based arrangement encourages associate dentists to communicate clearly with clients when they discuss treatment plans. However, if you base pay on collection, your dental practice needs to be efficient at billing and collecting the correct amount from patients because your associate dentists will depend on the efficiency for their paycheck. Here is an example of a net collection definition for purposes of an employment agreement:

Net Collections: the fees generated by the Employee's performance of Dental Services and actually received by the Practice reduced by: (i) lab fees/implant parts; (ii) patient refunds; (iii) insurance and finance charges or reductions that occur after collections; and (iv) costs related to Rework or Remakes. Any fees generated for the performance of hygiene services, or other Dental Services not actually performed by the Employee, are not included in the definition.

III. Production-Based Compensation: Production-based compensation benefits associate dentists because the associate dentist will not have to wait for insurance companies and patients to process and pay for services to receive their pay. Production-based compensation is also more predictable, because the associate dentist will be paid on a regular basis for services they perform. The dental practice, however, bears the burden for late or unpaid invoices in production-based compensation.

Structuring Compensation Based on Collection or Production

If your dental practice decides to base pay on collection or production, you must then decide how the salary will be structured. Dental practices generally structure pay based on collection or production in one of three ways: (i) a straight percentage of collection or production, (ii) a base amount plus a percentage of collection or production, or (iii) a draw based on average collection or production. A competitive percentage for pay varies by location, but is typically somewhere between 30-35%. If you offer a base plus a percentage of collection or production, you may lower the percentage of incentive relative to how much base salary you pay. On the other hand, a draw structure ensures that a dental practice never pays an associate dentist more than the dentist earns. A draw pays an associate dentist a set amount based on average collection or production, and adjusts the associate dentist's salary according to periodical reviews of the dentist's collection or production.

Guaranteeing Salary for New Associate Dentists

During the first three months of employment, dental practices typically compensate a new associate based on a guaranteed minimum salary or a draw on future collection or production. An associate will appreciate a dependable stream of income while they get into the swing of things at your dental practice. A guaranteed minimum salary should be just enough to cover living expenses while the associate dentist gets his practice up and running. A draw based on collection or production pays an associate out of expected future earnings.

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In sum, there are a variety of ways that you can compensate associate dentists. At the end of the day, it should be fair and affordable. You have to remember as business owners, and especially dental practice business owners, well-qualified associate dentists are invaluable to a practice. When a practice has a productive associate dentist as an employee, the practice can benefit significantly in terms of profitability on a yearly basis, as well as in the overall growth of the practice. Thus, to maintain and, hopefully, ensure their loyalty to the practice, an associate dentist must be properly compensated.

Limiting Liability for Employment Claims: Shortening the Statute of Limitations

By Vince Nardone, Esq., LL. M

Part of our job as dental practice attorneys at Nardone Law Group is to help dental practice owners minimize their exposure to employment litigation. One way to protect yourself and your dental practice against potential employment-related claims is to have employees agree to a shortening of the statute of limitations. Our employment law attorneys and dental practice attorneys recommend that our clients agree to a shortening of the statute of limitations with their employees to limit exposure to employment litigation.

How Does a Statute of Limitations Work?

The statute of limitations is the amount of time an individual has the ability to bring a claim against a party after the date of the events that gave rise to the claim. Federal employment discrimination claims under 42 USC § 1981 can be filed up to four years after the discrimination occurred. In Ohio, some employment discrimination claims have a six year statute of limitations. Workplace intentional tort claims have a two year statute of limitations under Ohio law. A party cannot bring a lawsuit after the statute of limitations expires on the claim.

Shortening the Statute of Limitations in Employment Contracts

Courts have consistently held that employment contract clauses that shorten the statute of limitations are enforceable. A contractual provision that shortens the time in which a party has to bring a lawsuit is enforceable as long as it is not unreasonable. In *Thurman v. DaimlerChrysler, Inc.*, the Sixth Circuit held that a clause in an employee's application materials prevented her from bringing a claim against her employer. In the employee's application to work at DaimlerChrysler, a clause provided that any claim or lawsuit relating to her employment must be filed within six months of the employment action giving rise to the claim. When the employee brought an action against DaimlerChrysler over six months after the event giving rise to her claim, the court granted DaimlerChrysler's motion for summary judgment because of the clause in the application materials. The Sixth Circuit said there was nothing inherently unreasonable about a six-month limitation period on bringing an employment-related lawsuit. Therefore, the shortening of the statute of limitations provision was enforceable against the employee.

NLG's Advice for Dental Practices

To limit the time period employees and former employees can bring a lawsuit against your dental practice, you should include a clause in employee contracts that shortens the statute of limitations. Be sure that the clause stands out in the document to signal its importance. You should have the employee sign the page of document that contains the clause. The best amount of time to shorten the statute of limitations is probably six months. If the time period is any shorter, a court may find that it is unreasonable and void the clause.

September 11-14, 2014
Greater Columbus Convention Center

**Ohio Dental Association
ANNUAL SESSION**

Are you attending the Ohio Dental Association Annual Session in September?

Join Zimmerman, Boltz & Co., Bank of America, and Nardone Law Group for "Happy Hour."

