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EMPLOYMENT GUIDELINES FOR THE DENTAL OFFICE

Ontario Dental ASSOCIATION

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The updated Guidelines now include new information on:

- Clearly drawing a distinction between employees and independent contractors in the dental office;
- The most recent amendments to the *Employment Standards Act, 2000*;
- Amendments to the grounds protected by the *Human Rights Code*;
- The duty to accommodate employees with physical and/or mental disabilities, from the hiring process to termination;
- The *Accessibility for Ontarians with Disabilities Act, 2005* and its related standards;
- The *Occupational Health and Safety Act*'s requirements relating to workplace violence and harassment; and
- A list of additional resources appended to the Guidelines, including template associate and other staff agreements, and workplace checklists.

Note:

This is a reference manual that provides general information on employment law and policy, and is not intended to constitute legal advice. Individuals should seek independent legal advice to address any specific legal issues they may have.

Table of Contents

Introduction

These Guidelines have been prepared to assist Ontario dentists in understanding employment issues in the dental office, from both a legal and policy perspective. It is important to know that the principle sources of law governing the workplace in Ontario are:

- Common law (precedents established by judges in cases that have gone before the courts);
- The *Employment Standards Act, 2000*,[1] as amended (the "*ESA*");
- Ontario's *Human Rights Code*,[2] as amended (the "*Code*");
- The *Occupational Health and Safety Act*,[3] as amended (the "*OHSA*");
- The *Accessibility for Ontarians with Disabilities Act*,[4] 2005, as amended (the "*AODA*"); and
- The *Ontario Labour Relations Act*,[5] as amended (the "*OLRA*").

In addition, the *Regulated Health Professions Act, 1991* (the "*RHPA*"),[6] the *Dentistry Act, 1991*,[7] the *Dental Hygiene Act*, 1991,[8] and their related Regulations contain rules that govern the employment of dentists and dental hygienists working in the dental office.

All Ontario legislation referred to in this manual is available online at the government website: https://www.ontario.ca/laws. All references are listed as endnotes on the last page of this manual.

The rights of employees set out in legislation must always be adhered to. Furthermore, employers and employees cannot "contract out" of any legal requirements set out in legislation in their employment agreements (whether verbal or written); in other words, even if your employees consent, they cannot be provided with less than their entitlements under the *ESA*.

The purpose of this manual is to provide an overview of considerations and guidelines for developing employment contracts, independent contractor agreements, and office policies and procedures that affect employees and others — such as independent contractors — working in a dental office. ODA members are asked to contact the ODA regarding any questions about the manual.

These guidelines address the various stages of the employment relationship, from the hiring stage to the termination stage. The manual contains nine parts, as follows:

- Part I: The Hiring Process
- Part II: Employment Relationship and Contracts
- Part III: Regulated Health Professional Employees
- Part IV: Employment Standards
- Part V: Human Rights Considerations
- Part VI: Occupational Health and Safety
- Part VII: Terminating the Employment Relationship
- Part VIII: Policies and Procedures
- Part IX: Associate Agreements — Special Considerations

Part I: The Hiring Process

The *Ontario Human Rights Code*, as amended (the "*Code*") prohibits discrimination throughout the hiring process on specified grounds including, "*race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability*".[9] This prohibition applies to employment advertising, application forms, and interviews, as well as to the activities of employment agencies.[10] Essentially, any questions asked or information requested during the hiring process must be relevant to a *bona fide* occupational requirement and the employee's ability to perform the essential duties of the job. Human rights considerations for advertising, interviewing, Criminal Record Checks, and accommodation of job applicants with a mental or physical disability are addressed in further detail below.

Information on the Hiring Process

The employer should inform job applicants of the application process up front, so that there is clarity of expectations. The employer may want to explain, on its website and/or in the job posting:

- How the application process will proceed;
- Whether, when and which references will be checked;
- Whether a credit rating will be checked; and
- Whether a Criminal Record Check will be done.

In addition, in compliance with the *Accessibility for Ontarians with Disabilities Act*, as amended ("AODA"), the employer must notify the public that it will accommodate the needs of job applicants with disabilities throughout the hiring process.[11] The Ontario government suggests the following sample wording for the employer's website and the job posting:

> *[Name of Organization] welcomes and encourages applications from people with disabilities. Accommodations are available on request for candidates taking part in all aspects of the selection process.*[12]

Wrongful Hiring/Misrepresentation to Prospective Employees

An employer can be held legally accountable for direct or indirect untrue, inaccurate or misleading statements or representations made to prospective employees during the hiring process.[13] A claim for negligent misrepresentation in the employment context may arise when, for example, a prospective employee applies for a position based on the job description as advertised, only to learn after entering into an employment contract that the advertisement was inconsistent with the job requirements. Employers must ensure accurate portrayal of their business practices during the hiring process. Generally speaking, employers should avoid "overselling" a position in cases where they will not be able to fulfill their promises. Such situations may create liability.

The following specific best practices should be followed:

- Any statement made to a job applicant during any stage of the hiring process must be accurate; and
- Any written employment agreement must contain the employee's acknowledgment that the dental office offered them a reasonable opportunity to secure independent legal advice if desired prior to signing the employment agreement. Seven (7) calendar days to review an employment offer is considered reasonable.

Advertisement for Employment

Before an employer prepares an advertisement for a position, consideration must be given to section 23 of the *Code*. Under that section, employment advertisements cannot be published or displayed in a manner that classifies or indicates qualifications by a prohibited ground of discrimination. The *Code* prohibits, for example, discrimination on the basis of ethnic origin and citizen; therefore, employers must avoid stating in advertisements that Canadian experience is required.

As noted above, the advertisement should also notify the public that job applicants with disabilities are encouraged to apply, and will be accommodated in the hiring process.

Interview Process and Application Forms

Once job applicants are selected for an interview or other selection process, advise them that accommodation will be provided if required.[14]

Ontario's Human Rights Commission (the "Commission") has developed guidelines on the types of questions that are appropriate and inappropriate. Questions during an interview or on an application form must only be asked for the purpose of determining the job applicant's qualifications to perform the essential duties of the job. A copy of the Commission's guidelines on the interview process, as well as a sample "Application for Employment" form, are appended to this manual as Appendix "B". Additional information can be obtained directly by searching the Commission's website at: http://www.ohrc.on.ca/en.

Application forms and questions must also be carefully prepared to comply with section 23 of the *Code*, in order to ensure that they do not make an inquiry of a job applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

Certain questions can only be asked after a conditional offer of employment has been made, and only if they are related to the job applicant's ability to perform the essential duties of the job. Such requests include:

- Their driver's license (again, only if driving is a *bona fide* occupational requirement of the position);
- Their birth certificate (if, for example, there is a need to confirm that the job applicant has reached the age of majority);
- Their Social Insurance Number (or "SIN");
- Information related to health or age for benefits and insurance purposes;
- Their relationship with a person to be identified in case of emergency or as insurance beneficiary;
- Their date of birth; and
- Their need, if any, for accommodation.

The following are examples of topics to be avoided altogether, at all times during the hiring process and throughout the employment relationship:

- Whether the job applicant has had any problems with occupational health and safety issues;
- Whether the job applicant ever made a claim for workers' compensation;
- How much sick time has been taken in previous jobs;
- Whether the job applicant is married or single;
- Whether the job applicant has or is intending to have children;
- Whether the job applicant is a Canadian citizen or has Canadian experience; and
- Where the job applicant "comes from", or what nationality their name is.

Record of Offences

Questions are permitted for the purpose of determining whether the job applicant has been convicted of a criminal offence for which a pardon has not been granted. Questions are also permitted for the purpose of determining if a job applicant is bondable, so long as being bondable is a genuine qualification of the job.

Criminal Record Checks should only be made after a conditional employment offer has been made, and only if a clear Criminal Record is a reasonable and bona fide requirement of the job.[15] It would be appropriate to require, for example, individuals who work directly with vulnerable children or adults or who work with cash to provide a Criminal Record Check, ideally prior to employment commencing.

Criminal Record Checks will often be done by local police services, although there are private companies that offer this service as well. Regardless of the service used, the employee's written consent will be needed for the Check to be conducted.

Employers should be sure that the only information provided to them as a result of the Check is information about any offences for which a pardon has not been granted. For more details on how to conduct a Criminal Record Check, please refer to Appendix "A" of this manual.

When Job Applicant Requests Accommodation

The employer has a legal duty to accommodate employees and job applicants to the point of undue hardship, even during the application and interview stages of the hiring process. The Commission recommends that employers offer all candidates who are invited for an interview accommodation should they so require.

If a job applicant requests accommodation for a disability, religious or family caregiving issue, or any other protected ground and, assuming the need for accommodation is sufficiently established, an appropriate accommodation should be determined through discussion with the job applicant and then implemented, unless to accommodate would cause the employer undue hardship.

The process of accommodation is a shared responsibility between the employer and employee/job applicant, and requires the cooperation of everyone involved in order to identify solutions appropriate to the individual, taking into account the privacy, autonomy and dignity of the employee/job applicant. At a minimum, employers must show a willingness to explore solutions and, in every case, it is important to consult the employee or job applicant, as the case may be.

The *Code* contains a very restrictive definition of the factors to be considered in determining whether an employer will suffer undue hardship if it provides a requested accommodation, including:

1. The cost of the accommodation;
2. Consideration of outside sources of funding, if any; and
3. The health and safety requirements of the job.

At the hiring stage, undue hardship is a particularly difficult threshold to meet. In most cases, job applicants' accommodation needs may be met by providing sufficient time to complete the interview or test, offering flexibility in the scheduling of a job interview, or permitting the use of assistive devices, such as TTY or a service animal, at a job interview.

For more information on disability accommodation, you may wish to consult the Commission's Policy and Guidelines on Disability and the Duty to Accommodate, a copy of which is available on the Commission's website at: http://www.ohrc.on.ca/so/node/2461.

As an incentive to encourage employers to hire persons with disabilities, the *Corporations Tax Act*[16] allows employers an additional deduction for the costs of modifying buildings, structures and premises, acquiring certain equipment, and providing special training in order to accommodate persons with disabilities in the workplace. The *Income Tax Act*[17] provides a similar credit to unincorporated employers. The *Ontario Disability Support Program Act*, 1997[18] provides a separate income and employment support program for eligible persons with disabilities. For information on disability-related funding available to employers, as well as other resources for persons with disabilities, you should contact the Ministry of Children, Community and Social Services regarding the Ontario Disability Support Program.

References and Reference Checks

Part of the due diligence required in hiring new employees is to check the references given by the job applicant. Although unlikely, failing to conduct reference checks may result in liability on the part of the employer in the event that damages that could have been prevented had a proper reference check been done. As such, it is important to ensure that a job offer is not made until satisfactory reference checks are completed.

It is important to obtain the employee's consent before seeking or providing a reference. The prospective employer may wish to ask the job applicant to sign a consent form to have the prospective employer contact references as part of the hiring process.

When conducting a reference check, questions should be related only to the job applicant's abilities with respect to the job requirements. Questions should be geared towards confirming periods and history of employment, confirming information provided on the job applicant's resume, understanding the job applicant's previous job responsibilities and ability to perform specific tasks, and whether the former employer would hire the person back, if given the opportunity to do so.

When a prospective employer contacts a former employer listed as a reference by the job applicant, there is a duty placed on the former employer to provide a reference, as failing to do so may constitute a breach of the common law obligation of good faith and fair dealing.[19] Further, when providing a reference, one should ensure to not make any statement that might be deemed "defamatory" in nature. A defamatory statement is one that is written or oral and that refers in a negative way to, or reduces the respect of, an individual, and at the same time is referred specifically to the employee and is published to a third party (i.e., the prospective employer). If, however, the statement can be supported as being true, the statement can be deemed justified in the circumstances; in other words, one should avoid negative comments when giving references, unless there is a legitimate evidentiary basis upon which to make the comment. Any reference given should be done without malice, and without reckless disregard for the truth. An unfavourable reference, if given honestly and without malice, will be protected by the courts in the event a claim of defamation or slander is made.[20]

When a reference is being sought, one should ensure to review the employee performance evaluations kept on file. If a written reference is to be provided, thought should be given to having the employee agree to its content.

The person giving a reference should keep notes of the reference provided, and the employer receiving a reference should similarly keep notes of what they were told.

Some employers may have a policy that they do not provide employment references; in that case, the employer's policy should state that they do not provide references and should be in writing. Notwithstanding the existence of such a policy, however, the employer should be prepared to provide information to a new employer, whether orally or in writing, confirming a former employee's employment, dates of service, and position and duties.

Part II — Employment Relationships and Contracts

Employment Contracts

There is a benefit for both the employer and the employee to have a written employment contract in place before the commencement of employment, so that rights and obligations are clarified up front. While the ODA is not in a position to suggest a standard form employment contract for the dental office, as it is not practical to address the needs of every employment situation in dentistry, appended to this manual in Appendix "H" is a **sample** employment agreement for dental office staff. The sample agreement should not be used as a fill-in-the-blanks document; rather, the sample employment agreement is intended as a starting point in drafting an agreement for dental staff. It should be customized for each individual that is hired, and should never be used without legal advice. Additionally, the following guidelines should always be considered.

For a written employment contract to be valid and binding, it must be signed and returned to the employer before an employee starts working. The contract should be provided to the employee well in advance (i.e., at least seven (7) calendar days), in order to allow ample time for them to obtain independent legal advice if desired.

For those employers who wish to put written employment contracts in place for their employees after work has already started, this can be done; however, to be done properly and effectively, it is strongly recommended that the advice and assistance of employment law counsel be obtained in advance. The process will typically involve providing the employee(s) with sufficient advanced notice of the requirement to sign the contract, as well as carefully worded language to communicate the consequences of a failure to sign. It will also require provision of "fresh" or "new" consideration, such as a signing bonus, increased salary, or other monetary benefit that the employee does not already enjoy, in order to make the contract valid and enforceable.

For more information, please see the Employment Contract Checklist appended as Appendix "C" to this manual.

Distinguishing Employee and Independent Contractor

When hiring a dentist, dental assistant, registered dental hygienist, receptionist and/or other staff to assist you in running your practice, one of the critical decisions to make is whether to hire them as an "employee" or as an "independent contractor". As discussed below, it is very important to ensure that the intent of the parties regarding the status of the working relationship is clarified prior to the commencement of the working relationship, and that the actions and relationship of the parties reflects that intention once the working relationship commences. The Canada Revenue Agency is auditing these relationships more vigorously lately to determine the true nature of the relationship.

There are many factors to consider when deciding whether the individuals you retain to assist in your practice will be employees or independent contractors, as there are — often costly — implications for:

- The employer's liability for harm done to others by the individual;
- Income tax payment requirements;
- Liability for Canada Pension Plan ("CPP") payments and Employment Insurance ("EI") premiums;
- The application of employment standards, such as vacation pay, public holiday pay, overtime pay, etc.;
- Ownership of confidential information (e.g., patient lists); and
- Provision of proper notice of termination of employment and severance pay, as applicable.

At law, employers can be deemed vicariously liable for the conduct of their employees, if the conduct in question arises from the scope of their employment. Independent contractors, however, are generally liable for their own acts or omissions, and therefore should have their own liability insurance. Accordingly, the structure of the working relationship will impact whether or not the "employer" will be held responsible for the work done by the individual.

Also, employment standards legislation generally does not apply to independent contractors, but if a complaint is made to the Ministry of Labour (the "MOL"; the "Ministry"), it is possible that a decision will be made declaring that, for the purpose of entitlements under the *Employment Standards Act, 2000*, as amended (the "*ESA*"), the individual is deemed to be an "employee," despite the fact that the dental office believed the individual to be an independent contractor. The employer may then be responsible for Employer Health Tax contributions, notice of termination and severance pay in the event of termination of employment, overtime, vacation and statutory holiday pay. If an employer is found to have failed to provide the minimum employment standards prescribed in the *ESA*, it may be subject to penalties. Contravention of the *ESA* is an offence punishable by a fine, and officers and directors of a corporation can be held personally liable for any unpaid wages and vacation pay in the event that the employer cannot honour its commitments.

The *ESA* now expressly prohibits employers from treating individuals who are employees as if they are not employees.[21] The Ministry may commence a prosecution against an organization where they suspect that the organization has misclassified an individual as something other than an employee of the employer. An employer found to have misclassified an individual as an employee may be subject to a fine of up to $50,000 or imprisonment of up to 12 months or, if the employer is a corporation, a fine of not more than $100,000.

Similar declarations or findings may be made by Canada Revenue Agency ("CRA") for the purpose of income tax payments and CPP and EI contributions. Such declarations may be made after a routine audit. A finding that an employer has failed to remit the prescribed amounts of tax and/or CPP and EI contributions can attract interest, as well as monetary fines and penalties. It is therefore important to ensure that the contract is carefully written, and independent legal advice should be sought.

Simply stating in the contract that someone is an independent contractor does not necessarily make that person an independent contractor under the law.[22] There is never any guarantee that the status of the relationship will be deemed to be one of independent contractors. If the matter goes before a court of law, the court will review all aspects of the relationship to determine its true nature. The way the relationship has been defined by the parties in a written contract is likely to be of little relevance compared to the actual nature of the relationship. Some of these factors are addressed in a publication by CRA entitled, "Employee or Self-Employed?"[23] This document is a tool designed to assist businesses in determining whether a worker is an employee or independent contractor. It allows businesses to examine and analyze terms and conditions of employment as they relate to four key factors:

1. Control: How much control is exercised by the payor over the individual? For example, does the individual set their own hours? Work without the supervision of the payor? Decide what methods to use to complete the work? The more control, the more likely it is that the individual is an employee.
2. Ownership of tools: Who owns the tools and equipment necessary to do the work?
3. Chance of profit/risk of loss: Can the individual doing the work turn a profit if they are very efficient, or risk a loss if they are not? Someone earning an hourly or daily rate has no chance of extra profit or risk of loss, and is thus more likely to be an employee.
4. Functional integration: How incorporated into the practice is this individual? Are they running their own business, or are they part of the dental practice?

These factors are further described in CRA's publication.

Businesses can make a written request to CRA for a ruling on the status of a worker for the purpose of EI and CPP contributions.[24]

Dental Hygienists as Independent Contractors

As discussed above, there is never any guarantee that a working relationship will be deemed that of two independent contractors, and each case depends on the total relationship of the parties.

