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## EEOC Releases 2014 Charge Statistics

By Tanya Nardone, Esq.

The dental attorneys at Nardone Law Group regularly assist our dental practice clients with labor, employment, and human resource issues, including providing guidance on preventing and responding to discrimination and harassment charges filed with the Equal Employment Opportunity Commission (“EEOC”) or the civil rights commission for the state where your practice and its employees are located. Please view our prior articles regarding how to establish and enforce harassment policies, how to prevent claims of harassment, how to respond to a harassment complaint, and what documentation should be maintained during an investigation.

### What is the EEOC and the Ohio Civil Rights Commission (“OCRC”)?

The EEOC and the OCRC (and other state civil rights commissions) are responsible for enforcing both federal and Ohio’s anti-discrimination laws. For instance, employees may file a charge with the EEOC or the OCRC against their employer alleging discrimination or harassment based on: (i) gender or sex, including pregnancy; (ii) race; (iii) color; (iv) age; (v) religion; (vi) disability; (vii) national origin; (viii) ancestry; (ix) military; or (x) other legally protected class (the “Bases”).

### EEOC Statistics for 2014

In February 2015, the EEOC released its charge statistics for the 2014 fiscal year. A review of the EEOC charge statistics provides some trends involving employment claims involving those federal anti-discrimination statutes enforced by the EEOC. Overall, the total number of EEOC charges filed per year has been decreasing, but this is likely due to certain economic factors, such as: (i) fewer employees on the payroll; (ii) employers not hiring as many full-time employees and relying more on part-time employees and contractors; (iii) workforces are stabilizing since the 2008 recession; and (iv) the government shutdown in the 2014 reporting period.

Important trends or items to note pursuant to EEOC’s 2014 statistics are as follows:

1. Discharge continues to be the most common issue (the discriminatory action) for all Bases under Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act filed with the EEOC;

### Inside This Issue

#### EEOC Releases 2014 Charge Statistics

By: Tanya Nardone, Esq. 1

#### Vince Nardone Visits OSU Organizations To Speak on Employment Contracts for an Associate Dentist

By: Vincent Nardone, Esq., LL. M. 2

#### When it Comes to Goodwill, Planning is Key

By: Ashley Privett, Esq. 3

#### FLSA Compliance Audit vs. FLSA Position Audit

By: Tanya Nardone, Esq. 4

#### Upcoming Events

5

2. Allegations of harassment for all types of discrimination Bases, with the exception of race, are the second most frequently cited issue after discharge;
3. 30% of charges filed with the EEOC alleged the issue of harassment on various Bases, such as race harassment or harassment on the basis of disability. Because of this, the EEOC is making it a priority to prevent harassment through systematic enforcement and targeted outreach;
4. Out of all Bases under which a discrimination charge can be filed, the Bases on which charges were most frequently filed was retaliation at 42.8% and then race at 35% of all charges filed in 2014.

### Bottom Line

NLG has conducted many discrimination and harassment investigations for clients and has also defended clients against discrimination or harassment charges filed by employees or former employees. The bottom line is that all employers must ensure that they are complying with federal and state anti-discrimination laws, including: (i) establishing and enforcing anti-harassment and anti-discrimination policies and procedures; (ii) providing the necessary training on such policies; and (iii) addressing related complaints promptly, thoroughly, and sufficiently to defend against potential discrimination charges or litigation and related liability. A discrimination charge could be the result of a disgruntled current or former employee seeking revenge. It is important to take the necessary preventative steps to prevent such future potential employment-related litigation and liability.

## Vince Nardone Visits Various Ohio State Organizations to Speak on Employment Contracts for an Associate Dentist

April marks a busy month for Columbus attorney Vince Nardone. Throughout the past couple of weeks, Vince has visited The Ohio State University's (i) Delta Sigma Delta dental fraternity, (ii) the Dental Entrepreneur Society, and (iii) Transitions' "student to business owner" preparation group. Vince Nardone covered all aspects of an employment contract from an associate dentist perspective, but he emphasized certain aspects of that employment contract, including:

- (i) The term of an employment contract – in most instances, associate doctors are hired for a one-year term. With that one-year term, the employment contracts generally automatically renew unless one of the parties to the contract notify the other that they do not intend to renew.
- (ii) Termination – Mr. Nardone discussed the difference between a for-cause termination and a not-for-cause termination.
- (iii) Compensation – There are a variety of ways that an associate dentist may be compensated in a dental practice. Vince went through and discussed the difference between net collections, net production, a daily rate, draws, and a salary. It is important to fully understand the formulas for each one of these compensation structures when presented to you.