Friday, September 12th, 2014
5pm to 8pm
Park Street Tavern
501 Park Street
Columbus, Ohio 43215




Enforceability of Employee Non-Compete for Dental Practices

By Vince Nardone, Esq., LL.M

Many dentists and dental practice owners across the county are familiar with non-compete agreements. Basically, a non-compete agreement is an employment-based restrictive covenant that prohibits a former employee from competing with a former employer in a specific geographic area for a specified period of time. Courts in general, however, have long held that these employment based restrictive covenants, including those that prohibit a former employee from contacting, soliciting, or servicing the dental practice's patients, are disfavored as they are seen as restraints on trade.

Yet, the courts consistently have enforced these covenants, as long as the restrictive covenants protect a dental practice's legitimate business interests, such as confidential information and trade secrets, patient relations, or business goodwill. This assumes, however, that the restrictive covenants are not overly restrictive on the former employee's post-employment activities. Thus, the enforceability of such covenants are evaluated in terms of the geographic scope, the activities that are restricted, and the length of time the restrictions apply.

Factors to Consider

In Ohio, as an example, most disputes over the enforcement of a restrictive covenant center on the reasonableness of that restrictive covenant to ensure it is not overly broad. Of course, what's reasonable depends a great deal on the actual employment context of the particular dental practice and the dental practice employee. Fortunately, the Ohio courts have defined a variety of factors that are used to scrutinize the reasonableness of a restrictive covenant. Some of these factors include:

- Whether the employer has set a limit on how long the restriction will last;
- Whether the employer has set a geographic limit on noncompetition;
- Whether the agreement seeks to prevent the employee from using their inherent skills and experience, or whether the agreement seeks to enforce a temporary restriction on the employee bringing to the marketplace a new set of skills that they gained based on the employer's investment and based on the employer's confidential information;
- Whether the restrictions sought by the employer operate as a bar to the employee's sole means of support; and
- Whether the benefit to the employer in gaining protection against unfair competition is disproportional to the detriment to the employee.

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Upcoming Events/Deadlines

September 11th – 14th, 2014

The Ohio Dental Association Annual Session located at the Greater Columbus Convention Center in Columbus, Ohio. Don't forget to join us for Happy Hour on Friday, September 12th from 5pm - 8pm!

September 18th – 19th, 2014

Paragon's The Front Office Academy located at the Sheraton Baltimore Washington Airport Hotel in Baltimore, Maryland.

Quote of the Month

“The greatest discovery of all time is that a person can change his future by merely changing his attitude.”

Oprah Winfrey

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Application to Dental Practices

In looking at restrictive covenants in the context of a non-compete agreement, many dentists and dental practices erroneously believe that a two year non-compete with a ten mile radius is standard and therefore enforceable. But, that is not accurate. Rather, the facts and circumstances of each particular case must be examined to determine: (i) the legitimate business interest being protected; and (ii) the scope of the restrictive covenants to ensure such scope is not overly broad. So, as an example, if a particular dental practice's patient base is a two mile radius, yet the dentist is trying to enforce a non-compete of ten miles, it is very likely that a court would not uphold the ten mile radius if challenged. Further, if the employee only worked for a particular dental practice employer for one month, yet the dental practice is trying to force a two year non-compete on the employee, the courts will likely not enforce that non-compete, if challenged.

The concern that a dental practice employer should have with an overly broad restrictive covenant is the following: if the associate dentist, or other staff, challenge the restrictive covenant, the court may strike down the entire covenant, rather than limit it. So, does it make sense to draft a restrictive covenant that protects the dental practice's interests without being overly restrictive? Or, let's ask it another way:

Why do pigs get fat and hogs get slaughtered?

This is precisely why a cookie-cutter approach to drafting and enforcing restrictive covenants often leads to unsatisfactory results or unwelcome surprises. Agreements that are far too broad will be rejected, and the dental practice may be left with no protection against unfair competition and/or debilitating solicitation of key patients. Moreover, even if an agreement is found to be enforceable, an agreement that is too narrow may not go far enough to protect the dental practice from the very harm the dental practice was seeking to prevent. In the end, a well-drafted agreement that is appropriately drawn to fit the particular dental practice's legitimate interests and the employee's work will provide the greatest likelihood of success, the greatest level of protection, and will avoid many of the unwelcome surprises that some have discovered along the way in the arena of restrictive covenants.

Conclusion and Upcoming Articles

In sum, dental practices should absolutely have restrictive covenants to protect their legitimate business interests. Think about it for a moment: you as the dentist, work for 25 years to develop goodwill, and you bring on an associate dentist for two years, who believes that the value of the dental practice is based on their presence. We know that this is false, yet if that associate leaves, they may attempt to take some of the patient base and we cannot allow that to occur. So, take the time and incur the expense of hiring someone to properly draft the agreement.

We will be writing a group of articles as a follow-up to this article that will address the following restrictive covenants: (i) non-compete agreements; (ii) non-solicitation and confidentiality agreements; (iii) non-treatment provisions; and (iv) the reasonableness of each.



Nardone Dental Practice Advisor



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