Dental offices are frequently the subject of CRA audits concerning the employment status of dental hygienists. The following are factors that may strengthen the probability that an independent contractor relationship will be found:

- Billing the patient receiving dental hygiene services through the dental office on a per hour basis;
- Paying the dental hygienist as a percentage of their billings, and not at an hourly rate;
- Clearly stating in the contract that the registered dental hygienist's hourly compensation rate includes expenses for use of the dentist's premises, equipment, receptionist and any other support staff, or charging an administrative fee (e.g., ten percent (10%) of invoice) for the use of the practice's premises, equipment, staff and any other resources;
- Having no set hours for the registered dental hygienist;
- Placing no minimum or maximum number of patients to be treated or hours to be worked;
- Allowing the registered dental hygienist some control over patient volume;
- Allowing the registered dental hygienist to treat patients of other dentists;
- Requiring the registered dental hygienist to provide their own hand tools and uniforms;
- Requiring the registered dental hygienist to be responsible for their own benefits and professional liability insurance, and not providing any vacation or other paid time off;
- Allowing the registered dental hygienist to self-promote by giving lectures, distributing toothpaste, floss and professional business cards, etc.;
- Ensuring that the registered dental hygienist is set up to run their own business; and
- Ensuring that the registered dental hygienist agrees to be responsible for CPP, EI and tax deductions.

Implied Terms of Contracts with Employees

Duties Owed to the Employer

Whether or not there is a written contract in place, all employees have implied obligations of good faith, loyalty, confidentiality and, for certain categories of employees, fiduciary duties. The employee must act in the best interests of the employer.

In addition, the employer has the right to expect that an employee will not, knowingly or wilfully, directly or indirectly, misuse, disclose or disseminate to any third party any confidential information belonging to the employer that the employee acquired in connection with or as a result of their employment with the employer, including trade secrets, the names of patients, price lists, marketing strategies, etc.

In the 2008 case of *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*,[25] the Supreme Court of Canada addressed the implied term of any employment contract, which places a legal obligation on employees to maintain confidentiality and to act in good faith, even after the employment relationship ends. RBC Dominion Securities Inc. ("RBC") had sued its former employees for breach of an implied contractual term not to compete unfairly upon leaving RBC's employ, misuse of confidential information, and other wrongs. RBC also sued its competitor, Merrill Lynch, and its manager for breach of duty in tort for inducing RBC staff to terminate their contracts of employment without notice and to breach their contractual obligations with their former employer. The defendants had removed documents known to be the property of RBC. The case is an example of how a departing employee may be liable for specific wrongs, such as improper use or misuse of confidential information. While a contract of employment ends when either the employer or the employee terminates the employment relationship, residual duties remain.

Employee's Rights

An employment contract cannot provide an employee with lesser rights or benefits than those stipulated in employment standards legislation, which is discussed in Part IV of this manual. Unless an employment agreement containing an enforceable termination provision limiting the employee to their entitlements under the *ESA* on termination has been signed, employees also have an implied right to be provided with reasonable notice of the termination of their employment at common law, as discussed in Part VII of this manual.

While the nature of the employment may evolve and change over time, the employer is generally not entitled to unilaterally alter significant terms and conditions of employment without the consent of the employee (see Part VII of this manual: Constructive Dismissal).

Developing a Written Employment Contract for Employees

As stated above, a written employment contract should be developed and agreed to by the parties prior to the commencement of employment. New contracts can, however, be put into place for existing employees, but legal advice should be sought before doing so.

As elaborated upon throughout this manual, there are many clauses to consider for inclusion in a written contract. At a minimum, the employment agreement should:

- Indicate the term of employment (i.e., indefinite, or for some defined period);
- Indicate the position being hired for;
- Provide a definition and description of the probationary period, if any, and the prerogatives of the employer during that period;
- Provide a mechanism for periodic performance reviews;
- Address days and hours of work, vacation and public holidays;
- Require compliance with office policies and procedures;
- Be clear on remuneration and benefits, if any;
- Discuss how expenses will be reimbursed;
- Include a confidentiality agreement to protect the employer's business interests and patient lists;
- Include a non-solicitation clause and, where appropriate, a non-competition clause;
- Clearly state the notice period for termination and the employee's statutory entitlements to severance pay and benefit and vacation accrual during that time, and exclude the application of the common law;
- Clearly state the notice period for circumstances such as change of employer, sale of a practice, retirement or illness of the employer;
- Include an acknowledgement that the employee has had an opportunity to seek and obtain independent legal advice;
- Confirm the status of the working relationship (e.g., employee, not independent contractor); and
- For existing employees, expressly state the new consideration being provided.

Incorporating Office Policies and Procedures into Contracts

Office policies and procedures are not legally enforceable in the same way that employment contracts are; rather, policies and procedures should be brought to the employee's attention prior to the commencement of the employment relationship and, before commencing employment, the employee should sign an agreement agreeing to be bound by them. The employment contract itself may refer to the enforceability of office policies, to be amended from time to time, or the employee may be asked to sign a separate policy agreement acknowledging that they have read, understand and agree to abide by the policies.

Independent contractors may also be asked to comply with specified office policies/procedures as may be applicable to the independent contractor.

Probationary Periods

A contract should include a probationary period, in order to allow sufficient time for the employer to evaluate the suitability of the new employee for fixed term or indefinite employment. This should be fixed for a period of time determined by the employer (typically, probationary periods are for three (3) months, but could be as long as twelve (12) months), and should represent the longest amount of time the employer might need to assess the employee. During this time, the employer should supervise the employee, and give guidance and support for success on the job.

An employer should act reasonably and fairly in determining suitability, and should allow the employee a reasonable opportunity to demonstrate the ability to meet the standards of the employer as set out in the hiring process. The standards of the employer can include aspects that go beyond skill sets, such as the ability to work with others, compatibility or "fit", character, and usefulness to the employer in the future.

Progress should be evaluated by standards established by the job description. There should be a performance review at the end of the probationary period, and confirmation of employment. An unsuccessful review may result in extending the probationary period or termination of employment.

If the employer decides not to continue the employment of a probationary employee, it should not be assumed that there is no obligation to provide the probationary employee with notice of termination or termination pay. While this may be permissible, depending on the language in the written employment contract and depending on whether the employee's behaviour or performance constitutes "just cause" for dismissal, there may also be an obligation to pay the employee something at this time. The likelihood of being required to provide a probationary employee with reasonable notice of termination increases if the probationary period extended beyond three (3) months, and/or if the employment contract does not effectively limit the employee's entitlements on termination to the statutory minimums pursuant to the *ESA*. In any event, legal counsel should be sought before the termination of a probationary employee to determine whether termination compensation and benefit continuation are required in the circumstances.

Personnel Records

It is important to keep a file containing all pertinent information regarding each employee. Personnel files should be stored in a secure fashion to protect the privacy and confidentiality of the personal information of employees. Records might include payroll information, copies of the employment agreement, performance appraisals, warning letters, and any other information relating to the employment of an individual. Maintaining complete and accurate records is important for payroll audits by CRA or other governmental agencies, and any legal proceeding. CRA requires employers to keep payroll records and supporting documents for six (6) years after the tax year to which they relate. For *ESA* requirements on record keeping for employees, see the "Records to be Kept" section of Part IV of this manual.

Performance Appraisals

Performance appraisals should be completed at regularly scheduled intervals, and should be done honestly so that the employee knows where they stand. Performance reviews provide an opportunity to identify achievements, as well as any areas where improvement is required. A "satisfactory" rating means the employee meets the requirements of the position. A satisfactory or positive appraisal will damage an employer's ability to terminate the employee for performance reasons in the future; accordingly, be candid and, if there are performance deficiencies, note them. The overall assessment should reflect the employer's concerns.

Ideally, performance is assessed and issues are addressed over the course of the year, and the appraisal is a summary of those discussions that sets clear objectives and expectations regarding performance going forward.

Employees should be asked to sign an acknowledgement of receiving a copy of any review, and may also be given an opportunity to respond with their comments for the file.

When holding a performance review, take into account the needs of employees with disabilities. Ensure, for example, that documents are provided in an accessible format, that feedback and coaching is provided in an accessible way, and that any accommodations needed to learn new skills or improve performance are provided.

Notice Periods for Termination

One of the most important clauses to include in a contract of employment is the notice period for, and entitlements upon, termination. So long as the minimum notice, benefit continuation and severance requirements for termination under the *ESA* are met, the parties can agree up front whether the notice period should be longer than as required by the *ESA*. (See Part IV of this manual for more information on *ESA* requirements).

To limit the employer's liability upon termination to only that which is required under the *ESA*, a carefully worded termination clause should be considered, in consultation with legal advice. One example of a termination clause that was upheld by the Ontario Superior Court of Justice in *Lopez v. EMD Inc. (Canada)*,[26] is as follows:

> *EMD Serono may terminate your employment without cause upon giving you the applicable statutory notice, termination pay and/or severance pay to which you may be entitled.*
>
> *[....]*
>
> *You confirm that the termination provisions above, and specifically, the notice and pay in lieu of notice provisions above (sic) are fair and reasonable and are necessary to protect both parties. You further agree that, upon termination of your employment under the provisions of this Agreement, you will not be entitled to any additional notice, pay in lieu of notice or compensation whether under statute, at common law or otherwise. Therefore, you agree that upon termination of your employment under the provisions of this Agreement, you will have no action, cause of action, claim, complaint or demand against EMD Serono or any other person as a consequence of such termination and that you will not file or commence any such action, cause of action, claim or demand against EMD Serono.*

Several recent decisions by the Ontario Court of Appeal have stated that termination clauses in employment contacts must comply with the minimum requirements of the *ESA*, which often requires explicit reference to the employee's entitlement to severance pay, vacation pay and benefit continuation during the *ESA* notice period, as well as explicit reference to the fact that only the minimum *ESA* entitlements will be provided; otherwise, the more generous common law reasonable notice period will apply.[27] The courts prefer to see employees receive notice in excess of the minimum *ESA* requirements, and are more likely to uphold the termination notice given when it exceeds the statutory minimum. Many employment contracts provide additional payment in lieu of notice in exchange for a full and final release agreement being signed by the departing employee.

For circumstances where there is no existing employment agreement in writing and an employer wishes to terminate an employee without cause for dismissal, please see the "Termination Without Cause and Reasonable Notice" section of Part VII of this manual.

Non-Competition and Non-Solicitation (Restrictive Covenants)

Non-competition clauses and non-solicitation clauses are restrictive covenants contained in employment contracts that are aimed at preventing a departing employee from later competing with their former employer, or soliciting the patients and/or employees of the former employer.

Dentists may have an interest in including such clauses in contracts with staff, particularly those who are professionals, such as dentist associates or registered dental hygienists. Such clauses require careful consideration, as was highlighted in a leading employment law decision from the Ontario Court of Appeal that incidentally involved the competing interests of two dentists: *Lyons v. Multari*.[28] The issue in this case was whether a non-competition clause was enforceable. The clause stated: "Protective Covenant. 3 yrs. — 5 mi." (i.e., three (3) years and five (5) miles). In deciding the case, the Court noted that professionals are always recruiting entry level associates, that such recruitment is good for both the principal and the associate, and that it is natural that these relationships end after a few years. Given that the former employer has a legitimate interest to protect their practice but, on the other hand, the departing associate has a legitimate interest to work in the same community after leaving, the Court concluded that the proper balance of the interests is struck by an appropriate non-solicitation clause, rather than a more restrictive non-competition clause. In the result, the covenant agreed to was held to be unenforceable. The following is a summary of the lessons learned from this important case:

- A regular source of referrals to a dental practice is considered part of the "goodwill" of the business, which constitutes a "proprietary interest" that is capable of legal protection;
- There is no proprietary interest in people who were not actual or potential patients, unless the nature of the employment will likely cause patients to perceive an individual employee as the "personification of the company or employer";

- The public should not be denied access to the expertise and services of a professional simply because that professional has stopped working for a particular employer;
- Except in certain circumstances (see below), non-competition clauses in employment contracts are void for the reason that there is a public interest in allowing every person to carry on their trade freely;
- The exception to this general principle is that a covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest; and
- In considering the reasonableness of the covenant, the Court will evaluate "upon an overall assessment of the clause, the agreement within which it is found, and all of the surrounding circumstances". The courts consider the time period of the non-competition agreement (note: rarely do the courts permit longer than twelve (12) months), the reasonableness of the geographic area of the limitation (i.e., X kilometre radius of the practice), and the nature of the business in which the individual is restricted from competing (e.g., orthodontics, hygiene, general dentistry, etc.) and whether it has been properly characterized and limited.

A subsequent case from the British Columbia Court of Appeal provides important guidance to dentists who wish to rely upon non-solicitation clauses. *Dr. P. Andreou Inc. v. McCaig*[29] considered the construction and application of non-solicitation clauses contained in associate agreements with two dentists. It was alleged that the departing dentist unlawfully solicited patients from a former employer by placing advertisements in the local paper. The Court held that a general advertisement announcing the opening of a new practice does not constitute "solicitation", but that parties to an agreement may wish to include a clause that prohibits informational advertising.

It is to be noted that the Professional Misconduct Regulations made under Ontario's *Dentistry Act* prohibited solicitation by an associate of the principal member's patients, except as agreed to in writing. That said, the Regulations recognize that patients have a legal right to know where their former treatment provider is located, and permit former associate dentists to send an announcement to former patients with information limited to that reasonably necessary to inform the patients of a change in practice location and the nature of the new practice.[30]

Dentists looking to protect their proprietary interests should consider obtaining legal assistance in drafting appropriate restrictive covenants that will stand the best chance of being seen to be "reasonable" if ever challenged in court. Restrictive covenants must be reasonable in terms of their temporal application, geographic application, and the description of the business to be protected; otherwise, such clauses will not be enforced by the courts. The courts will enforce only that which they consider to be the very least the dental practice requires in order to protect its legitimate business interests.

Part III — Regulated Health Professional Employees

There are more than 25 regulated health professions in Ontario, governed by the *Regulated Health Professions Act, 1991* (the "*RHPA*"), including four dentistry-related professions: dentistry, dental hygiene, dental technology, and denturism.[31] Employers should have a process of confirming annually the currency of the certificate of registration of all staff members who are regulated professionals, including the requirement that these employees notify the dental office upon loss, suspension or restriction of their certificate of registration.

The Federation of Health Regulatory Colleges of Ontario has published a guide entitled, "Responsibilities of Employers, Managers and Partners under the *Regulated Health Professions Act*".[32] The guide encourages employers of regulated professionals to be familiar with all the governing rules, but in particular describes the following areas, of which employers of regulated health professionals must be especially conscious:

- Mandatory reporting obligations;
- Unauthorized practice and improper use of titles;
- Professional misconduct considerations;
- Record keeping requirements; and
- The duty to cooperate in College investigations.

This part of the manual focuses on the mandatory reporting obligations under the *RHPA*, and on controlled acts in dentistry. In addition, the legislative requirements impacting the scopes of practice for registered dental technologists and registered dental hygienists are discussed.

Mandatory Reporting

Reporting by Members of a Regulated Health Profession

Under section 85.1 of the Health Professions Procedural Code[33] (the "Procedural Code"), a member of any College has an obligation to report another member of the same or a different College, if there are reasonable grounds, obtained in the practice of a profession, to believe that the other member has sexually abused a patient.

Reporting by Employers/Partnerships/Professional Corporations

Under section 85.5 of the Procedural Code, a person who terminates the employment of a member, revokes, suspends or imposes restrictions on the privileges of a member, or dissolves a partnership, a health profession corporation, or association with a member for reasons of professional misconduct, incompetence or incapacity is required to file a report with the applicable College within 30 days. Further, if a person had such an intention, but the member resigned or voluntarily relinquished privileges, the person is still obligated to report.

Self-Reporting

Members are required to self-report to their College if they have been found guilty of an offence.[34] In addition, members are required to self-report a finding of professional negligence or malpractice.[35]

Controlled Acts in Dentistry

The employing dentist needs to be aware of the persons who are entitled to perform certain controlled acts defined under section 27 of the *RHPA*. Controlled acts may only be performed if:

- The person is a member of a profession that is expressly authorized by legislation to perform the controlled act; or
- The controlled act is delegated by a member of a profession who is so authorized to so delegate.

Controlled acts under section 27(2), which may be performed by dentists in Ontario, by virtue of section 4 of the *Dentistry Act, 1991*, include the following:

1. Communicating a diagnosis identifying a disease or disorder of the oral-facial complex as the cause of a person's symptoms;
2. Performing a procedure on tissue of the oral-facial complex below the dermis, below the surface of a mucous membrane or in or below the surfaces of the teeth, including the scaling of teeth;
3. Harvesting tissue for the purpose of surgery on the oral-facial complex.
4. Setting a fracture of a bone of the oral-facial complex or setting a dislocation of a joint of the oral- facial complex;
5. Administering a substance by injection or inhalation;
6. Applying or ordering the application of a prescribed form of energy;
7. Prescribing, compounding or dispensing drugs;
8. Selling a drug; and
9. Fitting or dispensing a dental prosthesis, an orthodontic or periodontal appliance or a device used inside the mouth to protect teeth from abnormal functioning.

Dental offices commonly deal with the question of whether the above acts may also be performed by or delegated to other regulated dental professionals, such as registered dental hygienists and registered dental technologists. Such questions may only be answered by considering the legislation that specifically governs each of these two professions, as discussed below. As well, it should be noted that, under the Professional Misconduct Regulations made under the *Dentistry Act, 1991*, a dentist may delegate a controlled act only if this is permitted in the Regulations. Since the current Regulations do not provide for such delegation, dentists are prohibited from delegating a controlled act to anyone.

Registered Dental Technologists' Scope of Practice

Under section 3 of the *Dental Technology Act, 1991*, registered dental technologists ("RDTs") have a scope of practice that is restricted to "*the design, construction, repair or alteration of dental prosthetic, restorative and orthodontic devices*". Given that the fitting or dispensing of such devices used inside the mouth are controlled acts, the current law does not permit dental technologists to enter the patient's mouth for these purposes. Furthermore, as stated above, there are no legislative rules that would permit dentists to delegate any controlled act to RDTs or any other provider.

The role of the RDT today is therefore limited to the design, construction, repair or alteration of devices, such as bridges, crowns, dentures, implants, and orthodontic and other appliances prescribed by dentists or other regulated health professionals. RDTs also have a role in supervising the technical aspect of a dental laboratory.

