

# Lifeline

## Protecting your practice against employment snafus

Experts speak up on employment claims

It is no secret that employment-related lawsuits have increased dramatically in recent years. This trend affects businesses nationwide, large and small. Data from the U.S. Equal Employment Opportunity Commission lists 88,778 charges of various types of discrimination in the workplace in 2014, and insurance statistics show that businesses with fewer than 100 employees comprise 40 percent of employment practices cases.

The Dentists Insurance Company, TDIC, reports 54 closed employment practices claims in 2014, with TDIC paying indemnity on 61 percent of those claims. By contrast, TDIC had six closed employment practices claims

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in 2000, with 33 percent paying indemnity. Risk management analysts say dentists report having the most trouble in the areas of wrongful termination, discrimination, sexual harassment and wage and hour violations.

Analysts also say the increasing indemnity payments indicate that practice owners are not fully aware of employment laws.

“Even the most basic knowledge of employment law can help small business owners prevent major financial losses to their business in the long run,” said Jennifer Duggan, a Northern California attorney who focuses on business and employment issues. “With a wealth of information available for employees on the Internet, and no shortage of willing lawyers to pursue employment law claims, prevention of such claims should be a constant thought for any business owner.”

While claim statistics are daunting, TDIC risk management analysts offer dentists specific information about how to protect their practices from such lawsuits. The good news is that many of the protective measures are not difficult. Basic steps include:

- Addressing employee concerns immediately using an interactive process.
- Staying current on employment law.
- Keeping employees fully aware of office policies and job expectations.
- Striving for consistency and fairness in application of office policies.
- Maintaining a personnel file for each employee.
- Documenting significant conversations and interactions.
- Utilizing resources such as an employment manual.

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Jennifer Duggan, attorney



### Let's look at the specifics

**Act now.** Proactive may seem like a buzzword, but when it comes to preventing costly and time-consuming legal battles, proactive is the word. It means handling employee issues right away and not ignoring them. Legal experts say “poor communication is the great cause of litigation,” and engaging an employee in a conversation about a potentially problematic situation, such

as alleged harassment, discrimination or unfair labor practices, can prevent a communication breakdown, misunderstanding or lawsuit.

Discussion about employee concerns does not have to be difficult. It involves asking open-ended questions that encourage employees to communicate, requesting additional information and evaluating the situation to reach a reasonable resolution. Legal professionals say some practice owners feel uncomfortable asking employees questions, but they are clear that “questions are your friend” as long as inquiries are not accusatory or discriminating.

A key to the process is listening carefully and documenting the discussion. “The best practice is to always keep a written record of any corrective or substantive conversations with employees noting, among other things, the date, who was present, what issues were addressed and what were the results of the conversation,” Duggan said. “Even though record keeping can feel cumbersome in the moment, documentation can be very helpful later to an employer who is facing a lawsuit by an employee.”

**Knowledge is power.** Open communication combined with an understanding of basic employment laws can help employers prevent surprise employment claims. “Oftentimes, our clients are surprised when they receive a complaint from the Labor Commissioner and call us after the fact to gain a better understanding of what went wrong,” said Duggan. “This surprise usually is a result of business owners not understanding the legal implications of their practice management.”

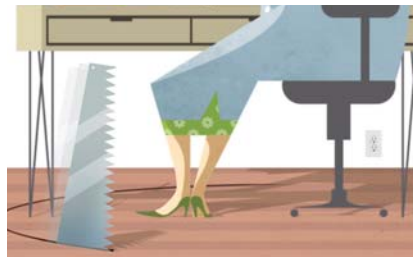
Duggan noted that employers sometimes feel their employees were treated well and they do not understand why a complaint has even been filed. “Unfortunately for the business owner, the Labor Commissioner does not evaluate the total picture of how well employees were treated; he or she only examines whether you abided by the applicable laws. Even the smallest violation can cost small business owners thousands of dollars in fines, penalties and back payment of wages,” Duggan said.