- (iv) Restrictive covenants – He discussed the various restrictive covenants, including non-competes, non-solicitation of employees, non-solicitation of patients, advertising, and non-solicitation of referral sources.
- (v) Geographical limitation of the non-compete – The distance for the radius of a non-compete provision should be determined and based upon the particular patient base for that particular practice. The way to determine a patient base is to complete a zip code analysis using the practice's dental software. Any owning doctor should know what the source of their patients are in the first place. But, to the extent that they do not, completing the zip code analysis will allow both the owning doctor, and the associate dentist to better understand and determine the fairness of that radius.

- (vi) Time period limitations – Vince encourages and generally recommends: (i) no non-compete for an associate dentist that works less than six months; (ii) a one-year non-compete for an associate dentist that works at least six months but less than one year; and (iii) a two-year non-compete for an associate dentist that works one year or more.
- (vii) Employment versus owning – He also discussed the difference between the non-compete for an associate dentist working under an employment contract versus a non-compete for a selling doctor as part of the purchase of a dental practice entity.

In sum, he emphasized to the dental students that simply because a particular practice may pay less of a percentage on a net collection or net production basis, as compared to another practice, does not mean that you should not work for that particular practice. Rather, you have to look at the compensation packages as a whole and the employment contract in its entirety.



It is also important to fully understand all aspects of the employment contract. As an example, does the practice pay for malpractice insurance, lab fees, materials and supplies? Does the owning practice cover continuing education, provide paid vacation, provide paid sick leave, etc.? You cannot simply consider one aspect of a particular employment contract and determine that it is good or bad.

Further, as an associate dentist, if you like the practice, like the practice area, like the owning doctor, and the overall compensation package and employment contract seem fair, then do not nitpick various provisions of a particular employment contract and do not allow your attorney or accountant to nitpick various aspects either.

Once you are in the practice for a while and you have established your value to that particular practice by: (i) exhibiting good clinical skills; (ii) continuing to increase your production per hour; and (iii) assisting with the day-to-day activities of the practice, you will then be able to establish value to the practice and will have more leverage to discuss other aspects of the employment relationship.

## When It Comes to Goodwill, Planning is Key

By Ashley Privett, Esq.

Part of our job as dental practice attorneys at Nardone Law Group is to help dental practice owners plan for the long term. We understand that it is important for dental practice owners to be aware of how structuring a business and the agreements they enter into may affect their tax liabilities, both in the short term and the long term.

### What is Goodwill?

The Internal Revenue Code defines goodwill as “the value of a trade or business attributable to the expectancy of continued customer patronage.” According to the Internal Revenue Service (the “**Service**”), when valuing businesses, goodwill may be based primarily on earnings, and factors such as (i) the prestige of the business; and (ii) the ownership of a trade or brand name. A record of successful operation over a long period of time in a particular location may also furnish support for the inclusion of goodwill.

The taxation of goodwill is a very important issue when it comes to the sale of dental practices. Courts tend to ask two main questions for purposes of the taxation of goodwill: (i) who created the goodwill; and (ii) did that person transfer the goodwill. It is important to determine who created the goodwill, by analyzing: (i) whose relationships drive the dental practice’s success; (ii) whose special knowledge is used in the dental practice; (iii) whose ability or skill generates the revenue; and (iv) whose reputation is used to draw or retain customers. Courts may look at contractual relationships between the owner and the dental practice to determine if the person transferred goodwill through an employment contract or a contract not to compete. A good example of what courts may look at in regards to the contracts is the *Howard* case, which is described below.