Role of RDTs in Shade Verification and Custom Staining

Dentists in Ontario are currently permitted to occasionally send patients to a dental laboratory for shade verification and/or custom staining, as there has been a longstanding accepted practice whereby dentists have been advised by the Royal College of Dental Surgeons of Ontario (the "RCDSO") that, if they require special assistance with custom staining and/or shade selection, they should encourage the RDT to come to the dental office to assist the dentist. However, in the early 1980s, the RCDSO and the-then Governing Board of Dental Technicians entered into a "terms of understanding" on the procedures to be followed in the rare circumstances when a patient must attend a laboratory for shade verification and custom staining. These terms of understanding were published in the June, 1983 issue of *Dispatch* as follows:

- It is understood by the patient, the dentist and the laboratory personnel that the referring dentist is ultimately responsible for the shade selection or custom staining.
- It is understood that laboratory personnel will not place or remove any crown (temporary or otherwise), or perform any intraoral procedure or suggest to the patient that he or she does so.
- Written instructions concerning the tooth (or teeth) requiring shade verification or custom staining, duly signed by the dentist must be supplied to the laboratory in advance of the procedure being performed.

- Shade verification or custom staining of etched-bonded bridges is to be done only prior to fabrication.
- Dentists are not to routinely refer patients to dental laboratories for shade verification or custom staining.
- The dental laboratory may charge the dentist for shade verification and/or custom staining.

Registered Dental Hygienists' Scope of Practice

The scope of practice of registered dental hygienists is governed under section 3 of the *Dental Hygiene Act, 1991*, and is defined as the "*assessment of teeth and adjacent tissues and treatment by preventive and therapeutic means and the provision of restorative and orthodontic procedures and services*". Section 4 of the *Act* authorizes registered dental hygienists to perform the following acts, but such authorization is subject to the terms, conditions and limitations imposed on their certificate of registration, as well as additional requirements prescribed by the Regulations:

1. Scaling teeth and root planning, including curetting surrounding tissue;
2. Orthodontic and restorative procedures; and
3. Prescribing, dispensing, compounding or selling a drug designated in the regulations.

Legislative Requirements Regarding Scaling Teeth and Root Planing

Section 5 of the *Dental Hygiene Act* permits registered dental hygienists to self-initiate the performance of the controlled act of scaling teeth and root planing if:

1. None of the contraindications prescribed in the regulations (see below) are present, and if the registered dental hygienist ceases the procedure if any of the prescribed contraindications to continuing the procedure are present; or
2. The procedure is ordered by a member of the RCDSO.

With respect to the contraindications referred to at point 1 above, if a patient has not received clearance from a physician or dentist, or both, section 7 of Ontario Regulation 218/94, made under the *Dental Hygiene Act, 1991*, sets out the prescribed contraindications as follows:

- Any cardiac condition for which antibiotic prophylaxis is recommended in the guidelines set by the American Heart Association (AHA), as those guidelines are amended from time to time, unless the member has consulted with either the patient's physician, dentist or registered nurse in the extended class (RN(EC)) and determined that it is appropriate to proceed if the patient has taken the prescribed medication per the AHA guidelines;
- Any other condition for which antibiotic prophylaxis is recommended or required;
- An unstable medical or oral health condition where the condition may affect the appropriateness or safety of scaling and root planing, including curetting surrounding tissue;
- Active chemotherapy or radiation therapy;
- Significant immunosuppression caused by disease, medications or treatment modalities;
- Any blood disorders;
- Active tuberculosis;
- Drug or alcohol dependency of a type or extent that it may affect the appropriateness or safety of scaling and root planing, including curetting surrounding tissue;
- High-risk of infective endocarditis;
- A medical or oral health condition with which the registered dental hygienist is unfamiliar or that could affect the appropriateness, efficacy or safety of the procedure; and
- A drug or combination of drugs with which the registered dental hygienist is unfamiliar or which could affect the appropriateness, efficacy or safety of the procedure.

In addition, a registered dental hygienist shall not perform a procedure of scaling teeth/root planing if they are in doubt as to the status or accuracy of the medical or oral history of the patient.

It is important to be aware that not all registered dental hygienists are qualified to undertake the performance of scaling teeth and root planing on their own initiative, as they must first demonstrate to their College — the College of Dental Hygienists of Ontario (the "CDHO") — that they have met the necessary educational and experiential qualifications. Those registered dental hygienists who wish to self-initiate must first apply for and receive authorization from the CDHO. Those who qualify to self-initiate scaling and root planing are identified on the public register and have received a seal to place on their wall certificates.

In some cases, registered dental hygienists or their employing dentist may wish to continue relying upon an order from the dentist before initiating scaling teeth/root planing. All registered dental hygienists who have not received authorization from the CDHO to self-initiate are required to:

- Work on an order from a member of the RCDSO;
- Have a hard, accessible copy of any standing order(s), signed by the dentist and the registered dental hygienist;[36]
- Have documentation to support specific orders, such as an initialled and dated chart or patient specific record notes; and
- Record a reference to the order in each patient entry.

Legislative Requirements Regarding Orthodontic and Restorative Procedures

Under section 5(2) of the *Dental Hygiene Act, 1991*, a registered dental hygienist may perform orthodontic and restorative procedures only if the procedures are ordered by a member of the RCDSO. It is to be noted that the CDHO will issue specialty certificates for registration as a restorative dental hygienist. Section 34 of the General Regulation made under the *Dental Hygiene Act, 1991*, sets out registration requirements for a specialty certificate of registration as a restorative dental hygienist.

Part IV — Employment Standards

The *Employment Standards Act, 2000*, as amended (the "*ESA*"), establishes the minimum terms, conditions and standards of employment, and sets out the workplace requirements, rights and obligations of employers and employees in Ontario. The Ministry of Labour (the "Ministry"; the "MOL") is responsible for enforcing these minimum requirements, and the will investigate complaints and may inspect payroll records and workplace practices.

The MOL provides a number of resources to assist employers and employees in understanding employment standards. These are available at: https://www.labour.gov.on.ca/english/es/.

This part of the manual reviews the various minimum standards set out in the *ESA*. It should be noted, however, that not all employees will necessarily qualify for every *ESA* right, and employers should consult with the legislation, the Ministry and/or legal counsel. Also, if an employee is entitled to a greater right or benefit than those provided for by the *ESA* by virtue of their employment contract, workplace policy or another Act, that greater right or benefit will prevail over the minimum standard established under the *ESA*.[37]

Posting of Information on Rights and Obligations

Section 2(3) of the *ESA* requires every employer to post and keep posted in at least one conspicuous place in every workplace a copy of material prescribed and prepared by the MOL. The poster could, for example, be posted in the staff lunch room. A copy of the poster currently in effect is appended as Appendix "D" to this manual. The poster outlines employees' rights and employers' obligations under the *ESA*. As the Ministry updates the poster from time-to-time to incorporate new amendments under the *ESA*, employers should ensure that their poster is current. Employers should be aware that, if the majority language of a workplace is a language other than English, the employer is required to check whether the Ministry has translated the prescribed material into that language[38] and, if so, to post that material next to a copy of the prescribed material.

Public Holidays

Public holidays, are also known as statutory holidays, include the following:

- New Year's Day
- Family Day
- Good Friday
- Victoria Day
- Canada Day
- Labour Day
- Thanksgiving Day
- Christmas Day
- Boxing Day

Note that the August Civic Holiday (the first Monday in August) is not a public holiday, although many employers do provide employees with the day off with pay.

To determine whether an employee is entitled to public holiday pay, the employer should review sections 24 to 32 of the *ESA* to clarify eligibility, as well as how to calculate the entitlement. Most employees will be entitled to public holiday pay based on the formula set out in the *ESA*.

Who Qualifies for Public Holiday Pay?

Most — but not all — employees are eligible for public holiday pay, whether they are full-time or part-time, permanent or on a limited-term contract, students or casual staff. It does not matter how recently they were hired, or how many days they worked before the public holiday.

If an employee who qualifies agrees in writing to work on the holiday, there are two (2) options:

- The employee is entitled to wages at their regular rate for all hours worked on the public holiday plus another regular working day off with public holiday pay (and this substitute day off must be scheduled for no later than three (3) months after the public holiday or, if the employee has agreed in writing, up to twelve (12) months after the public holiday);

  OR

- If the employee agrees in writing, they are entitled to public holiday pay for the public holiday plus premium pay (i.e., 1.5 times the employee's regular rate) for all hours worked on the public holiday. In this case, the employee is not given a substitute day off.

Who Does Not Qualify?

Certain regulated professionals — such as dentists — are exempt from public holiday entitlements under the *ESA*; however, registered dental hygienists, dental assistants and other dental office staff are not exempt.

How is Public Holiday Pay Quantified?

Employers should consult the MOL website for more information on how to calculate public holiday pay.[39] Generally, for those entitled, public holiday pay amounts to the employee's regular wages earned in the four weeks prior to the work week in which the public holiday falls, plus any vacation pay payable during that period, divided by 20. "Regular wages" do not include overtime pay, public holiday pay, vacation pay, other premium pay or personal emergency leave pay.

Employers Who Provide More Than the Required Number of Holidays

Some employers already provide more than the required number of holidays (e.g., "floater days" in addition to the current public holidays described above). These might include, for example, Easter Sunday, Easter Monday, the Civic Holiday, or Remembrance Day.

Such additional holidays are not public holidays under the ESA. If an employee's employment contract allows for more holidays than the statutory minimum, the employer might have the option to substitute one of these additional paid days for a public holiday. Legal advice should be sought to confirm your set of circumstances.

Retail Business Holidays Act and Whether Dental Offices can "Open" on Public Holidays

Ontario's *Retail Business Holidays Act* (the "RBHA") requires certain business to be closed during certain public holidays. Some businesses are expressly exempt from the *RBHA*; however, dental offices are not specifically mentioned. The *RBHA* is therefore not clear on whether dental offices are captured.

As a matter of statutory interpretation, it is unlikely that dental offices were intended to be captured by the *RBHA*, as dentists are exempt from the public holiday benefits under the *ESA*, which suggests a public need to have dentists available to provide services even during public holidays. It is difficult to reconcile this requirement with an interpretation under the *RBHA* that would require closure of dental clinics on public holidays.

Thus, while the ODA supports an interpretation that suggests dental offices are exempt from the *RBHA*, such interpretation is not certain. The ODA therefore recommends that dentists who wish to operate during public holidays do so by appointment only (including, for example, to respond to emergencies), such that the store front operation is arguably "closed". Any decision to remain open of course remains with the owner of the dental practice, but any employee who refuses to work during the public holiday has the right to so refuse per the above rules under the *ESA* regarding public holidays.

Sale or Transfer of a Practice

Under section 9 of the *ESA*, if an employer sells a business or part of a business and the purchaser employs an employee of the seller, the employment of the employee is not deemed to be terminated at the time of sale; rather, the employment with the seller is deemed to have been the employment of the purchaser for the purpose of calculating entitlements under the ESA, including vacation pay, pregnancy and parental leaves, notice of termination and termination pay. In other words, the purchaser inherits the service of the employee and all service-based entitlements.

If, however, the new employer hires the employee more than 13 weeks after the employee's last day of employment with the seller, or 13 weeks after the day of sale (whichever takes place earlier), the employee is deemed, for the purposes of the *ESA*, to have just commenced a new job.*

If the purchaser chooses not to employ an employee of the predecessor employer, the seller may need to comply with the *ESA*'s requirements for termination and severance pay, if applicable, as well as benefit continuation, and independent legal advice should be obtained on how to manage the changeover.

Payment of Wages

The employer is required to establish regular pay periods and pay days. Payment of wages may be done by cash, cheque, or direct deposit (see section 11(4) of the *ESA* for detailed requirements for direct deposit payments).

On or before the pay day, the employer is required to give a written statement setting out:

- The pay period for which wages are being paid;
- The wage rate;
- The gross amount of wages and how that amount was calculated, including any amounts for vacation or public holiday pay;
- The amount and purpose of each deduction; and
- The net amount of wages being paid.

An employer cannot withhold wages for any reason except as required by statute or a court order, and in limited other circumstances when written consent is provided by the employee. For more information on this topic, see section 13 of the *ESA*.

Records to be Kept

An employer is generally required to keep the following information with respect to each employee:

- Name and address;
- Date of birth if the employee is a student and under age 18;
- Date of commencement of employment;
- Dates and times the employee worked;
- Number of hours worked each day and each week;
- The statement of wages given for each pay period;
- Information contained in any written statements required to be given to the employee under the *ESA*; and
- Information regarding entitlement to vacation pay and vacation time.

The *ESA* sets out the retention period for various kinds of information, but generally it is for three years after the employee ceases to be an employee, or for a longer period if the employee is under age 18.

Pursuant to the *ESA*, the following specific records must also be retained, for the following time periods:

Record	Retention Period
Dates and times employee worked	3 years
Yearly vacation pay and how calculated	5 years
Vacation pay earned during the stub period, and how calculated	5 years
Date of public holidays employee worked, if any, date of any substitute holidays taken, and date substitute holiday statement provided to employee	3 years

* A gap of this length may not be sufficient to satisfy a judge that the prior employment should not be considered for common law purposes. Common law considerations on the sale or transfer of a practice are addressed in Part VII of this manual, "Termination on the Sale or Winding Down of a Practice".

As of January 1, 2019, the *ESA* will be amended to require that the following, additional records be kept for the following time periods:

Record	Retention Period
Dates and times employee scheduled to work and any changes to their schedule	3 years
Any cancellations of employee's scheduled work day and date and time of cancellation	3 years

See Section 15 of the *ESA* for more detail on record retention.

Hours of Work

Under section 17 of the *ESA*, an employer cannot require an employee to work more than eight (8) hours in a day, unless the employer has established a "regular" work day of more than eight (8) hours and so long as the employee is not required to work more than forty-eight (48) hours in a week. An employer may permit an employee to work even longer hours, so long as the employee agrees to those hours and the employer seeks and obtains approval from the Director of Employment Standards under section 17.1 of the *ESA*, in the form of a Ministerial permit.

Employees must be paid for all hours worked, including time spent on set up, clean up, charting, staff meeting, and mandatory attendance at training and seminars.

Eating Periods

An employer is required to give at least a 30-minute break period in each consecutive five-hour period of work, such that the employee is not required to work more than five (5) hours without an eating period.[40] An employer is not required to pay the employee during the eating period, unless the employment contract requires such payment.[41]

Overtime Pay

With certain exceptions set out in section 22 of the *ESA*, an employer is required to pay an employee overtime pay of at least one and one-half times (1.5 times) the regular rate for each hour of work in excess of forty-four (44) hours in each week. If the employee's regular hours of work per week are less than forty-four (44) and an employment agreement so provides, there is a possibility that this overtime threshold will be met sooner.

Time Off in Lieu

The employee may be compensated for overtime hours by receiving time off work for overtime worked instead of overtime pay. For this to be permissible, the employee must receive time off in lieu at a rate of one and one half hour (1.5) of paid time off for each hour of overtime worked. The employer and employee must also enter into a written agreement which, among other things, provides that the time off will be taken within three (3) months (or where the employee agrees — within twelve (12) months).

Scheduling

Three Hour Rule:

As of January 1, 2019, under section 21.2 of the *ESA*, employees who regularly work more than three (3) hours per day and who are available to work more than three (3) hours on a given day, and who, upon reporting to work, are given fewer than three (3) hours of work, must be paid for three (3) hours at their regular rate. This rule does not apply, however, if the employer is unable to provide work due to a cause beyond its control (e.g., a power failure).

Minimum Wage

Effective January 1, 2018, Ontario increased the minimum wage to fourteen dollars ($14.00) per hour. The minimum wage is frozen at fourteen dollars ($14.00) per hour, and any CPI adjustments are deferred until October 2020. Employers should consult the Ministry for updates, and for the minimum wage for certain types of employees, such as students under age 18.[42]

Vacations and Vacation Pay

Generally, an employer is required to give an employee a vacation of at least two (2) weeks after each vacation entitlement year that the employee completes. In addition to the requirement to give "vacation time," there is a corresponding requirement that employees receive "vacation pay" in an amount equal to four percent (4%) of the employee's wages earned in the period during which the vacation is earned.

After five (5) completed years of service, employees are entitled to three (3) weeks of vacation time, and a corresponding six percent (6%) of wages as vacation pay.

Part XI of the *ESA* should be consulted for details on how the employer is to establish a vacation entitlement year, how to calculate vacation pay, the timing of vacation, how vacation pay is paid, etc.

Equal Pay for Equal Work

The *ESA* prohibits an employer from paying an employee of a given sex at a rate of pay less than the rate paid to an employee of another sex when the employees perform substantially the same kind of work in the same establishment, under similar working conditions and using the substantially the same skills, effort and responsibility. Also, an employer is prohibited from reducing the rate of pay of an employee for the purpose of complying with this requirement.

Benefit Plans

While employers are not required to provide benefits plans to their employees, if they do, both they and anyone acting on their behalf (e.g., an insurer) are prohibited from providing or offering a benefit that treats employees, beneficiaries, survivors or dependants differently because of age, sex, marital status (including same-sex partnership status). The employer should be clear about who pays the premium cost, including any premium share of benefits and whether the plan is mandatory for all employees or not. The employee should agree in writing to waive benefits coverage, if that is an option. Employees who are paying some percentage of the premium share should agree to do so by way of regular deduction from pay.

Pregnancy Leave

Pregnancy leave is distinguished from parental leave under the *ESA*, and both are not to be confused with maternity benefits and parental benefits available under the federal *Employment Insurance Act*.

Under the ESA, a pregnant employee is entitled to a leave of absence without pay unless her due date falls fewer than thirteen (13) weeks after she commenced employment. The employee may begin her pregnancy leave no earlier than seventeen (17) weeks before her due date or the day she gives birth. The employee is required to give her employer at least two (2) weeks' notice before the day the leave begins and, if requested by the employer, a certificate from a legally qualified medical practitioner stating the due date.

If an employee is entitled to parental leave, the pregnancy leave ends seventeen (17) weeks after the leave began. If the employee is not entitled to parental leave, the pregnancy leave ends either seventeen (17) after the pregnancy leave began or twelve (12) weeks after the birth, still-birth or miscarriage (whichever came first). An employee may choose to end her pregnancy leave early by giving her employer at least four (4) weeks' written notice. An employee on pregnancy leave is prohibited from terminating her employment before or when the leave expires, without giving her employer at least four (4) weeks' written notice.

It is important to take note that — as with any *ESA* benefit or right — these protections are available only to those who are in fact employees of the office. Those who are independent contractors are not covered by the *ESA*. Furthermore, as employers are not required to submit Employment Insurance ("EI") deductions for those who are not employees, those independent contractors who do wish to take time off from the provision of dental services after having a baby may not be entitled to EI benefits during their maternity leave, if they do not have other sources of employment.