Spending a little time researching laws online or taking continuing education courses pays off. The U.S. Small Business Administration (SBA) offers an online tool at [tdic.click/1bycVDx](http://tdic.click/1bycVDx) called the “FirstStep Employment Law Advisor” that can help with an overview of federal employment laws. Because state law can override federal law, SBA also offers links to state labor offices for law pertaining to your specific state, and a free online Employment Law Guide describes major employment laws for hands-on information about wage, benefit, safety and nondiscrimination policies.

The U.S. Equal Employment Opportunity Commission (EEOC) website includes a concise list of prohibited employment practices and policies and is available online at [tdic.click/1xiHdUl](http://tdic.click/1xiHdUl) as well as other resources including guidance on criminal background checks. This site is specific about laws enforced by the EEOC and states: “It is illegal to discriminate against someone (applicant or employee) because of that person’s race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

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It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination or participated in an employment discrimination investigation or lawsuit. The law forbids discrimination in every aspect of employment.”

In addition to federal and state laws, general knowledge of local ordinances is useful, especially relating to wage and hour rules, as minimum wage can

be set locally. For example, the federal minimum wage is currently \$7.25 per hour, but employers in California, which has a minimum wage of \$9 per hour, must pay the higher amount. Further, employers in San Francisco, San Jose, San Diego, and Chicago pay higher minimum wages.

Twenty-three states have minimum wages higher than what is mandated by federal law, including Alaska, Arizona, Illinois, Minnesota, Nevada and New Jersey. State wage and hour laws are accessible online at [tdic.click/1FXppQ2](http://tdic.click/1FXppQ2).

Federal and state laws require most employers to pay overtime. The “time-and-a-half” formula is set by the Fair Labor Standards Act (FLSA) and applies to nonexempt employees. FLSA requires 1.5 times an employee’s regular rate of pay for all hours worked over 40 in a week. California and a few other states, including Alaska, have a “daily overtime standard” that entitles nonexempt employees to time-and-a-half pay for every hour more than eight hours in a day. California additionally requires “double-time” for hours worked over 12 in one day. Further information about overtime is online at [tdic.click/1CS1jpo](http://tdic.click/1CS1jpo).

Paid sick leave for employees is an area where employers must be aware of changing laws. One significant change is in California where employers are required to provide at least 24 hours of sick leave per year effective July 1, 2015.

A lack of knowledge regarding minimum wage, overtime, meals, breaks and paid sick leave can be especially problematic for employers, and Duggan said her practice has noted a recent influx in wage and hour claims from a number of clients. “One example is, if an hourly employee

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does not receive his or her lunch and rest breaks on time, there are serious monetary ramifications for the business owner. This is true even if the meal break was taken, but was merely taken later than required.”

Employees can be entitled to back pay of overtime, penalties for missed or late meal breaks and missed rest breaks. Small businesses also face a lot of questions on compliance with disability and pregnancy leaves, the applicable laws and ensuring that they engage in the required “interactive process” with disabled employees, according to Duggan. “Payment of these kinds of claims and even settlement of disputed claims can be incredibly costly, especially to small businesses.”

**Make it clear.** With a commitment to keep current on employment laws, the next essential step is to make sure employees are fully aware of office policies and job expectations. This includes a thorough job description for each employee and an employee manual that spells out nondiscriminatory employment practices and a “zero tolerance” policy regarding harassment. The employee manual should include a definition of harassment as well as examples of unprofessional and rude behavior. Include in the manual the names of at least two people in the dental office that employees can report to regarding harassment, and emphasize that there will be no retaliation for reporting harassment.

Additional employee manual details include reasons for immediate dismissal, information about resolving grievances in the workplace and disciplinary protocol. Also include employment at-will policies, protocol for pregnant employees and outline wage and hour

information concerning meals, breaks and overtime. TDIC also recommends that employers have a clear policy regarding texting and use of mobile phones during work hours. Update your employee manual annually and ask each employee to sign off on receipt of the manual and updates.

Duggan added that practice owners and managers must be aware of the contents of the employee manual

and lead by example. “We often see employers not follow their own policies, which can lead to other legal concerns.”

With office policy clearly outlined in the employee manual, consistent and fair application of policy helps keep employers out of legal trouble. Treat all employees with equal respect and courtesy and avoid preferential treatment.