### The Howard Case

There was a case a few years ago, which involved Dr. Howard, a dentist, who sold his professional service corporation (the “**Corporation**”) to another dentist by an asset sale. *Howard v. United States*, 2010 U.S. Dist. LEXIS 77251, 3, 2010-2 U.S. Tax Cas. (CCH) P50, 542, 106 A.F.T.R.2d (RIA) 5533 (E.D. Wash. 2010). In the *Howard* case, the asset purchase agreement allocated approximately \$550,000 for the personal goodwill of Dr. Howard. Dr. Howard asserted that any goodwill was a personal asset subject to taxation as a long-term capital gain. The Service argued that any goodwill belonged to the Corporation and must be characterized as a dividend payment taxed as ordinary income. Dr. Howard sued for a tax refund in federal district court. The district court agreed with the Service and held that goodwill was a corporate asset of the Corporation. Dr. Howard appealed to the Ninth Circuit.

On appeal, the Ninth Circuit looked at: (i) the employment contract between Dr. Howard and the Corporation; (ii) Dr. Howard’s covenant not to compete; and (iii) the asset purchase agreement.

### The Employment Contract

Under the employment contract, the Corporation controlled which clients it accepted or rejected. The Corporation also controlled client records and files. In the employment contract, Dr. Howard agreed to “practice dentistry solely as an employee of the Corporation and to devote his entire professional time to the affairs of the Corporation.”

### Covenant Non-Compete

Under the non-competes agreement, Dr. Howard agreed not to engage in any business that competed with the Corporation while Dr. Howard held any stock in the Corporation, or for the three year period following his ownership of any stock. Neither the employment contract nor the non-competes agreement expressly stated who owned any generated goodwill.



### Asset Purchase Agreement

The asset purchase agreement stated that “the personal goodwill of the practice [was] established by Dr. Howard... [and] is based on the relationship between Dr. Howard and the patients.” Dr. Howard had also entered into another non-competes agreement with the purchaser of the Corporation, in which Dr. Howard agreed that he would not practice dentistry within ten miles of the practice for three years.

Dr. Howard argued that according to the asset purchase agreement, the goodwill was personal to him and therefore, it controlled the tax treatment of the goodwill. The Ninth Circuit disagreed and held that the substance of a transaction controlled, not the form of a transaction.

Dr. Howard then argued that the asset purchase agreement operated to transfer the accumulated goodwill back to him personally. He also argued that the asset purchase agreement controlled over his preexisting employment contract and non-competes agreement with the Corporation. Ultimately, the Court held that even if it agreed with Dr. Howard’s arguments, the release of goodwill back to Dr. Howard would still constitute a dividend under Section 316(a) of the Internal Revenue Code.

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### Planning Strategy

As shown in the *Howard* case, courts will look at both corporate and employment documents to determine who created the goodwill and was that goodwill ever transferred. It is important to remember that when goodwill is a corporate asset and is purchased in an asset sale, the goodwill can be treated as a dividend from the corporation to the professional. If goodwill is transferred, it is ideal to have it taxed as a capital gain instead of as ordinary income. But, if the goodwill is treated as a dividend, it is subject to double taxation, at both the corporate level and the shareholder level. Thus, to reap the most benefits from a tax perspective, the goodwill needs to belong to the individual, not the entity. To recognize and benefit from a capital gains treatment on the consideration allocable to goodwill, the ideal way to structure the transaction is for (i) the shareholders to sell their stock, or the corporation its assets; and (ii) the shareholders should separately sell their personal goodwill.



Ultimately, you want goodwill to belong to the individual, not the entity. This is done through an employment agreement that gives the company the ability to control the future services of an individual. It is ideal if corporate resolutions and minutes, in addition to the employment agreement, all expressly state that any goodwill stays with the individual employee or owner.

### Quote of the Month

“A business that makes nothing but money is a poor business.”

Henry Ford

## FLSA Compliance Audit versus FLSA Position Audit

By Tanya Nardone, Esq.