Complicated Pregnancies

If an employee stops working because of a complication caused by her pregnancy or because of an early birth, still-birth or miscarriage that occurs earlier than the due date, the employee is required to give the employer written notice, within two (2) weeks after she stops working, of the day the pregnancy leave began or is to begin. Also, if requested by the employer, the employee must give a certificate from a doctor stating that the employee is unable to perform her duties because of a complication caused by the pregnancy or the date of the still-birth or miscarriage, as the case may be.

Employees who are ill during pregnancy may access EI sick benefits prior to the commencement of their pregnancy leave. Pregnancy leave begins no later than the later of: the due date, or the birth date.

Parental Leave

An employee who has been employed by their employer for at least thirteen (13) weeks and who is the parent of a child is entitled to a leave of absence without pay following the event of the birth of the child or the coming of the child into the employee's custody, care or control for the first time.

The parental leave may begin no later than seventy-eight (78) weeks after the event. An employee who has taken pregnancy leave must begin her parental leave when her pregnancy leave ends, unless the child has not yet come into her custody, care and control.

To take parental leave, at least two (2) weeks' written notice is required, unless the child comes earlier than expected. If the employee took pregnancy leave, parental leave ends sixty-one (61) weeks after it began. Otherwise, for parents who do not or cannot take pregnancy leave, parental leave ends after sixty-three (63) weeks. To end the parental leave earlier, four (4) weeks of written notice is required. If the employee wishes to terminate employment after parental leave, four (4) weeks' notice is required.

Effective January 1, 2019: Sick Leave, Family Responsibility Leave and Bereavement Leave (Replaces Personal Emergency Leave)

After two (2) weeks of employment, an employee is entitled to each of the following:

- **Sick Leave:** Up to three (3) days of unpaid leave each calendar year for personal illness, injury or medical emergency.
- **Family Responsibility Leave:** Up to three (3) days of unpaid leave in each calendar year for the illness, injury, medical emergency or urgent matter of defined family members.
- **Bereavement Leave** — up to two (2) days of unpaid leave in each calendar year to be used for the death of defined family members.

For the purposes of Family Responsibility Leave and Bereavement Leave, the list of defined family members is as follows:

- Spouse (including same sex partner);
- Parent, step-parent, foster parent of the employee or the employee's spouse;
- Child, step-child or foster child of the employee or the employee's spouse;
- Grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse;
- Spouse of a child of the employee;
- Employee's brother or sister; and
- A relative of the employee who is dependent on the employee for care or assistance.

For each of these leaves, the employer may require the employee to provide evidence reasonable in the circumstances that the employee is entitled to the leave, which may include a medical note from a qualified health practitioner.

As noted earlier in this manual, an employment contract may provide a greater right or benefit in terms of paid time off for illness, bereavement, or family responsibilities (e.g., sick leave, bereavement leave, etc.), in which case that standard would apply and additional leave days need not be provided. In considering whether your current policies provide a greater right or benefit, it is necessary to consider a variety of factors, including the number of leave days given, whether they are with or without pay, the purposes for which the leave days can be taken, and the qualifying criteria to be eligible to use the leave days. Before concluding that the time off you provide to your employees is greater than that provided for under the *ESA*, it is advisable to consult with legal counsel.

Other Leaves

For more information on the other types of leaves available under the *ESA*, please consult the chart appended as Appendix "E" to this manual.

Rights of Employees on Leave

During any of the leaves described above, an employee has the right to continue to participate in the employer's group insurance, benefit and pension plans during the length of the leave (unless they elect in writing not to do so), and the employer has a corresponding obligation to continue to make any contributions to these plans on the employee's behalf.

In addition, at the conclusion of a pregnancy, parental or emergency leave of absence or other leave available under the *ESA*, an employer is required to reinstate the employee back to their pre-leave position, if the position still exists. Employers should note that the following circumstances are **not** likely to justify a failure to comply with this requirement:

(a) The employer prefers the employee's replacement;

(b) The employer wishes to fire the employee for performance issues that were not properly addressed before the leave; and

(c) During the leave, the employer has redistributed the employee's duties to others in the office, thereby "eliminating the position."

If the position legitimately no longer exists when the employee is ready to return to work following a leave, the employer is obligated to return the employee to a comparable position, if one exists.

Temporary Lay-Off

A temporary lay-off can either be a lay-off to a maximum of thirteen (13) weeks in any period of twenty (20) consecutive weeks, or a lay-off of up to thirty-five (35) weeks in any period of fifty-two (52) weeks, so long as the employer complies with the requirements of the *ESA* to provide additional benefit entitlements. There are certain steps that must be taken to ensure that the lay-off is properly done, and employers should consult the legislation and with legal counsel for more details.

A temporary lay-off done in accordance with the *ESA* is not considered termination of employment for the purposes of the *ESA*. If the lay-off continues longer than is permitted, however, the employment is deemed terminated on the first day of the lay-off. For example, if a dentist decides to close down their practice for the summer, the dentist might decide to temporarily lay off the staff. In such a case, the staff would be entitled to apply for, and might be eligible to collect, EI during the summer.

Dentists should note, however, that laying off employees temporarily without the required amount of notice, although not a violation of the *ESA*, could have other legal consequences; for example, it could be considered a termination of employment for common law purposes, such that the employees may become entitled to generous reasonable notice of termination. It is therefore recommended that this step be taken only with the advice of employment law counsel. The employment contract should specifically provide for the employer's ability to temporarily lay off the employee in accordance with the *ESA*.

Termination and Severance of Employment

Employees who have been employed continuously for three (3) months or more are generally entitled to be given written notice of termination, or termination pay in lieu of notice, or a combination of both. Certain employees are not entitled to notice or termination pay, and employers should consult the Ministry, the *ESA*, and legal counsel before terminating employees. The notice period depends on the length of employment, as set out in the table below.

Section 12.1 of the *ESA* sets out the information required in a written statement, which the employer is required to give on termination. An employer is also required to provide a written notice of termination letter.

Employers should also be aware that this section outlines only the employee's **minimum** *ESA* entitlements on termination. Additional entitlements are discussed in Part VI of this manual.

Notice Periods for Termination

The *ESA* sets out the following minimum notice periods for terminating an employee:

Length of Service	Notice Period
Three (3) months or more but less than 1 year	One (1) week
One (1) year but less than three (3) years	Two (2) weeks
Three (3) years but less than four (4) years	Three (3) weeks
Four (4) years but less than five (5) years	Four (4) weeks
Five (5) years but less than six (6) years	Five (5) weeks
Six (6) years but less than seven (7) years	Six (6) weeks
Seven (7) years but less than eight (8) years	Seven (7) weeks
Eight years or more	Eight (8) weeks

Generally, the time spent by an employee on leave (e.g., sick or pregnancy/parental leave) or other inactive employment is included in determining the period of employment.

During the minimum statutory notice period indicated above, the employer is not permitted to reduce the wage rate or alter any other term or condition of employment, and the employer is required to continue to make benefit plan contributions until the end of the notice period.

Notice must be given in writing, addressed to the employee, and served personally. If personal service is not possible, it must be sent to the employee's last known address on file with the employer.

Pay Instead of Notice

An employer may terminate an employee without giving working notice or with less working notice, so long as they pay the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive had working notice been given, and continue to make benefit plan contributions and ensure accrual of vacation pay during the notice period.[43]

If there has been no regular work week and the employer wishes to provide pay in lieu of notice, the employer is required to pay an amount equal to the average amount of regular wages earned per week for the weeks worked in the period of twelve (12) weeks before the notice is given.[44]

Severance Pay

Severance pay is not the same as termination pay and, in the appropriate circumstances, may be payable in addition to the termination pay. Employers should consult section 64 of the *ESA* to determine whether severance pay is applicable; it generally applies only in cases where the employee has five (5) or more years of service and the employer's Ontario payroll consists of $2.5 million or more. Severance pay is calculated based on all service with the employer and must be paid in a lump sum. Severance pay is calculated at one (1) week's regular pay per every year of completed service, to a maximum of twenty-six (26) weeks' regular pay. Severance pay is prorated for partial years of service.

Complaints

A person who alleges that the *ESA* has been contravened may file a complaint with the Ministry of Labour. There is a two-year (2) limitation period to initiate the complaint process.

Under section 97 of the *ESA*, an employee who files a complaint for a failure to pay wages or benefits, or for entitlement to termination or severance pay, may not commence a civil court action with respect to the same matter unless the complaint is withdrawn within two (2) weeks of being filed. Further, a person who has commenced a civil court action for wrongful dismissal may not initiate a complaint under the *ESA*.

Employers should be aware that an employment standards officer, with appropriate identification, may, without a warrant, enter and inspect any place to investigate possible contraventions of the *ESA*.

Resources

There are several policies published by the MOL to assist in the interpretation of the *ESA*. To read Your Guide to the *Employment Standards Act*, go to:
https://www.ontario.ca/document/your-guide-employment-standards-act-0.

For information on EI or Record of Employment inquiries, contact the Employer Contact Centre at: 1-800-367-5693; or visit: https://www.canada.ca/en/employment-social-development/corporate/contact/employer-contact-center.html.

Part V — Human Rights Considerations

The *Ontario Human Rights Code*, as amended (the "*Code*") represents public policy in Ontario that recognizes the inherent dignity and worth of every person, and provides for equal rights and opportunities without discrimination. The *Code* requires equal treatment with respect to employment without discrimination on the basis of race, ancestry, place of origin, color, ethnic origin, citizenship, creed, sex (including pregnancy), sexual orientation, gender identity, gender expression, age, record of offences, marital status (including same-sex partnership status), family status or disability (which includes both physical and mental disabilities, such as intellectual disabilities and mental illness). The legislation sets out exceptions to this general principle, including affirmative action programs and certain types of employment in which "discrimination" is allowed on the establishment of a *bona fide* occupational requirement.

The Human Rights Tribunal of Ontario (the "Tribunal") enforces the *Code*, and complaints are filed with the Tribunal.

Accommodation for Disability: *Bona Fide* Occupational Requirement ("BFOR")

A person's rights are not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements of a position because of a disability. A person is not deemed to be incapable of performing the essential duties of the job unless the needs of the person cannot be accommodated without undue hardship on the part of the employer. The only way that an employer can justify discrimination that violates the *Code* is by establishing the existence of a BFOR; however, a BFOR cannot be proven until the employer can demonstrate that it would have been nearly impossible to accommodate the employee.

As noted earlier in this manual, the process of accommodation is a shared responsibility between the employer and employee, and requires the cooperation of everyone involved to identify solutions appropriate to the individual, taking into account the privacy, autonomy and dignity of the employee. At a minimum, employers must show a willingness to explore solutions, and in every case it is important to consult the employee. The employer should document its efforts, discussions, and decisions, with the reasons for same, whenever accommodation is sought, provided or denied.

Accommodation is required up to the point of "undue hardship." This suggests that employers will be required to endure some hardship in the accommodation process. Issues around accommodation can be some of the most difficult legal issues employers face. Before refusing an employee's request for accommodation, or before terminating the employment of a disabled employee, dentists might consider getting advice from an employment lawyer.

For more information on disability accommodation, you may wish to consult the Commission's Policy and Guidelines on Disability and the Duty to Accommodate, a copy of which is available on the Commission's website at: http://www.ohrc.on.ca/so/node/2461.

Harassment in the Workplace

Section 5(2) of the *Code* states:

> *Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.*

"*Harassment*" under the *Code* is defined as, "*engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome*".[45]

Sexual Harassment

Section 7(2) if the *Code* states:

> *Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee.*

Section 7(3) states:

Every person has a right to be free from,

- *a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or*
- *a reprisal or threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.*

For additional information, employers should consult the Commission's Policy on Preventing Sexual and Gender-Based Harassment.[46] This Policy has been established to assist employers and other members of the public in understanding the scope of the *Code*'s protection. It also assists in understanding the distinction between accepted social interaction or "consensual" relations, and behaviour that is known or reasonably known to be "unwelcome". It offers suggestions on how to prevent sexual harassment in the workplace, how to avoid a "poisoned environment", and how to develop a workplace policy on sexual harassment.

Harassment Under the *Occupational Health and Safety Act* (the "OHSA")

Harassment, including personal harassment, harassment based on a ground protected by the *Code* and sexual harassment, is also prohibited by the *OHSA*, which sets out detailed requirements for workplace policies and programs to prevent — and protect employees against — workplace harassment.

Under the *OHSA*, the following definitions apply:

"workplace harassment" means,

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or

(b) workplace sexual harassment;

"*workplace sexual harassment*" means,

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or

(b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

"workplace violence" means,

(a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,

(b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,

(c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

Part VI — Occupational Health & Safety

Under Ontario's *Occupational Health and Safety Act*, as amended (the "*OHSA*"), all workers, whether they are employees or independent contractors, together with the "employer" (which, under the *OHSA*, includes a person who contracts for the services of a worker) are required to share responsibility for ensuring health and safety in the workplace.

Workplaces with more than five (5) and less than twenty (20) workers are required to select from among themselves one person to be a health and safety representative. This representative must be trained in accordance with the regulations made under the Act, and has responsibilities under the *OHSA* that are similar to those of a Joint Health and Safety Committee (such committees being required in workplaces with twenty (20) or more workers). Committees must have two (2) or four (4) employee representatives and two (2) or four (4) employer representatives, depending on the size of the employer.

Rights and Obligations Under the *OHSA* That Apply to all Workplaces

Even in settings where there are fewer than five (5) workers, there are still obligations on the part of both workers and employers under the *OHSA*, and therefore all dental offices in Ontario should be aware of these requirements. Dentists and their staff should work closely together to oversee the office's occupational health and safety program and to review and/or update the office's occupational health and safety policy on an annual basis. In part, these measures should aim to:

- Ensure that equipment, materials and protective devices are maintained in good condition and used appropriately;
- Ensure that workers have the information, instruction and supervision required to protect their health and safety;
- Acquaint workers with any hazard in the workplace, including the handling, storage, use, disposal and transport of any article, device, equipment or a biological, chemical or physical agent;
- Identify any potential or actual danger to the health and safety of workers;
- Take every precaution that is reasonable for the protection of workers;
- Ensure that a copy of the *OHSA* and any explanatory material prepared by the Ministry of Labour (the "MOL"; the "Ministry") are obtained directly from the Ministry and made available to staff;
- Ensure that workers are aware of the office's occupational health and safety policy;
- Have a protocol in place to address work related injuries;
- Keep and maintain accurate records of the handling, storage, use and disposal of biological, chemical or physical agents as required by the regulations;
- Ensure that all hazardous materials present in the workplace are identified, and that workers are trained in the use of such materials;
- Obtain and make available to workers a safety data sheet ("SDS") for each hazardous material, and ensure that the SDS is not expired;
- Ensure that workers are using or wearing the required protective clothing, equipment or devices;
- Ensure that a process is in place for workers to voice concerns about occupational health and safety or defects in any equipment or protective devices, so that appropriate steps may be taken to address these situations; and
- Ensure that a copy of the Workplace Harassment and Violence Prevention Policy and Program is posted in the dental office.

A copy of the *OHSA* and a Guide to the *Act* may be obtained directly from the Ministry's website.[47] The Guide provides information on how to prepare an occupational health and safety policy and program for the workplace.

Workplace Harassment and Violence Policies and Programs

All employers who employ more than five (5) workers, whether full- or part-time, must have a workplace harassment policy and program, as well as a workplace violence policy and program, which include measures and procedures for: assessing the risks of workplace violence, summoning immediate assistance in the event of workplace violence, reporting workplace violence or harassment (including an alternate person to whom reports may be made, if the usual individual is alleged to have engaged in harassment), investigating incidents in a competent, thorough and confidential manner, and informing complainants and respondents of the outcome of an investigation.

If an employer becomes aware, or ought reasonably to be aware, that domestic violence that is likely to expose a worker to physical injury may occur in the workplace, the employer must take all reasonable precautions to protect the worker(s) at risk.

All incidents and complaints of alleged workplace harassment must be investigated, a report of findings made, and corrective action taken if required. The complainant must be advised of any corrective action taken.

The employer has an obligation to train its workers with respect to its policies and programs, including the workplace violence and harassment policies and programs, and to review such policies annually, as well as after any incident occurs in the workplace.

Other Resources for Establishing Health and Safety Policies and Procedures

The ODA, in conjunction with the Public Services Health & Safety Association, published *Health & Safety Programs: A Guide for Dental Practices 2016-2017*, to provide dental offices in Ontario with a framework for the development of a health and safety program that satisfies the requirements of the *OHSA*. This Guide, along with other resources and tools, is available on the member section of the ODA website. The Guide provides sample content for the following:

1. A health and safety policy and program;
2. Workplace violence and harassment policy and program;
3. Terms of reference for a health and safety representative;
4. Employee incident report form;
5. Investigation form;
6. First aid procedures;
7. Workplace inspection report form;
8. Hazard assessment in the dental practice;
9. Health and Safety training matrix; and
10. Orientation checklist for staff.

For more information on the resources available through the ODA, please contact the Department of Professional Affairs.

Radiation Safety

All dental offices should be familiarized with the *OHSA*'s X-Ray Safety Regulation,[48] which sets out detailed requirements for the safety of X-ray workers in Ontario.

The ODA, in conjunction with the Public Services Health & Safety Association, published the *Radiation Safety Program: A Guide for Dental Practices*. This Guide, along with other resources and tools, is available on the member section of the ODA website. For more information on the resources available through the ODA, please contact the Department of Professional Affairs.

Workplace Hazardous Materials Information System ("WHMIS")

WHMIS is a Canada-wide system designed to give employers and workers information about hazardous materials in the workplace. Under federal laws, suppliers who manufacture, process, package, sell or import hazardous materials have a legal obligation to classify products, label them in accordance with the classification system, and provide the Safety Data Sheets (SDS) with the sale and distribution of these controlled products. Hazardous products, formerly called controlled products, include products that may be classified as either physical hazards or health hazards.

The SDS is a technical document or bulletin that summarizes the health and safety information available about a hazardous product, and supplements the warning information on the label. In accordance with new WHMIS 2015 standards, which are part of the Globally Harmonized System for the Classification and Labelling of Chemicals ("GHS"), and will be fully in place as of December 2018, information on labels will be updated to make them easier to understand, and the format of SDS will be updated and information provided consistently across different suppliers. If you use a WHMIS 1988 product in a workplace after November 30, 2018, you must create a WHMIS 2015-compliant label to place on the product, as well as a WHMIS 2015-compliant SDS if you are unable to get one from the supplier.