## Employment practices resources for dentists

**TDIC Advice Line:** The Advice Line offers direct access to risk management analysts and specialists who offer more than 55 years of combined experience in handling a vast range of dental practice issues. Analysts use multiple resources to assess the situation in question and recommend strategies that can keep an issue from becoming a full-blown problem. They will listen to your issue, ask several questions for clarification then offer solutions and strategies. Call a TDIC risk management analyst at 800.733.0634.

**Online Tools:** TDIC offers an employee manual to employment practices liability policyholders that you can customize for your dental practice and a Guide to Effective Employment Practices along with several employment focused articles available at [thedentists.com](http://thedentists.com).

**Effective Employment Practices Webcast:** Through the examination of actual cases, this course addresses some of the most common employment issues dentists’ face: sexual harassment, pregnancy discrimination, wrongful termination and wage and hour issues. This course addresses real-world issues, reviews pertinent

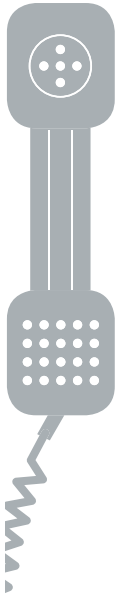
laws and gives practical steps for the dental office. Available at: [thedentists.com/elearning](http://thedentists.com/elearning)

**Employment Practices Liability (EPL) Coverage:** EPL insurance covers employment-related claims such as discrimination due to age, sex, race or disability, wrongful termination and sexual harassment, and pays for defense costs, settlements and civil damages in the event of such allegations. Employment Practices Liability is an optional coverage within TDIC’s Professional and Business Liability policy and is available with combined single limits. TDIC currently offers a limit of \$50,000 or \$100,000 and can be used for either defense or indemnity payments. TDIC began offering Employment Practices Liability coverage in 1998 as a response to the number of policyholders reporting employment related claims.

**Legal Support:** Establish a professional relationship with an attorney or business consultant who knows employment law. This provides practice owners an additional resource to ask occasional questions.

Disclaimer: Information in this article is not legal advice and is intended for general knowledge and educational purposes.





## And the recommendation is...

### Analysts weigh in on real-life employment challenges

Incoming calls to TDIC's Advice Line represent actual situations playing out in dental practices across the country. About 18 percent of calls to the Advice Line concern employment practices, including management issues, termination, wage and hour rules, employee pregnancy and workers' compensation.

Here are a few examples of calls to the Advice Line and the recommendations from risk management experts:

#### Call No. 1: Problem employee with open workers' compensation claim

Dr. Miller, a general dentist, called about "Sally," a registered dental assistant who previously worked 25 years for another dentist. While at the former practice, Sally's main function was to hand instruments to the dentist, and her daily routine did not include traditional RDA duties. Her previous employer retired about the same time Dr. Miller's long-term RDA moved. Sally applied for the RDA position with Dr. Miller. During the interview, Dr. Miller told Sally that she would need to perform traditional RDA duties and work 40 hours per week. Even though she agreed, Sally was clear about not really wanting to work on patients or a 40-hour work week. Dr. Miller hired her anyway, as there were few candidates to choose from.

Over the next six years, other employees reported that Sally was rude to them and to patients. When approached by the office manager,

Sally would refer to her coworkers with disparaging names. The office manager approached Dr. Miller about how to address this situation. He thought perhaps Sally was having a bad day and the situation would likely work itself out. Dr. Miller said he always tried to treat his staff well and they seemed to respond to his kind treatment. Except for Sally, his staff members were content, long-term employees. They all got along and were generally happy until Sally started. Since then, they all "walk on eggshells" around her, Dr. Miller included.

Recently, Sally casually mentioned to the office manager that she was looking for a new job. She was not giving notice, but said she felt Dr. Miller did not want her in the practice. Sally also claimed her wrists hurt from work and filed a workers' compensation claim. The dentist did not believe she was injured. He thought she was upset because she had to work a 40-hour workweek and work hands-on with patients.