The NLG dental attorneys at regularly assist our clients with labor, employment, and human resource issues, including providing guidance on the Fair Labor Standards Act (“FLSA”) and its regulations. One very important aspect of operating a dental practice is ensuring that the dental practice complies with federal and state labor and employment laws, rules, and regulations.

### What is the Fair Labor Standards Act?

For private sector employers, the FLSA establishes minimum wage, overtime pay, recordkeeping and youth employment standards affecting full-time and part-time workers. The Wage and Hour Division (“**Wage and Hour**”) of the Department of Labor administers and enforces the FLSA. Wage and Hour has the authority to (i) investigate an employer’s policies, practices, procedures, and other related documents; and (ii) interview employees to determine if the employer is in compliance with the FLSA and its regulations.

### What is an FLSA Audit?

As a preventative measure, it is important for all employers, including dental practices, to conduct an internal FLSA audit. There are two types of FLSA audits. One is an FLSA compliance audit and the other is an FLSA position audit.

FLSA Compliance Audit – An FLSA compliance audit is conducted by an individual or organization that is familiar with the FLSA and its regulations. This audit is conducted to review an employer’s policies, procedures, practices, and documentation to ensure that the employer is in compliance with the FLSA and its regulations. Once the individual or organization reviews the employer’s policies, procedures, practices, and documentation, the individual or organization will provide the employer with an analysis and recommendations on various requirements under the FLSA and its regulations.

FLSA Position Audit – Similar to the FLSA compliance audit, the FLSA position audit should also be conducted by an individual or organization that is familiar with the FLSA and its regulations. The position audit is a review of the employer’s positions that are paid on a salary basis and are designated as exempt from the FLSA. This audit will include a review and analysis of the duties and responsibilities of the positions designated as exempt. Once the review is complete, the individual or organization will provide the employer with an analysis and recommendations as to their opinions on whether each position is exempt.

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# SAVE THE DATE

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ZBCo., Paragon Management, and Nardone Law Group invite you to be a part of the *KiDDS Cup Charity Golf Tournament*. Come and experience the magic as the dental community comes together in one remarkable effort to change the lives of children in and outside our borders.

Please email our Client Relations Coordinator, Evan Manson, if you are interested in getting involved.  
[emanson@nardonelawgroup.com](mailto:emanson@nardonelawgroup.com)

## Upcoming Events

**June 12, 2015**

Paragon's Ohio Excelleration Seminar  
Sheraton Columbus Hotel – Columbus, OH

**June 17 – 19, 2015**

Paragon's Longboat Key National Study Club  
The Resort at Longboat Key – Longboat, FL

**July 3, 2015**

NLG offices will be closed in observance of Independence Day.

**July 31, 2015**

KiDDS Cup Charity Golf Tournament  
Little Turtle Golf Club – Westerville, OH

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### Why is an FLSA Audit Important?

The FLSA compliance audit and the FLSA position audit, both as defined above, are important to: (i) ensure your dental practice is in compliance with the FLSA; (ii) deter and prevent employees from filing complaints with Wage and Hour related to compliance with the FLSA and its regulations; and (iii) ensure positive findings and no penalties or future-related litigation if the Wage and Hour does conduct an audit of your dental practice. If Wage and Hour conducts an audit of your practice and they issue findings that your practice is not in compliance with the FLSA and its regulations, your dental practice could be subject to paying thousands of dollars in back wages, damages, penalties, and resulting legal fees.

### Bottom Line for Your Dental Practice

Nardone Law Group has conducted internal FLSA Audits for its clients and has also defended clients, including dental practices, against audits conducted by Wage and Hour. The bottom line is that all employers, including dental practices, must comply with the FLSA and its regulations.



Additionally, no employer is immune from Wage and Hour conducting an audit of your business and issuing findings, fines, and penalties or even filing suit against your practice. An audit could be the result of a complaint filed by a current or former employee or even the result of a random audit conducted by Wage and Hour. A complaint by a current or former employee could be based upon a valid FLSA violation or could be the result of a disgruntled employee seeking revenge. For these reasons, it is important to ensure your compliance with the FLSA and its regulations to prevent future potential employment-related litigation and liability.

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