Since suppliers are not in a position to anticipate every required protective measure for every workplace to which the product is sold, employers have an obligation to provide worker education programs tailored to the use of such products in their workplace. Employers must now ensure workers are trained on hazardous products with the new WHMIS 2015 and SDS as soon as possible before they are used.

For more information on WHMIS, employers should consult the WHMIS Regulations under the *OHSA*,[49] as well as the Ministry of Labour website.[50]

In addition, the ODA, in conjunction with the Public Services Health & Safety Association, published *WHMIS Program: A Guide for Dental Practices, 2016-2017*, which provides an overview of the WHMIS Regulation and its applicability to dental offices, as well as information on WHMIS policy and program requirements, worker education and training, personal protective equipment, WHMIS symbols, WHMIS program checklist, etc. This Guide, along with other resources and tools, is available on the member section of the ODA website. For more information on the resources available through the ODA, please contact the Department of Professional Affairs.

Workplace Inspections by the Ministry of Labour

The *OHSA* gives inspectors the authority to enter a workplace at any time without warrant or notice (unless the workplace is part of a dwelling, in which case either the consent of the occupier or a warrant is required). The ODA recommends that members take measures to ensure that persons holding themselves out as inspectors under the *OHSA* provide proper identification, which should include confirmation of the person's identity by following up directly with the MOL before allowing such persons to enter the workplace.

Management Liability

Compliance with the *OHSA* is particularly important given that supervisors, managers, officers and directors can be held personally liable for a failure to comply with the *OHSA*. Liability can lead to significant fines, and criminal prosecution.

Part VII — Terminating the Working Relationship

Note: this part applies to the employee/employer working relationship and **does not apply to working arrangements with independent contractors**. When considering the termination of a working relationship with an independent contractor, special considerations may apply. While such arrangements will be guided by the terms of the agreement between the parties, in the absence of a written agreement, the independent contractor may still be entitled to reasonable advance notice of the termination of the contract or compensation instead of such notice; however, the legal test applied by the courts for determining reasonable notice will be different from that which is applied to the employee/employer relationship.

Termination of an employment relationship can come about in one of three ways:

1. The employee resigns;
2. The employee is dismissed for just cause; or
3. The employee is terminated without cause.

These situations are elaborated upon in more detail below; however, it is important to bear in mind that, in any given case, the express terms of a written employment agreement must be considered.

Resignation by the Employee

To resign, an employee should give reasonable advanced notice to the employer. This notice period is generally to allow the employer time to replace the employee or take other steps to adjust to the loss of the employee. While there is no specific requirement in the *Employment Standards Act, 2000*, as amended ("*ESA*") for an employee to provide advanced notice of resignation, an enforceable employment agreement can so provide. Practically speaking, however, it is difficult to enforce a resignation notice period, as employers cannot compel employees to work; rather, the only remedy is to bring an action in the Small Claims Court for damages suffered by the dental practice as a result of reasonable notice of resignation not having been provided.

In order for a resignation to be valid, it must be clear and unequivocal on the part of the employee. Employers should be cautious when interpreting an employee's words or actions to constitute a resignation, and are recommended to follow up with a written acceptance of the employee's resignation.

Employers who advise an employee not to return to work following the provision of their resignation are required to pay the employee the balance of the resignation notice period if they do not want the employee to work out the balance of the period. Language may be used in an employment contract to allow the employer to waive the resignation notice period by providing payment instead.

Just Cause for Dismissal

If just cause for termination exists, the employer is entitled to terminate the employee immediately and without any obligation to provide notice of termination in accordance with the common law.*

When there is cause for dismissal, the employer has the onus of proving just cause. In other words, the employer is required to demonstrate that the employee has done something (or failed to do something) that is so serious that it warrants dismissal without notice or pay in lieu. However, even when there is evidence of just cause, the employer may not be entitled to terminate if there is evidence that the employer "condoned" the behaviour in question. The following is a list of many of the common behaviours that may result in just cause for dismissal:

* The test for providing notice of termination and severance pay, if applicable, under the *ESA* is a different, more stringent test. Before terminating an employee for just cause, consult with legal counsel to determine whether the cause for their termination also constitutes wilful misconduct, disobedience or wilful neglect of duty for the purposes of the relevant *ESA* Regulations.

1. A documented pattern of incompetence;
2. Gross insubordination;
3. Conflict of interest;
4. Off-duty misconduct, including social media postings;
5. Dishonesty, fraud and theft;
6. Sexual harassment; and
7. Violence.

Termination for cause is difficult for employers to justify. The standard to meet is very high, particularly with respect to long service and/or older employees. Courts generally are of the view that employees are entitled to receive reasonable notice or pay in lieu at the time of termination, so an employer's attempt to deprive an employee of this entitlement by terminating for just cause will be thoroughly scrutinized by a court. Not only does the employer bear the onus of proving that the employee engaged in the conduct in question, but the employer will also need to show that the conduct was so serious as to render the employment relationship incapable of continuation. In most cases, the damage to the employment relationship can be repaired with other, lesser forms of discipline, such as warnings (verbal or written) or suspensions (though unpaid suspensions carry with them their own risks — see the "Constructive Dismissal" section of Part VII of this manual).

Termination Without Cause and Reasonable Notice

If there is no just cause to terminate an employee, and there is no enforceable written employment contract that specifies the notice or severance to which the employee is entitled in the event of dismissal without cause, the employer is still entitled to terminate the employee; however, the employer is required to give reasonable notice or must make a payment to the employee instead of notice. Notice of termination must be in writing, and be "specific, unequivocal and clearly communicated to the employee".[51] Widely-circulated rumours or office gossip relating to downsizing will not be enough. The reasonableness of the notice is determined on a case-by-case basis, having regard to a number of factors, including what are known as the *Bardal* principles:

- Character of employment (i.e., management, professional, administrative, etc.);
- Length of service;
- Age of the employee; and
- Availability of similar employment, considering the experience, training and qualifications of the employee, and how long it will reasonably take the employee, given the above factors, to find reasonably comparable employment.[52]

The requirement to provide reasonable notice is mandated by case law (also called, "common law reasonable notice"), and is independent of the termination and severance requirements under the *ESA*; however, employees are not entitled to receive all these entitlements stacked on top of one another; rather, once an employer has paid out amounts owed under the *ESA*, the employer gets credit for these amounts, and can deduct them from the larger common law reasonable notice entitlement.

Any amounts paid in addition to the employee's minimum *ESA* entitlements may be paid by way of either a lump sum or a salary continuance. Each option attracts different tax treatment. Prior to terminating an employee, it is advisable to seek legal and potentially accounting advice.

Even when there has been a very lengthy service on the part of an employee, the law presumes that no employer is responsible to employ someone indefinitely. There is no specific upper limit on the amount of notice that an employer might be required to pay; however, as a guide, it would probably be unusual to see an employee in a dental office receive more than 24 months of notice or pay in lieu, and this amount often would be reserved for older, longer service and/or more highly paid employees.

Due to the requirement that terminations be conducted in good faith, the notice requirement can be increased in circumstances where employers do not conduct the termination in a respectful, considerate manner.

In addition to notice or payment instead of notice, employees are entitled to the continuation of all benefits, vacation accrual and public holiday pay during the minimum *ESA* notice period. In the event that there is no employment contract, or the employee's contract does not contain an enforceable provision limiting their entitlements on termination to the *ESA* minimums, continuation of all benefits during the common law reasonable notice period is generally awarded by the courts.

For more information on the minimum notice periods for termination under the *ESA*, see Part IV of this manual.

Constructive Dismissal

Where an employee has not been terminated from their employment, liability can still be invoked if the employee's terms of employment are unilaterally altered to a fundamental or significant extent, such as where the employee's pay or duties are changed without the employee's consent. What is considered to be "fundamental" is a legal determination, and is not a subjective assessment of the employee's personal experience. It is possible for employers to make changes to employees' terms of employment, while at the same time minimizing, and sometimes even eliminating, legal exposure. It is suggested that, before any such changes are made, the assistance of an employment lawyer be obtained. Liability for constructive dismissal can also be found where circumstances that make the employee's continued employment impossible exist, as might be the case of an employee being harassed or bullied.

An employee who has been constructively dismissed is entitled to the same notice of termination and severance pay as an employee who has been dismissed without cause.

Mitigation

The terminated employee has a legal obligation to take all reasonable steps to "mitigate" their losses following a termination of employment by looking for alternate employment, and is not entitled to recover losses that could have been avoided. For this reason, reasonable notice is sometimes offered as continuance of salary, only until the employee finds a new job.

Both successful mitigation (i.e., finding alternate employment) and a failure to make sufficient mitigation efforts will result in a reduction of damages. The courts, however, have taken into consideration the fact that it is more difficult for some employees (e.g., older employees; those with severe disabilities) to find new employment and have, in some cases, relieved such employees from the duty to mitigate altogether.

Employers should note also that amounts to which an employee is entitled under the *ESA* are not subject to mitigation, and there can be no deduction against these amounts, even if an employee finds another job during that statutory notice period or period for which they received severance pay.

Non-Competition by Employee After Termination

The right to compete with a former employer depends upon any express terms in the written employment agreement, and whether the employee was in a "fiduciary" role. Determining whether an employee was in a fiduciary role is not clear cut, but a fiduciary is generally a person employed in a position of such sensitivity or control that it would be unfair to let the employee compete in the circumstances. Only the most senior members of the dental practice may be considered fiduciaries (e.g., potentially dental associates and Chief Operating Officers).

Fiduciaries are not allowed to solicit customers or clients (e.g., patients) of the employer for a reasonable period of time. They are also restricted from taking unfair advantage of any business opportunities of which they became aware by virtue of their employment.

For more information, see Part II of this manual: "Non-Competition and Non-Solicitation (Restrictive Covenants)".

Ontario *Human Rights Code* (the "*Code*") Considerations

An employee cannot be terminated because of any prohibited ground set out in the *Code*, such as sex (including pregnancy), race or disability. Independent legal advice should be sought before terminating an employee who has been on leave from the office due to illness, disability, pregnancy or any other prohibited ground, or an employee who has filed a complaint of workplace harassment. Employers who make decisions about termination based even in part on one of the grounds protected by the *Code* face the risk of a human rights complaint before the Human Rights Tribunal (the "Tribunal"). If such a complaint is brought, the onus is on the employer to demonstrate that its decision to terminate the employee was completely unrelated to a protected ground, and that the employer had a legitimate business rationale for the decision to terminate. Should an employer be unsuccessful in defending a termination decision before the Tribunal, it is open to the Tribunal to impose a wide variety of remedies, including general damages for injury to dignity, and even an order to reinstate the employee with full compensation for lost wages and benefits.

Termination on the Sale or Winding Down of a Practice

Legal advice should be sought with respect to the rights of employees on the sale, transfer or amalgamation of a dental practice. Depending on the circumstances, a change in the employer may constitute a termination of employment. When an employee continues on in the same practice but under a new employer, the employee's rights may be affected.

The structure of the sale or transfer of the dental practice is important. A share purchase, which results in a change of ownership of equity only, results in continuity of employment: there is no termination of employment, and the purchaser inherits all of the employees' past service. By contrast, in an asset purchase, there is a change of employer and, technically, all employees are terminated at the moment of the sale, subject to their rehire by the purchaser. The *ESA's* continuity of employment provisions, highlighted earlier in this manual, provide that, where a business or part of a business is transferred or sold and the purchaser hires any employees of the seller within thirteen (13) weeks after the closing of the transaction, the employees' service continues.

It is preferable to have a clear agreement on how the sale of the practice will affect the rights of the employees, and this will generally require the consent of all the parties, including the vendor, purchaser and employee(s). Recall, however, that parties cannot contract out of the *ESA*'s continuity of employment provisions, which require that purchasers inherit the service of all employees they take on.

An example that highlights this point is a 2006 case from British Columbia — *Perkins v. Shuen et al.*[53] Here, a certified dental assistant had been dismissed from her employment with the defendant dental clinic where she had been employed for six (6) months. She had been previously employed by the former owner of the practice for approximately twenty-four (24) years. The issue in the lawsuit was whether the certified dental assistant was entitled to notice of termination that would take into account her twenty-four (24) years of service with the former owner, or whether she was entitled to pay in accordance with six (6) months' service. The purchase and sale agreement required the former owner to terminate the employment of the employees and to satisfy any obligations owing to those employees for salaries, wages, benefits and holiday pay. In addition, it was agreed between the purchaser and vendor that, if the purchaser employed any existing employees and then terminated that employment within ninety (90) days of the closing date for any reason, the vendor would indemnify the purchaser for any severance pay obligation. In considering the issues of the case, the Court followed the legal principles set out in *Sorel v. Tomenson Saunders Whitehead Ltd.*,[54] as follows:

- When a purchaser acquires a business as a going concern, there is an implied term in the contract of employment between it and those employees continuing in the service of the business, that the employees will be given credit for years' past service with the vendor for purposes of such incidents of employment as salaries, bonuses and notice of termination.
- This implied term may be negated by an express term to the contrary. In other words, the purchasing employer may, at his option, advise the employees that he does not intend to give them credit for past services to the vendor. If this is done, the employees have the option of entering into the new contract of employment on these terms or of declining to work for the purchasing company and suing the vendor for wrongful dismissal and damages in lieu of notice.

- Where the new employer does not advise the employees that he is unwilling to contract on the basis that the employees have credit for past years of service, the employer is deemed to have contracted with the employees on the basis that the employees will be given such credit.

In applying the above principles to the facts of the case at hand, the Court held that, absent an express term to the contrary, the implied term of the contract was that the dismissed employee would be given credit for her years of service with the previous dentist. The evidence did not support a finding that the defendant expressly negated this implied term. Furthermore, the Court held that any obligation on the part of the vendor to indemnify the purchaser under the terms of the purchase and sale agreement was time limited to within ninety (90) days of the closing date. As a result, the defendant purchaser was liable to pay twelve (12) months of termination pay to the certified dental assistant.

This case highlights the importance of obtaining independent legal advice on the terms of employment of employees of a practice being sold, and the importance of obtaining appropriate written agreements from the employees to confirm the intent of all parties. Each of the parties should seek their own independent legal advice.

Similarly, if an employer is considering retirement or the winding down of a practice, the employer is still required to give reasonable notice to the employees. This notice should be clear and provided to all employees in writing and far enough in advance to satisfy all legal requirements.

Conducting the Termination Meeting

Generally speaking, it is a legal requirement that employees be dismissed in a good faith, respectful, and honest manner. For both personal and legal reasons, terminations should be conducted promptly, effectively and respectfully. An employer who is considering whether to terminate an employee should obtain independent legal advice. A lawyer can assist with preparing a termination letter and any recommended release. If a release is sought, the employee should be given an opportunity to consult a lawyer.

During a termination meeting, it is important to have another person present to take notes. General reasons for the termination should be given, without going into the specifics; otherwise, the employee may jump to the conclusion that their employment is being terminated for a discriminatory reason. Termination meetings should be short. This is not the time to debate the decision. Advise the employee that the decision is final, and provide the termination letter in a sealed envelope, for them to read following the meeting. At the meeting, the employer may need to address pay in lieu of notice, pension and other benefits. Counselling from a third-party provider (such as an Employee Assistance Program) may be offered to the employee being terminated. The employee should also be given an opportunity to retrieve their personal belongings, or else arrangements should be made for them to collect their things after hours, or for their belongings to be sent by courier to their home. If the employee appears too emotional to drive, a safe ride home by way of a taxi should be provided.

Preparation is the key to a successful termination meeting. Please see the Conducting a Termination Checklist appended to this manual as Appendix "F".

Part VIII — Policies and Procedures

Establishing employment policies in the dental office can be an effective way of managing employees, and a vital tool in the aid of a healthy employer-employee relationship. They can help maintain continuity in the operation and management of the practice as employees refer to them for reference and guidelines. They are particularly helpful in giving clarity around expectations in the workplace, and can serve as a planning tool for unusual or unexpected events, such as emergency situations. Workplace policies, such as harassment complaint mechanisms, can be relied upon to resolve disputes in the workplace.

Policies should be drafted and implemented in compliance with employment laws. Preparing them can be time consuming but, once in place, they can help to facilitate good staff relations.

It is wise to refer to the employer's policies and procedures, "as may be amended from time to time at the employer's sole discretion" in the employment contract, so that expectations of employees are clarified at the commencement of the working relationship, and so that the requirements of the policies and procedures may be considered an enforceable element of the employment relationship. If policies are being developed during the course of employment, it is helpful to involve the staff in their creation. It is recommended that you are judicious in the number of policies to be implemented, taking into consideration the needs of your working environment.

Policies should be reviewed and updated at least yearly to ensure they meet your needs and fit with your office culture, and are compliant with relevant laws.

In accordance with the accessible employment standard under the *Accessibility for Ontarians with Disabilities Act, 2005*, as amended ("*AODA*"), workplace information, including job descriptions, company policies, health and safety information, and emergency information must be provided in an accessible format if requested by an employee.

Below is a list of the types of policies to consider for your workplace.

Overview of the Organization

Employers should consider developing a mission statement, strategic plan, goals and objectives, and other guiding principles to ensure that staff understand the vision of the practice. An example of an office philosophy follows:

> *We will provide the highest quality oral health care, taking into account the individual needs of each patient. We are committed to helping patients develop an active interest in their oral health care. Our patients will feel valued, respected and cared for.*

Code of Ethics for Employees

A code of ethics is a set of principles of moral behaviour that defines responsible conduct in specific professional situations. All self-governing professions, including dentistry and dental hygiene, have established a code of ethics that should be incorporated into any dental practice. These are updated from time to time, and dental offices should be cognizant of them.

Hiring Procedures

You should develop criteria for selecting employees, and ensure that these do not violate the Ontario *Human Rights Code*, as amended, or *AODA*, as discussed in Part I of this manual.

Employment Status Categories

Employment status generally refers to: probationary, full-time, part-time, temporary/casual, independent contractor, or associate. There may also be separate categories for professional, administrative and support staff designations. Distinctions should be made in terms of conditions and benefits to assist with better understanding of the working relationship, but without contravention of the *Employment Standards Act, 2000*, as amended ("*ESA*")'s equal pay for equal work requirements (for more information, see the "Equal Pay for Equal Work" section of Part IV of this manual).

Orientation Procedure and Checklist

Orientation makes new employees feel welcome and gives them an opportunity to learn important information about the workplace. It is an opportunity for you to communicate the office philosophy, culture and expectations in a non-threatening way. An orientation "checklist" can ensure that all appropriate areas are covered in the introduction process and that all on-boarding training has been provided, including *AODA* customer service accessibility training and training on the workplace violence and harassment prevention program. The checklist should be signed by both the employer and employee.