In addition, a staff member told the office manager Sally had been taking home a copy of the daily schedule that

included patients' names. When asked about this, Sally told her coworker she did it to prove the dentist was forcing her to perform duties that caused her injury. The office manager confronted Sally about taking home copies of the daily schedule, which Sally denied. She admitted to keeping them in her work locker to document the tasks she was required to perform. The office manager made it clear that this was not permitted, and instructed Sally to stop making copies of the daily schedules. She also documented the discussion in Sally's personnel file.

Dr. Miller stated Sally's attitude was having a negative impact upon the entire office and he was tired of coddling her. He was ready to terminate her employment, but asked whether he should take this action.

#### Recommendations:

The risk management analyst was clear that the workers' compensation claim complicated this situation and advised Dr. Miller to exercise caution in addressing the issue. Many states have laws prohibiting retaliatory termination of employees filing workers' compensation claims. If he fired Sally at this time, he risked a retaliatory claim, which in Dr. Miller's state of California fell under Labor Code 132a.

While this situation is difficult for the dentist and staff, the group must work as a team to prevent actions that could be considered discriminatory. For instance, he reprimanded Sally for something and other employees were not, his actions could be considered discriminatory and potentially create a hostile work environment. Documenting workplace standards and policies – such as not making copies of office documents – in

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the employee manual and evaluating all employees equally on standards is an important step in insulating the practice from a discrimination claim. Consistent application of policy is essential to avoiding allegations of favoritism or discrimination.

The analyst also noted the importance of not trying to discern whether the workers' compensation claim was credible or not and cautioned against trying to deal with the claim in the practice environment. She advised the dentist not to personalize the claim and to let it work through the system. It benefits the dentist and office manager to document their efforts to accommodate the injured RDA. Additionally, note any performance issues in the employee's file. A record of dates, times and a brief description of incidents will keep information straight. If the situation escalates, the analyst recommended the dentist discuss his strategy with an attorney.

## Call No. 2: Employee stops showing up for work

A dentist called about "Mary," who has worked Mondays, Wednesdays and Fridays in the practice for seven years. Over the last six months, Mary has had difficulties in her personal life, including a divorce and childcare issues. The dentist said she understood Mary's challenges and allowed her longer lunches to accommodate various appointments. Unfortunately, Mary's attendance was progressively getting worse. Last week the dentist had her third discussion with Mary about her attendance. She told Mary that it was essential for her to show up to work on

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her scheduled days. The dentist was clear that she would be monitoring Mary's attendance for the next few weeks and expected to see an improvement. Mary agreed and committed to resuming her regular schedule.

The following week however, Mary did not come in or call. She texted the dentist on Tuesday saying she was sick. The dentist responded via text asking Mary to provide a note from her physician. It was now Friday afternoon and Mary never responded. Can the dentist terminate Mary?

### Recommendations:

The analyst asked the dentist if she had documented her counseling appointments with Mary in her

employee file. The dentist affirmed that she had documented the discussions.

The analyst asked if the doctor had an employee manual, and if so, did it mention job abandonment? The dentist had an employee manual, but was not sure of the exact contents because she had not looked at the manual "in years." The analyst recommended she revisit the manual and locate the exact language discussing job abandonment. Consider it a guidebook for what the dentist could expect of the staff and vice versa. If the manual addresses job abandonment, it should define it and outline what happens if an employee abandons his or her job. The dentist agreed to follow policy as written in the manual and apply it in this situation. (Please note: many manuals define job abandonment as three days without showing up or calling into work.)

Although Mary did not respond to the dentist's text asking for a note from her physician, the analyst was unsure if this could qualify as "no call" and recommended the dentist speak to an attorney before doing anything further. Depending on how her employee manual outlined job abandonment, the dentist may be able to terminate the employee.

Finally, the analyst recommended the dentist update her employee manual, as labor laws change every year, and advised that an employment attorney review the manual prior to distribution to staff.

As these examples illustrate, employment situations are often challenging and complex. There are no easy answers. Ensuring that you implement fair and consistent practices that are well documented in your manual will demonstrate your commitment to a structured workplace.



# Beyond the Science: Patient emotions in dentistry

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**Lifeline**

Liability Lifeline is published by:

The Dentists Insurance Company  
1201 K Street, 17th Floor  
Sacramento, California 95814

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