Job Descriptions

Job descriptions outline general areas of duties and responsibilities, as well as qualifications for the job. They should be flexible enough to promote initiative and should be viewed as a guide rather than a "boundary". The job description can be subject to review and revision, particularly if the employee is asked to assume increased responsibilities (although dramatic changes may invoke legal liability — see Part VII: Terminating the Employment Relationship — Constructive Dismissal). Changes should be documented as concisely as possible, and discussed with the employer. Written job descriptions are useful for future performance reviews, resolving employee dissatisfaction, and hiring new employees.

For job descriptions of regulated health professionals, employers should consult with the applicable governing legislation to identify the legal scope of practice.

Job descriptions may need to be considered for the following positions:

- Accounts Supervisor
- Computer Supervisor
- Dental Assistant — Certified (Level I; Level II)
- Dental Assistant — Uncertified
- Dental Assistant — Registered
- Dental Technologist — Registered
- Laboratory Technician
- Office Manager
- Receptionist
- Registered Nurse

Violence and Harassment Prevention and Complaint Policy and Procedure

The workplace violence and harassment policy/policies should address what constitutes violence and harassment, and how it will be dealt with in the work place.

The ODA, in conjunction with the Public Services Health & Safety Association, published *Health & Safety Programs: A Guide for Dental Practices 2016-2017,* which describes in detail the requirements for a workplace violence and harassment policy and program, and includes a sample policy. The Guide, along with other resources and tools, is available on the member section of the ODA website.

Hours of Work, Overtime and Flex Time

You should establish a schedule of start and finish times, as well as work days, meal and rest breaks. These should be consistent with the minimum requirements of the *ESA*.

Salary and Wages

Salary may depend on experience, contribution, education, office efficiency and expenses. Salary increments should be discussed at performance appraisals. An annual cost of living adjustment (or "COLA") may be considered. Incentives for pay increases may include: working evenings (within the parameters of the *ESA*), length of service, performance incentives, productivity, working in remote areas, etc.

Deductions

An employer is obligated to make deductions for Employment Insurance, income tax, and Canada Pension Plan benefits, as well as the Ontario Health Tax.

Employment Standards

An office policy may address employment standards under the *ESA*, as discussed in Part IV of this manual.

Privacy Policy and Management of Health Records

Ontario's *Personal Health Information Protection Act, 2004*,[55] as amended (the "*PHIPA*") sets out requirements for regulated health professionals, hospitals and other health facilities to have in place a privacy policy and information practices that are in compliance with the *PHIPA*. Dental offices must take steps to ensure that all employees and agents (such as independent contractors) are informed of their duties under the *PHIPA* and act in compliance with the office's privacy policies and practices. In addition, dental offices must ensure that:

- Health information is accurate, complete and up-to-date;
- Health records are retained, transferred and disposed of in a secure manner;
- Personal health information about an individual is not collected, used or disclosed without the consent of the individual, unless there is a lawful purpose that is permitted or required by law;
- Steps are taken to secure personal health information;
- Patients are notified at the first reasonable opportunity if their information is lost, stolen or accessed by an unauthorized person or for an unauthorized purpose;
- Notations are made on the patient's chart regarding uses and disclosures made;
- A written statement is made available to the public that provides a general description of the office's information practices; and
- Processes are in place to respond to complaints or requests for access and/or correction of personal health information.

Generally, employees and other dental office workers should be required to comply with internal practice procedures and policies, including unauthorized removal or copying of books, records or documents relating to the practice, whether hard copy or electronic.

The ODA has additional information and resources on how to implement a privacy policy for the dental office, which can be accessed on the member section of the ODA website or by contacting the Department of Professional Affairs.

For additional information on the management of health records and patient lists in the dental office, please consult Part X of this manual under the heading "Proprietary Rights, Ownership of Goodwill, Records and Patient Lists".

Other Office Policies and Procedures

Topics for other office policies and procedures may include the following:

- *AODA* Policy
- Accommodation Policy
- Accounting and Third-Party Payment Procedures
- Alcohol and Drug (Including Cannabis) Use Policy
- Billing Procedures for Patient Care
- Customer Service Policy
- Dispute Resolution Procedure
- Dress Code
- Email, Internet and Computer Use Policy
- Emergency Office Procedures
- Equipment and Supplies Policy, Use of
- Equipment and Supplies Policy, Purchase of
- Infection Prevention and Control Procedures*
- Occupational Health and Safety Policy
- Performance Evaluation Process
- Privacy Policy
- Recordkeeping Guidelines
- Resignation, Retirement and Termination Policy
- Staff Meeting Policy
- Training and Continuing Education Policy
- Workplace Violence and Harassment Policy and Program

* In November 2018 the Royal College of Dental Surgeons of Ontario updated their *Standard of Practice on Infection Prevention and Control in the Dental Office*: https://www.rcdso.org/en-ca/rcdso-members/your-responsibilities/standards-of-practice

Part IX — Union Organization and Certification

Given the very short time period for responding to the Application for Certification, it is imperative that employers seek legal advice and representation as soon as they receive the Application. The Application will typically come from the union and will be delivered by hand, by fax, or by courier. There are generally no extensions provided to file a Response to the Application, and the Response must be filed within two (2) business days of receipt by the Employer of the certification package from the union.

If a union believes it has the support of at least forty percent (40%) of the employees in the bargaining unit it seeks to represent, as evidenced by signed union membership cards, it may file an Application for Certification. An employer then has only two (2) business days after the Application is served on them to make challenges to the proposed bargaining unit description and the union's alleged membership support. Within three (3) to four (4) days after the Application is filed, the Board will contact the employer and union to set up an employee vote, to be held five (5) days after the filing of the Application. If the union obtains the support of fifty percent (50%) plus one (1) of eligible bargaining unit members who vote, the union will be certified to act on the employees' behalf thereafter.

Once a union has applied for certification, the employer is prohibited from unilaterally altering employees' wages or any other term or condition of their employment until the application has either been granted or dismissed by the Board (typically called the "statutory freeze"). In determining whether terms and conditions of employment have been altered in violation of the *Ontario Labour Relations Act*, as amended (the "*OLRA*"), the OLRB has traditionally applied two tests: the "reasonable expectations" test and the "business as usual" test. Essentially, if a change does not represent a status quo or usual business pattern for the employer, it is likely to be a violation of the *OLRA*'s statutory freeze provisions.

Employers must be vigilant regarding the signs that an organizing drive may be occurring at their workplace. Such signs include:

1. Employee behaviour towards each other:
    - Employees who do not usually associate start spending time together frequently
    - The number, composition and size of informal employee meetings change
    - Employee speak in hushed tones, and/or stop talking and scatter when management approaches
    - Increased tension between employees
    - Employees openly talk about unions
2. Employee behaviour towards management:
    - Defiance, and questioning or challenging decisions
    - The nature and frequency of employee complaints change
    - Employees use "legal" terms, such as "union", "seniority", "grievances" or "rights"
    - Employees request employee information, including personal phone numbers and email addresses
    - Employees start to question policies, employment standards and entitlements

3. External signs:
    - A stranger or recently terminated employee is hanging around the office
    - Union-oriented graffiti or propaganda, or the distribution or posting of flyers, union cards or leaflets
    - Distribution of a petition or open letter with employee signatures
    - Union leaders approaching management
4. Silent or "invisible" signs:
    - Chatter about social media posts or text messages

While these signs do not necessarily mean an organizing drive is underway, the potential is there, and should not be ignored. There are limits, however, on what an employer may do and say when an organizing drive is underway. For guidance on what employers can and cannot do during an organizing drive, please see the Organizing Drive Checklist, appended to this manual as Appendix "G".

Part X — Associate Agreements — Special Considerations

Introduction

A number of legal relationships, agreements or business arrangements may be entered into by dentists practising together, including:

1. An agreement to share office space;
2. A partnership agreement;
3. Incorporation;
4. Employee/employer; or
5. Independent contractor.

Due to the increasingly creative tax planning arrangements that are being developed, principals and associates may enter into arrangements that are structured so as to enable the associate to argue that they are self-employed for tax purposes, thus permitting the associate to maximize deductions. In addition, many principals find utilization of management companies and other tax planning arrangements such as incorporation to their advantage. Obviously, legal advice is once again an important element when deciding how to structure a principal/associate agreement. The relationship between the parties will have a significant effect upon obligations and rights to patient lists, in addition to tax treatment and liabilities upon the termination of the relationship. While a number of relationships are possible, the relationship the parties choose to enter into will depend upon a large number of factors, including the degree of independence and responsibility to be accorded the associate, and the financial structuring of the relationship.

These guidelines focus upon the employment and independent contractor relationships, which appear to be prevalent in the profession. Members should also refer to Part II of this manual for additional information on employment contracts and independent contractors.

When principal and associate dentists embark upon a new contractual arrangement, it is usually with a positive outlook. Initial agreements may be on a verbal basis with little written down, and may not look farther down the road to when separation or termination of the relationship may occur. Frequently, at that point, the parties may have different perceptions of the statements and understandings that were initially present. The ODA is aware that various disputes may arise between principals and associates upon the termination of an associateship, and that these generally fall into three main categories:

- Ownership of patient lists and whether patients may be contacted by the departing associate;
- The winding up of financial responsibilities of the principal to the associate and the associate to the principal; and
- The relocation of the former associate's office in an area the principal feels is excessively close to their office, and may interfere with their practice.

It is to be noted that the above disputes are usually less complex for employee/employer relationships than for independent contractor relationships. In addition, the employee/employer relationship is one which gives the principal dentist more control over the relationship and the obligations of the associate dentist on termination.

Terms and Clauses

It is strongly recommended that dentists **do not** draw up their own agreements, but rather have these drawn up by their lawyers to ensure currency in the law, and to ensure the specific needs of the parties are met. The initial expense incurred at the commencement of the relationship may result in considerable long-term savings, both in possible future litigation or in allocation of revenue. The agreement, if very simple, may be in the form of a letter in duplicate from the principal to the associate setting out the terms of the agreement which should be reviewed by legal counsel before execution.

The following section suggests topics that should be considered, but should not be considered as all-encompassing.

In addition to considering the topics already addressed earlier in these Guidelines, associate agreements should also address the following:

1. Term of the Agreement

It is common for employment and independent contractor agreements to specify a fixed term for the contract (e.g., one year). The starting date should be indicated. It is common, but not always advisable due to the risk of the employment being deemed indeterminate, to state that the contract may be renewed automatically unless notice of termination is given in accordance with the termination clause. It is also acceptable to have a contract of an indefinite nature provided that there are termination provisions to end the contract.

It may also be appropriate to indicate a trial period (or probationary period), as discussed in more detail in this manual in Part II: Employment Relationships and Contracts — Probationary Periods.

2. Termination Clause

All agreements should include an early termination clause. Please refer to Part II: Employment Relationships and Contracts — Notice Periods for Termination, and Part IV: Employment Standards of this manual for more information regarding statutory notice requirements and the common law if there is an employee/employer relationship. Independent contractor agreements also require termination provisions, but typically these would not be as significant as the notice provided to employees.

3. College Registration and Professional Dues

The associate should be required to maintain a current certificate of registration with the Royal College of Dental Surgeons of Ontario (the "College") and to notify the practice upon loss, suspension, or restriction on his/her certificate of registration with the College, even if such actions are under appeal. Consideration should also be given as to who pays for the annual fee(s), malpractice insurance, ODA membership fees, continuing education and other professional expenses.

4. Covenants and Warranties

The agreement should include a covenant that the associate will practice in conformity with all appropriate laws, including the *Regulated Health Professions Act, 1991*, the *Dentistry Act, 1991*, and all regulations there under, and standards and code of ethics set out by the College.

5. Services to be Provided

The agreement should consider the range of dental treatment to be provided by the associate. For example, the principal may decide that they wish to do all of the crown and bridge work in the office, while the associate handles all endodontic treatment — all of which should be expressly outlined.

The manner in which emergency services will be provided should also be addressed. The associate should be required to faithfully render to the patients of the dental office a range of dental services as outlined or detailed in the agreement.

6. Compensation

Consider the mechanism by which dental fees and the associate's share of the income of the practice will be handled. For example, the parties may wish to agree on a percentage of billings, if any, that will accrue to the associate. Any percentage agreed upon should be clear on whether this is the net amount of billings collected, or some other agreed upon division. Also, identify how and when these amounts are to be paid.

The compensation clause should provide for a periodic review, such as on the anniversary dates of the agreement. Examples of compensation models include: (a) pay based on gross production or billings, (b) pay based on net collections, or (c) pay based on a per diem rate.

7. Occupier's Liability and Other Non-Professional Liability Insurance

There are many insurance options available to protect against identity theft, occupier's liability (e.g., slip and fall) and other potential risks unrelated to professional liability, which should be considered, particularly in terms of whether it is the principal's or associate's responsibility for coverage. ODA members are encouraged to contact CDSPI for insurance coverage options.[56]

8. Vacation and Holidays

It is helpful to include requirements regarding the process by which vacations/holidays are taken, so long as the minimum *ESA* requirements are met in cases where the relationship is that of employee/employer. See Part IV: Employment Standards — Vacations and Vacation Pay for more details, as may be applicable.

9. Days and Hours of Work

For employees, the parties should address how the dental office facilities and specific operating rooms will be used during certain hours on certain days, as well as the associate's time commitments. Independent contractors ideally set their own hours of work.

10. Sickness and Disability

The parties may wish to include a provision that addresses responsibility for insurance coverage in the event of sickness or disability, particularly where the agreement is one of independent contractor. Sickness and Disability insurance is also available from CDSPI.

11. Principal's Supply Obligations

Consider what the principal dentist will supply to the associate (e.g., premises, equipment, support staff, professional staff, laboratory facilities, expendable supplies, etc.). If the associate is an independent contractor, consider whether they will have the right or obligation to hire their own staff. Agreements vary widely in this area of supply obligation. The independent contractor can be charged a fee for services or the contract can indicate the percentage of fees that cover such expenses.

12. Associate's Supply Obligations

Describe what the associate will be required to supply. This may include things such as hand surgical instruments, other instruments, materials, etc. This would be most important where the associate has set ideas on the equipment or materials they wish to use, which do not fit with the principal's practice, and should therefore be enumerated.

13. Patient Assignment and Referrals

Consider how patients will be allocated to the associate, and the process by which referrals are to be made to professionals outside the dental office. The principal may wish to ensure that all new patients are to be first seen by the associate or that both the principal and associate share patient care. Several options exist.

14. Proprietary Rights, Ownership of Goodwill, Records and Patient Lists

Generally, an associate who is an employee acquires no proprietary rights relating to the patients that they have treated. However, written agreements may provide otherwise. Given the importance of ownership of patient records (e.g., original hard copy and electronic files) it is extremely important to clarify in the agreement any terms related to ownership of these records. Many agreements require that all patients of the practice are deemed to be patients of the principal dentist, and that all patient records, files and lists belong to the principal. At common law, as outlined by the Supreme Court of Canada in *McInerney v. MacDonald*,[57] it is the health-care professional, institution or clinic compiling the health record that "owns" the physical records.

However, due to the fact that the information in the health record is highly private and personal to the individual, and goes to the personal integrity and autonomy of the patient, the information is to be used by the health professional for the benefit of the patient. In addition, the manner in which records are accessed, used and/or disclosed to others must be in compliance with provincial privacy legislation: the *Personal Health Information Protection Act, 2004*, as amended.

Generally, an associate who is an employee is not entitled to a copy of the patient's dental records, unless the patient consents in writing and makes a request for access in accordance with the dental office's privacy policy. The associate should be required to comply with practice procedures and policies, including those that prohibit the unauthorized removal or copying of books, records or documents relating to the practice, whether hard copy or electronic.

The principal dentist should agree to provide access to records of the associate where required by the College or by law.

15. Records to be Kept

The agreement should specify the manner in which records of the dental office are to be handled and maintained, so long as such processes are consistent with those prescribed under the *Dentistry Act, 1991* and through the College. The principal dentist may wish to require that the associate will ensure that all records become a permanent record of the principal's practice, which will remain in the office after the associate's departure. This is particularly important in situations where a new associate replaces a former associate, and to ensure continuity of patient care.

16. Patient Accounts

Provide a process by which billing procedures will be handled through the dental office. For example, in some cases payment will be made directly to the dental office or to the principal dentist even though the care was provided by the associate. Include in this clause how billing of third-party insurers is to be handled. Consideration should be given to the ODA's Non-Assignment Policy, available through the ODA's Department of Advisory Services.

In addition, special billing procedures may be required for patients receiving various provincial or other governmental benefits such as ODSP, and CINOT. Additional information is available through the ODA's Department of Government Relations, or Department of Advisory Services.

17. Laboratory Fees

Consider who will be responsible to cover the cost of lab fees, and how these are paid. If it is the ultimate responsibility of the associate to cover the cost, such accounts should be billed under the name of the associate. It is important to bear in mind that section 2.35 of the Professional Misconduct Regulations made under the *Dentistry Act, 1991*, prohibits dentists from charging a laboratory fee for a dental appliance or device that is more than the commercial laboratory cost actually incurred by the dentist.

18. Income Tax, Canada Pension Plan and Employment Insurance Deductions

Employers are required by law to make all appropriate deductions for income tax, Canada Pension Plan, Ontario Health Tax, and Employment Insurance. Failure to comply may result in penalties to the principal dentist. In some cases, parties who have purported to enter into an independent contractor relationship may subsequently be determined to be in an employee/employer relationship, resulting in potential consequences wherein the principal is responsible for failing to withhold money for income tax, or failing to make other deductions required by law. Consultation with an accountant is recommended in order to consider any potential tax advantages/disadvantages to entering into an independent contractor arrangement.

An indemnity clause may reduce the principal's liability for such costs.

19. Confidentiality/Non-Disclosure

Principals should obtain a covenant from associates that, during the term of the agreement and at any time thereafter, the associates will not disclose or use any information relating to the private or confidential affairs of the principal. This should apply to the confidentiality of both patient records and other business information, in order to protect both the confidentiality of patient information and office records.

20. Non-Competition and Non-Solicitation Clauses

These clauses are also referred to as "restrictive covenants", and are dealt with in detail in the manual, Part II: Employment Relationships and Contracts — Non-Competition and Non-Solicitation. Please refer to this section of the manual for information on these important legal covenants, which are intended to protect the principal's good will and proprietary interests. Non-competition clauses are not appropriate for independent contactor dentists who are running their own business.

21. Dispute Resolution

Agreements should provide a mechanism by which the parties to the associate agreement may attempt to resolve any disputes arising from the agreement, including possibly the option of mandatory mediation or arbitration, in order to potentially avoid the expense of legal proceedings.

22. Sole Agreement

The agreement should include a clause that the agreement is the sole agreement between the parties, and can only be modified by an agreement in writing signed by both parties.

23. Confirm Relationship

The Agreement should confirm the nature of the relationship between the parties. For example, if it is an employee/employer relationship, include a statement that the agreement is an employment agreement and does not create a partnership between the principle and the associate.

For independent contractors, please consult the manual in Part II: Employment Relationships and Contracts for more information, as it is critical that the relationship be properly established in order to meet the legal test of an independent contractor. For example, it is important to have all monies payable to the associate in the form of a fee for service, possibly on a per diem or hourly rate, rather than as a salary, in order to reduce the risk of a court or administrative body later concluding that the associate was an employee rather than an independent contractor. When restructuring a working relationship to take advantage of tax or other financial considerations, be sure to consult with legal counsel.

24. Retirement and/or Death

Consider a section in the agreement as to what will occur if the principal retires or dies while the associate is still involved with the practice. Negotiations over a period of time following the death of the principal can result in the practice and its value being lost as patients go to other dentists. Valuation of a practice is complex and should involve professional advice from a lawyer and/or appraiser.

Sample Associate Agreements

Because of the disputes that may arise, the ODA has developed these guidelines as an overview of considerations in the drafting of associate agreements. These guidelines should be used by ODA members in consultation with their solicitors. The ODA has also developed sample agreements for associate dentists: one employment agreement, and one in the form of an independent contractor agreement. While the ODA is not in a position to suggest a standard form contract for a principal/associate relationship, as it is not practical to address the needs of every situation, the sample agreements are intended as a starting point in drafting an agreement for associate dentists. They must be customized for each individual associate, and should never be used without legal advice.

To view the sample agreements, see Appendix "H".

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APPENDIX A – Process for Criminal Record Checks When Hiring Employees for the Dental Office

To protect your patients and your practice, you — the dentist — should implement a process for conducting a Criminal Record Check on job applicants you are considering for hire in your dental office. You should bear in mind that there are human rights laws and privacy laws that must be followed during the Criminal Record Check process.

As discussed in Part I of the manual, under the Ontario *Human Rights Code*, as amended, an employer may ask a job applicant if they have been convicted of a criminal offence for which a pardon has not been granted. Questions are also permitted for the purpose of determining if an applicant is bondable, since dental offices do deal with financial transactions and customer billings.

In addition to asking the question of a job applicant, "Have you been convicted of a criminal offence for which a pardon has not been granted?", the prospective employer may also require that the job applicant undergo a Criminal Record Check; however, the Criminal Record Check should only be made after a conditional employment offer is made. Essentially, during the interview process, you should advise the job applicant that they will be required to undergo a Criminal Record Check as a pre-condition to starting on the job, and that they are required to provide the completed Criminal Record Check to the employer prior to commencement of employment. In short, the conditional offer of employment should be made before the Criminal Record Check is actually done, and the Criminal Record Check should ideally be done before the individual is scheduled to start the job.

A Criminal Record Check may be obtained from your local or regional police service anywhere in Canada for a nominal fee. They will use the Royal Canadian Mounted Police's Canadian Police Information Centre (CPIC) database to generate the report. In most cases, the individual undergoing a Criminal Record Check will be required to attend in person at the local police service where the individual resides. Each local police service may have a different procedure for doing Criminal Record Checks, and may have their own forms and fees for the service. To get the process started, and to understand how the Criminal Record Check process works in your area, you should contact your local police service for more information.

In addition to your local/regional police service, there are several private companies available who can assist in conducting a Criminal Record Check. While potentially more expensive, these companies may be able to provide a more expedited process. If you use one of these services, you will need the prospective employee to sign a consent form and provide all applicable personal information to the provider.

The Criminal Record Check report, once completed, will show that a search was done on the name(s) used by the person who is the subject of the Record Check. Ideally, the employer should pre-determine the applicant's name on their identification cards (e.g., drivers licence, birth certificate, etc.) as well as any former names, once a conditional offer of employment has been made.

You should ensure that the report:

- Says a search was done using the CPIC database; and
- Is sufficiently current for your purposes.

Once you receive the final report, consider whether the findings have any implications for performing the *bona fide* requirements of the job.

Criminal Record Checks for Existing Employees

Requiring existing employees to undergo a Criminal Record Check gives rise to a number of challenges and potential sources of liability, including the following:

- An allegation of constructive dismissal, if the requirement is considered a fundamental change to the terms of the employment (which, for some settings, it might be), which is a risk that requires a complex process of sufficient advanced notice and a warning of termination in order to avoid;
- The fact that the employee has already been performing work may present a significant hurdle in establishing that a clean Criminal Record Check is a *bona fide* requirement of the position; and
- What will you do if you receive information in the check that causes concern?

For the above reasons, you should seek independent legal advice as to whether you are in a position to a) require existing employees to undergo a Criminal Record Check or b) terminate an existing employee's employment, with or without cause, if a Criminal Record Check returns information that is a cause for concern.

APPENDIX B — Commission Interview Guidelines and Sample Application for Employment

This section describes the human rights issues that commonly arise in interviews, some of the types of questions that may or may not be asked, and how to make hiring decisions that do not contravene the *Code*. Supervisors, managers and human resources staff who are responsible for making hiring decisions must be trained and educated to identify and eliminate discrimination, harassment and barriers to advancement for persons protected by the *Code*.

a) Employment agencies/search firms

An employer cannot use an employment agency to hire people based on preferences related to race, sex, disability or other *Code* grounds. This is specifically prohibited in section 23(4) of the *Code*. Employment agencies cannot screen applicants based on discriminatoiy grounds, and are not allowed to keep a record of client "preferences" of this kind. When using an employment agency or search firm, employers should make sure that the agency or firm is aware that they are an equal opportunity employer and wish to see a broad range of candidates.

b) The hiring process must be fair

An employer should aim for a fair process that focuses on each candidate's ability to perform the essential job duties. A best practice is to have a multi-person panel conduct formal interviews. Ideally, the interview panel should reflect the diversity available in the organization. They should develop set questions in advance, and ask all applicants the same questions. The questions should be based on the job's essential duties and *bona fide* requirements. Before interviews start, create an answer guide showing the desired answers and a marking scheme. Then, each member of the interview panel can record and score each candidate's answers against this guide.

This kind of approach will help employers avoid making decisions based on subjective considerations such as whether the person exhibits "confidence" or is viewed as "suitable." Employers who rely on these kinds of subjective assessments are vulnerable to claims of discrimination, Without objective criteria, an employer will have trouble explaining why some candidates were or were not qualified for the job if a human rights complaint is filed.

> **Example**: A woman is denied access to a job normally held by men. Even though she has previously done the job, she is viewed as not having the skills to do the job. The employer did not develop or rely on objective assessment criteria, so it was unable to show that its decision was not based on discriminatory stereotypes.

Similar considerations apply to written tests that applicants are asked to complete during a hiring process. The tests given to all applicants should be identical and scoring should be done based on an objective marking scheme determined before answers are graded. Any written test should also be based on the job's essential duties and *bona fide* requirements.

For both interviews and written tests, the process should be the same for all candidates and determined inadvance, subject to accommodation needs. For example, a hiring panel may decide that all candidates can be prompted if their answers in an interview do not correspond to the question asked. Or, in a written test, the employer may indicate that answers will be assessed based only on the information the candidates provide. If so, the candidates should be told to make sure that they address all parts of each question. Employers cannot ask some candidates questions they do not ask other candidates.

> **Example:** An employer asks racialized candidates whether they would be able to deal with racial slurs while it does not ask this of other applicants. This was found to be discriminatory. Instead, the employer might have asked all candidates how they would deal with difficult clients or challenging customers.

How far an applicant goes in a hiring process should not depend on informal assessments by individual interviewers. Staffing decisions based on informal processes are much more likely to lead to subconsciously biased decision-making. For example, conducting an interview by chatting with the applicant to see if he or she shares similar interests and will "fit" into the organizational culture may present a barrier for persons who are or appear to be different than the dominant norm in the workplace. If this is used as a starting point for deciding whether candidates will be seen by senior decision-makers, this creates a major barrier to persons protected by the *Code*.

Example: A firm's hiring process for students is to have them all interviewed individually by a number of associates and partners. Interviewers are not given a set list of questions or hiring criteria. Instead, each candidate's resume is used as a starting point for a free-flowing discussion of topics of interest to the interviewer, such as which school the person studies at and where they play golf. At the end of the interview, candidates are ranked based on how well they "fit" the firm's image. Ultimately, access to the senior decision-makers depends on the candidate being assessed as a good fit by the previous interviewers. This type of process is extremely vulnerable to claims of discrimination.

Deviating from the usual hiring process can indicate discrimination even if a person excluded because of a *Code* ground would not have been the successful applicant in the absence of discrimination.

Example: A person shows up for an interview in a wheelchair and is told that she need not attend the interview. The failure to individually assess this applicant is discriminatory even if she could not perform the essential duties of the position with accommodation and is less qualified than the successful candidate.

c) Offer and provide accommodation for the interview or test

Employers must accommodate applicants' needs related to *Code* grounds for any part of the interview or hiring process, including tests. The employer must provide appropriate accommodation subject to the test of undue hardship. See also Section IV-8 — "Meeting the accommodation needs of employees on the job" for more information on the principles involved.

The Commission recommends that employers offer accommodation to all candidates who need it when inviting them for an interview or test. A person who needs accommodation to take part in an interview is responsible for advising of this need in enough detail, and co-operating in consultations to enable the employer to respond to the request before the interview or testing. There is no set formula for accommodation. Each person's needs are unique and must be considered individually.

Example: A government employer invites 30 candidates to come in to write a written test for a position in the Communications department Candidates are told in advance that they will have one hour to read some materials and write two short documents similar to those they would be asked to do on the job, such as a brief or a press release. They are asked to identify any needs for accommodation. One person identifies a need for a computer with screen-reading software, and another asks for more time to do the tasks. The employer has enough time to ask for more information, if needed, and to plan to meet these needs so candidates can be fairly assessed on their abilities.

Example: An employer has scheduled candidates for interviews. When one person is told of her interview time, she says she is unavailable due to caregiving responsibilities, and asks for another time. The manager in charge of hiring then says that if she cannot attend, she will no longer be considered for the job, as there are many other candidates who are interested. Although the applicant has not specifically requested "accommodation because of family status," if a complaint was filed, this employer would be seen to have failed in its duty to accommodate to the point of undue hardship.

Example: A person applies for a position online and is asked to take part in a telephone interview. The person sends an e-mail asking that the interviewer call via TTY or the Bell Relay Service as an accommodation in the interview process. In response, she is told that she is unsuitable for the position because the position involves making telephone calls to customers. The employer may be found to have failed in its duty to accommodate. Also, the applicant has been denied an opportunity to demonstrate her ability to meet the essential duties of the position. This is discriminatory.

d) Make sure interview questions comply with the *Code*

When inappropriate questions relating to *Code* grounds are asked in an interview, an inference may be made that a decision not to hire was influenced by such questions. Employers could face a finding of discrimination even if there is no intention to discriminate. The fact that improper questions have been asked is sufficient to prove discrimination, even if the applicant is ultimately given the job.

> **Example:** A hiring manager interviewing a female applicant starts off by casually discussing his family and asking if she has any children of her own. Throughout the interview, the applicant is distracted, wondering if her family status is going to be an issue for the employer. This may be a violation of the *Code*, even if this information is not taken into account and the applicant is offered the job.

Take care to make sure that interviews are only to get information about qualifications and job requirements needed for the hiring decision.

Section 23(2) prohibits employers from asking questions that directly or indirectly classify or indicate qualifications by a prohibited ground of discrimination. On the other hand, section 23(3) permits asking questions at a personal interview about a prohibited ground of discrimination when discrimination on such ground is permitted under the *Code*. This means that at the interview stage, the employer has more flexibility to ask questions about prohibited areas of discrimination, provided that the questions relate to exceptions and defences that are provided for in the *Code*. These exceptions relate to special service organizations, special programs and jobs whose requirements are linked to specific *Code* grounds.

i) Hiring based on *Code* grounds for a special program:

When an employer meets the requirements of a special program, they will be able to target and hire persons based on specific *Code* grounds. For more information on special programs, see Section IV-Ic) — "Plan and implement a special program."

At the interview stage, an employer can ask questions related to *Code* grounds to assess the applicant's eligibility for a special program under section 14 of the *Code*. If a special program exists, it would be appropriate to ask relevant questions on a job application or in an interview to determine the candidate's eligibility for participation in the special program. For example, an employer can ask questions relating to membership in a group experiencing hardship or disadvantage to determine if the person meets the provisions of a special program. Make sure to provide the person with information about the special program when asking these kinds of questions.

ii) Hiring based on *Code* grounds if a special employment exemption applies:

When an exemption under section 24 applies, an employer can hire persons based on specific *Code* grounds, as long as the requirement is reasonable and bona fide based on the nature of the job. In such situations, it would be appropriate to ask relevant questions on a job application or in an interview.

> **Example:** A social service organization serving people who are deaf, deafened or hard of hearing may be allowed to prefer a community liaison officer who has a hearing disability.

The employer is allowed to ask questions relating to *Code* grounds in an interview, and to rely on them in making hiring decisions, if it meets the criteria for one of the following exemptions:

Special interest organization: Subsection 24(l)(a) allows certain special interest organizations to prefer hiring people based on their membership in certain groups. Special interest organizations might include:

- religious organizations that follow a particular system of faith and worship, such as a church or religious order
- philanthropic organizations that perform acts of benevolence, including man organizations that are registered as charities under the federal *Income Tax Act*

- educational organizations such as schools, colleges and other institutions that offer instruction and training of a moral, religious, vocational, intellectual or physical nature
- fraternal organizations formed for mutual aid or benefit but not for profit
- social organizations providing social or cultural benefits (for example, a cultural club serving a particular ethnic group).

For an organization to qualify for the exemption, it must also meet the following conditions:

- be primarily engaged in serving the interests of persons identified by their race, ancestiy, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability
- employs only, or gives preference in employment to, persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability
- the qualification must be reasonable and *bona fide* because of the nature of the job.

If these conditions are met, it may be permissible to hire someone who is identified or preferred based on a ground in the *Code*.

> **Example:** A denominational school is hiring teachers and caretaking staff. Questions about religious membership would be permitted if the job involves teaching religious values to students. So such questions would be allowed for teachers, but not for the caretaking staff.

Reasonable and *bona fide* link to *Code* grounds such as age or sex: Subsection 24(l)(b) allows discrimination in employment when the grounds of age, sex, record of offences or marital status are reasonable and *bona fide* qualifications because of the nature of the job.

> **Example:** A women's shelter advertises for support counsellors to women experiencing violence and states that applications will only be accepted from women. In this situation, the nature of the work would mean that gender could be a reasonable and *bona fide* requirement of the job.

Individual hiring for self, spouse or child who is "ill, aged or infirm": Subsection 24(l)(c) allows an individual to discriminate based on all prohibited grounds listed in section 5, if the primary duty of the job is to attend to the medical or personal needs of the person, of an ill child or an aged, infirm or ill spouse or other relative.

> **Example:** A man hires a male live-in caregiver for his father who has severe disabilities. Despite receiving applications from several qualified women, his father would prefer a male attendant and this has been taken into account in the hiring process. This is permissible.

Nepotism or anti-nepotism policies: Subsection 24(l)(d) allows an employer to grant or withhold employment or advancement to a person who is the spouse, child or parent of the employer or an employee.

iii) Asking about the applicant's ability to do essential duties of a job:

In an interview, the employer can expand the scope of job-related questions to determine the applicant's qualifications or ability to perform the essential job duties. If, during an interview, the applicant asks for on-the-job accommodation for needs such as those relating to religion or pregnancy, these kinds of needs may be discussed at the interview stage. If the person identifies disability-related needs as an issue in an interview, disability and accommodation measures related to the essential job duties can be discussed. Other than at an applicant's request, only discuss on-the-job accommodation after making a conditional offer of employment.

e) Making non-discriminatory hiring decisions

The decision-making process should be uniform, consistent, transparent, fair, unbiased, comprehensive and objective. Answers provided in an interview or written test should be scored against pre-set criteria that are based on the essential job requirements. Once a hiring decision is made, an organization should be able to document non-discriminatory reasons for hiring or not hiring each candidate.

Written records from the interview and the entire job competition should be kept for at least six months if no complaint about the process is made, and longer if a human rights claim is made (until the claim is resolved in the courts or before the Human Rights Tribunal). Unless there is a specific reason to destroy competition records, it is in an employer's interests to retain these documents as it will be better able to respond if a human rights claim is filed. Employees often choose not to "rock the boat" by filing a human rights complaint challenging hiring processes until after they have found another job or the final incident of discrimination, such as being fired.

> **Example:** A Black employee with a disability applies for promotions in 2002, 2005 and 2006. When he returns from a disability leave in 2007, he is fired. The reason given is that he does not have management potential and cannot continue in his current position due to a company reorganization. He files a human rights complaint alleging discrimination in all three job competitions and his termination from employment. As long as his complaint is filed within the applicable deadline, all of his allegations would be examined.

Employers must make sure that only information about qualifications and job requirements is considered when making hiring decisions. If an applicant has volunteered information relating to *Code* grounds during the hiring process, decision-makers should not consider this information. In these cases, employers should be very careful about assessing the candidates based on legitimate factors. The only time an employer can consider information related to *Code* grounds is when one of the *Code* exceptions applies.

When deciding whether to offer someone a job, employers should not take into account the fact that a candidate will not be able to start work on an anticipated start date due to a maternity, parental or disability leave. If the most qualified candidate is not immediately available, make alternate arrangements to fill the position in the interim. As with other forms of accommodation, this would be subject to the undue hardship standard.

> **Example:** A school board has a permanent vice-principal position available as of September. The top candidate is on a parental leave until January of the following year. Unless there is evidence of undue hardship, it would be discriminatory for the school board to decide not to offer this candidate the permanent position for this reason.

A decision-making process must not have the effect of excluding any group identified by *Code* grounds, whether overtly or covertly.

> **Example:** An employer rejected a Black candidate for a job after meeting her. He was visibly shocked and turned her down flat, without even asking about her credentials. When asked what was wrong, he said something about maintaining the company image.

> **Example:** An employer narrows down the pool of applicants from 10 to three who have Canadian experience. One of these candidates is awarded the job. The seven who were screened out because they did not have Canadian experience could file human rights claims alleging discrimination based on race and race-related grounds.

While required qualifications may legitimately change from time to time, take care to make sure that any changes to the decision-making criteria will not have discriminatory impacts on applicants.

> **Example:** Applicants for tenure track positions at a university are normally assessed according to their history of publications, research grants and teaching evaluations. When assessing candidates, a selection committee decides not to apply these requirements and instead relies on the subjective assessment of "potential." Ultimately, a new graduate who is White is hired for a tenure track position over a more accomplished racialized candidate who has been recognized internationally for his work at the university. This raises an inference of discrimination.

An organization should be able to provide a non-discriminatory reason for not hiring a person. Employers should avoid telling an untruth to spare an applicant's feelings, as this may lead him or her to suspect that discrimination is in fact behind the decision not to hire. Even if a complainant is not the most qualified, discrimination may be found when he or she is given a discriminatory reason for the employer's decision.

Example: An applicant scores 19th out of 20 in a fair job competition, and positions are awarded to the top 14 candidates. The employer tells the applicant that he was not a "good fit" to spare him from knowing that he actually scored second lowest on the competition. The applicant is led to believe that he scored well on the test but that he was not hired because of subjective considerations such as age or race. Even if the documents and other evidence support the employer's case, the employer may need to spend time and resources defending against this complaint.

i) Discrimination in the hiring process:

In general, discrimination in hiring may be identified when a qualified person is turned down for a job that is then given to another person who is not similarly protected under the *Code*. However, discrimination in the hiring process may also be established even if a particular person protected by the *Code* would not have been the successful candidate without the discrimination. For example, if two candidates are equally qualified and the non-racialized person is selected, the organization will need to provide a non-discriminatory explanation for not hiring the racialized person if a human rights claim is filed. As well, discrimination may be found when a qualified candidate is protected under the *Code*.

Bias or stereotypes in the decision-making process may lead to eliminating candidates on the basis of grounds protected under the *Code*. The following list provides a few examples of hiring decisions that may be tainted by discriminatory considerations:

- **Rejecting applicants because they do not match the "company image" or "fit" the organization's culture:** This could disadvantage persons identified by race and race-related grounds, older applicants, persons with disabilities or other people who are easily identified as not belonging to the dominant group.
- **Not hiring someone due to a perceived lack of "career potential":** This requirement tends to adversely affect older applicants, especially where they are applying for "entry-level" type jobs.
- **Refusing an applicant who has "too much experience" or who is "overqualilied":** Turning away candidates who are "overqualified" may sometimes have an adverse effect on older candidates, people who are seeking to re-enter the workforce after lengthy absences (such as people with disabilities or who have caregiving responsibilities), and newcomers to Canada.
- **Assuming that a person is not suitable without fully assessing their qualifications:** Persons with disabilities may be affected by "social handicapping" when they are presumed to be unable to do the job, even though their disabilities are not relevant. This may also affect older candidates, women and racialized persons.
- **Eliminating applicants because their backgrounds contain gaps:** This can be a particular problem for older women who have re-entered the workforce after childrearing and have had to retrain. This may also be a barrier for persons with disabilities who were out of the workforce for an extended time for medical reasons.
- **Viewing an applicant as unsuitable because they needed accommodation in the hiring process:** When making hiring decisions, employers should not take into account whether a person has requested accommodation during the hiring process.
- **Perceiving that an applicant is trouble or will somehow be disruptive because they have objected to discriminatory comment or conduct in the interview:** It is reprisal for a qualified applicant to be penalized for reacting to discriminatory comment or conduct related to a *Code* ground in an interview. For example, an employer asks an applicant whether she is single. She says that this is not relevant and asks that the interview focus on her qualifications. As a result, she is viewed as not having "people skills" and is no longer considered for the job.

- **Taking into account discriminatory customer preferences:** If an employer believes that customers would object to a person being hired due to their membership in a group protected by the *Code*, it is not allowed to take this into account in a hiring process. For example, it would be discriminatory for a manager of a small business office serving mostly White clientele to reject a Black candidate because he believes that customers would be uncomfortable being greeted by a racialized receptionist.

Employers should make sure that persons assessing or rating candidates are trained to identify and correct for bias based on age, social class, life experience and other personal factors that may affect how they view, and ultimately score, candidates.

Example: In an airline's hiring process, all candidates were assessed on criteria such as "assertiveness," "teamwork" and "ability to have fun." Although these were age-neutral on their face, bias was introduced through the subjective views of the assessors, many of whom were under age 35. The assessors tended to choose candidates with the same age, social class and life experience as they did. Thus, workers over 35 years of age were disadvantaged compared to workers under age 35.

Employers should also make sure to review and assess the qualifications of all candidates equally. When a decision-making process is cut short, take care to make sure this is not linked to *Code* grounds, and it will not have a more severe impact on persons protected under the *Code*.

Example: Some candidates are viewed as undesirable because of their perceived race, ethnic origin, disability, sexual orientation, family status or other *Code* ground. The employer does not review their qualifications in as much detail as other candidates. The employer also decides to skip the reference check that is normally done. If proven, these changes from the normal process would lead to a finding of discrimination regardless of whether these candidates ultimately would have been successful if their qualifications were assessed fairly.

f) Specific concerns based on individual *Code* grounds

i) Age:

Under subsection 24(1)(a) of the *Code*, questions about age are allowed if the employer is a special service organization that serves a particular age group. Special service organizations are defined as religious, philanthropic, educational, fraternal or social in nature, serving mostly the interests of certain age groups. Employers can hire persons based on their age if age is a reasonable and *bona fide* 'job requirement

Example: A youth group is hiring a social coordinator and the organization wishes to hire a person under age 25. The group may be able to do so, if it can show that this is a *bona fide* job requirement.

Even if an employer is not considered to be a "special service organization," it can still make distinctions based on age if age is a reasonable and *bona fide* qualification because of the nature of the job. If so, then the exemption under subsection 24(1)(b) of the *Code* may apply. No other questions or statements related to age are allowed.

Comments on the applicant's appearance and/or health or suggesting that the person may not fit into a youthful work culture may indicate discrimination on the basis of age and should always be avoided. The following types of statements can be reasonably interpreted as euphemisms for age, or indirect ways of making inappropriate age-related comments:

- "Do you think you can handle this job?"
- "It takes a person who is full of vim and vigour."
- "We are looking to rejuvenate the workforce."

ii) Citizenship:

Employers can ask if a person is legally entitled to work in Canada. Avoid asking for information on nationality, place of birth or ethnic origin, even if these are required by the organization responsible for licensing the applicant's occupation. Other than three specific situations described below, employers cannot ask for information about citizenship.

- **Citizenship requirements imposed or authorized by law**
  Section 16(1) of the *Code* indicates that questions about citizenship are allowed if a citizenship requirement is imposed or authorized by law for the particular job. If there is a legal requirement for citizenship, or other qualifications that have to be certified or acquired in this countiy, the law would have to be reasonable and non-discriminatory. Employers should note that compliance with laws from another jurisdiction does not entitle an employer to rely on section 16(1). See also i) — "Citizenship" in Section III-3 — "Grounds of discrimination; definitions and scope of protection."

  Example: A Canadian employer requires all employees to hold only Canadian or American citizenship and asks about this in interviews. As this requirement arises only under U.S. laws, these types of questions would be viewed as being contrary to the *Code*.

- **Promoting participation of citizens and permanent residents**
  Questions about citizenship or permanent resident status are also allowed in some cases under subsection 16(2) of the *Code*. An example is when a requirement of Canadian citizenship or permanent residence has been adopted to promote participation in cultural, educational, trade union or athletic activities to other citizens or permanent residents.

- **Senior executives**
  Employers can also ask candidates for the chief or senior executive positions questions about their Canadian citizenship or residence. Subsection 16(3) of the *Code* allows these questions to be asked if the organization has adopted a requirement that such senior executives be Canadian citizens or live in Canada with the intention to get Canadian citizenship.

iii) Race and race-related grounds:

Questions about "Canadian experience" sometimes pose particular problems for recent immigrants, and may have an adverse impact on persons based on their place of origin, ethnic origin or race. Employers should ask questions to assess whether candidates have trade or professional qualifications without asking about Canadian experience or stating that Canadian experience is preferred.

In an interview, employers should avoid asking questions or otherwise commenting on the applicant's:

- presence or absence of Canadian experience;
- landed immigrant status, permanent residency, naturalization or refugee status;
- place of birth;
- affiliation with a particular "community" or where the applicant "comes from";
- membership in organizations such as cultural or ethnic associations;
- name and/or the applicant's appearance;
- name and location of schools attended.

Special service organizations that are religious, philanthropic, educational, fraternal or social may employ only people from certain racialized groups, if the organization serves mostly their interests. In these cases, employers can hire persons based on race, place of origin, ethnic origin. This exception does not, however, extend to citizenship and is only permitted if membership in the *protected* group is reasonable and *bona fide* because of the nature of the job.

Example: Recruiters for a social organization that mainly serves Aboriginal communities and seeks to hire an employment counsellor may prefer a person who is of Aboriginal ancestry. The organization may be able to do so, provided that it can show that this is a *bona fide* job requirement.

In an interview, questions may be asked about language abilities, even if those requirements might be indirectly linked to a person's racial background, as long as the language abilities relate to a *bona fide* job requirement.

Example: A financial institution is filling a customer service job for one of its branches located in an ethnically diverse area of the city. The position requires fluency in one or more of the languages the local population uses. Asking what languages the applicant speaks would be allowed if this is a bona fide job requirement.

One of the most common forms of discrimination that racialized candidates are exposed to in an interview situation is being asked "Where are you from?" or "What nationality is your name?" These questions single out the candidate based on race, place of origin or ethnic origin and would not likely be asked of a Caucasian candidate. They are therefore discriminatory. While an interviewer might intend no harm, or even be seeking to put a candidate at ease, these questions should always be avoided. Racialized applicants and tribunals routinely find these types of questions to be discriminatory. Where having knowledge of a particular country or language is a *bona fide* occupational qualification, the questions asked should clearly relate to the qualification.

Example: Instead of asking "Where are you from," the employer might refer back to the job description and state, "We are an Ontario-based NGO recruiting workers to provide services in Zambia. As a field worker, knowledge and experience in local geography, politics or languages are essential given the short length of the contract. Please describe what knowledge and experience you would bring to the position."

iv) Creed/religion:

In an interview, if an applicant requests accommodation for religious requirements in the workplace, the accommodation needs may be discussed. Otherwise, employers should discuss accommodation of religious needs in the workplace after making a conditional offer of employment.

Example: An observant Muslim who applies for a job that requires wearing a uniform may request accommodation for her religious requirement of wearing a hijab (a head covering).

Special service organizations that are religious, philanthropic, educational, fraternal or social may prefer to employ persons of a particular religion if the organization serves mostly the interests of that group. If the exemption in subsection 24(l)(a) applies, the organization would be permitted to ask questions about an applicant's creed or religion.

Note that under section 19 of the *Code*, the constitutional rights and protections given to Roman Catholic schools are not affected by the *Code*.

v) Disability:

When an applicant's disability becomes an issue during an interview, an employer is expected to canvas the need for accommodation measures. If this is not done and the applicant is not successful, this could lead to a complaint on the ground of disability.

If a person chooses to talk about his/her disability at an interview, an employer can ask about their accommodation needs and ability to perform the essential duties of the job with accommodation. Any questions beyond this scope should be made with great caution and vigilance as they may lead to a complaint on the ground of disability if the person is not hired. Avoid asking gratuitous questions such as "How did you end up in a wheelchair?" or "Have you been blind all your life?"

Questions about disability may be allowed by religious, philanthropic, educational, fraternal or social organizations that serve persons with disabilities. The exception in subsection 24(l)(a) of the *Code* applies provided that having a particular disability is a reasonable and *bona fide* requirement because of the nature of the job.

Requests for a driver's licence number or a copy of the licence, when relevant to the job, should only be made following a conditional offer of employment. Other disability-related issues should not be raised until after a conditional offer of employment has been made. All other questions about an applicant's disability are prohibited.

vi) Family status:

Where employees have significant caregiving responsibilities, their ability to travel regularly may be limited. Avoid assuming that an employee or applicant with children will not be interested in work that involves travel.

If travel is not a *bona fide* requirement, employees should not be denied opportunities because their caregiving responsibilities prevent them from traveling regularly or extensively. If travel is a *bona fide* requirement, and an applicant has said that he or she cannot travel often because of family status, this person should not automatically be screened out. If the person is otherwise qualified and suitable for the job, the employer may be expected to offer the person the job and provide accommodation to the point of undue hardship (for example, by recognizing related dependent-care expenses or providing appropriate supports).

An employer may grant or withhold employment or promotions from a person who is a child or parent of the employer or an employee. When an employer has a policy on this issue, inquiries about whether an applicant is a child or parent of a current employee would be allowed. However, such a policy must be applied consistently and without regard to the personal characteristics of the person being interviewed.

vii) Marital status:

Questions based on marital status may be asked if the organization serves a particular group of persons identified by their marital status. Questions about marital status are allowed if the employer is a religious, philanthropic, educational, fraternal or social organization that serves a particular group of persons such as single, divorced or other persons identified by their marital status. The *Code* permits giving preference to persons based on their marital status, as long as marital status is a reasonable and *bona fide* requirement because of the nature of the job.

For other employers, marital status may also be a reasonable and *bona fide* requirement for a particular job. In these cases, questions about the particular qualification can be asked at the employment interview stage. No other questions about marital status are allowed.

An employer may grant or withhold employment or promotions to a person who is a spouse of the employer or an employee. When an employer has a policy on this issue, questions about whether an applicant is a spouse of a current employee or the employer would be allowed. However, such a policy must be applied consistently and without regard to the personal characteristics of the person being interviewed.

> **Example:** A husband applies for a job with the company his wife works at. He passes the initial screening based on his application form, resume and a written test. He is invited to an interview. During his interview, he states that he would need accommodation related to disability to perform the essential duties of the position. The interviewer then asks him to confirm that he is in fact the spouse of an employee (information that was known even during the initial screening phase). When the applicant does so, he is told that he is not eligible for the position because of an unwritten nepotism policy. This scenario raises an inference of discriminatory treatment based on the intersection of disability and marital status.

No other questions about marital status are allowed.

viii) Record of offences:

Employers are allowed to ask about and consider unpardoned *Criminal Code* convictions when hiring. It is discriminatory to consider information about pardoned *Criminal Code* convictions and provincial offences unless an exemption applies.

Where an employer can show that the requirement is reasonable and *bona fide* because of the nature of the job, the exemption in subsection 24(l)(b) applies, and an employer can choose not to hire based on record of offences.

Example: A school board has hired as school bus drivers only people who do not have convictions for careless driving. This requirement is reasonable and *bona fide*.

Questions to determine if an applicant is bondable are also allowed, if being bondable is a reasonable and *bona fide* requirement given the nature of the job. All other questions are prohibited.

ix) Sex (and pregnancy):

In some cases, because of the nature of the job, being a man or a woman may be a reasonable and *bona fide* qualification. In interviews, an employer can discuss this with the applicant. To hire based on sex, employers must be able to show that such a requirement is reasonable and *bona fide*, and that accommodation would cause undue hardship.

Example: An employer hired only male attendants for night shifts providing care to elderly residents with disabilities that make them aggressive. This is found to be discriminatory because it is based on a stereotype that women would be less able to deal with aggression. There are less discriminatory alternatives, such as providing female attendants with the needed training.

Organizations that are religious, philanthropic, educational, fraternal or social are allowed to prefer to employ only men or only women, if the organization serves mostly their interests and being a man or a woman is reasonable and *bona fide* based on the nature of the job.

The right to equal treatment in employment because of sex prohibits pregnancy-related questions during a job interview. For example, an employer cannot ask an applicant whether she is pregnant or whether she has or plans to have a family, unless it relates to a reasonable and *bona fide* job requirement. If the applicant raises the issue of accommodation for pregnancy-related needs, the accommodation needs may be discussed at the interview stage. At the interview stage, the employer may expand the scope of job-related questions, if needed, to learn the applicant's qualifications or ability to perform the essential duties with accommodation. However, it may suffice for an employer to indicate that the accommodation process will be discussed following a conditional offer of employment.

Employers can refuse to hire someone based on pregnancy if they can show that this is reasonable, done in good faith and based on the nature of the job. However, to benefit from this exception, employers must show that the essential qualifications or requirements of the job cannot be changed or accommodated without creating undue hardship, considering excessive costs or health and/or safety risks. See also Section IV-2a) — "Make sure that job requirements are reasonable and made in good faith."

x) Sexual orientation:

Questions about sexual orientation are not allowed during an interview, even if the employer is a religious, philanthropic, educational, fraternal or social organization. This is because the ground of sexual orientation is not listed in subsection 24(l)(a). Questions relating to sexual orientation may be asked to determine eligibility for a special program. Otherwise, no questions about sexual orientation are permitted.

Sample Application for Employment

Position being applied for _____

Date available to begin work _____

PERSONAL DATA

Last name _____

Given name(s) _____

Address _____ Street _____ Apt.No. _____

Home Telephone _____ Number _____

City _____ Province _____ Postal Code _____

Business telephone number _____

Are you legally eligible to work in Canada? ☐ Yes ☐ No

Are you 18 years or more? ☐ Yes ☐ No

Are you willing to relocate in Ontario? ☐ Yes ☐ No

Preferred location _____

To determine your qualification for employment, please provide below and on the reverse, information about your academic and other achievements including volunteer work, as well as employment history. Attach any additional information on a separate sheet.

EDUCATION

☐ SECONDARY SCHOOL

☐ BUSINESS OR TRADE SCHOOL

Highest grade or level completed _____

Name of program _____

Length of program _____

Licence, certificate or diploma awarded? ☐ Yes ☐ No

Type: _____

COMMUNITY COLLEGE ☐ **UNIVERSITY** ☐

Name of program _____ Length of program _____

Diploma/degree awarded ☐ Yes ☐ No ☐ Honours

Major subject _____

Other courses, workshops, seminars _____

Licences, certificates, degrees _____

WORK-RELATED SKILLS

Describe any of your work-related skills, experience or training that relates to the position being applied for.

_____

_____

_____

_____

EMPLOYMENT

Name of present/last employer _____

Job title _____

Period of employment (includes time spent away from work due to disability or maternity/parental leave but it is not necessary to refer to this)

From _____ to _____

Type of business _____

Reason for leaving (do not refer to issues related to maternity/parental leave, Workers' Compensation claims, handicap/disability, or human rights complaints) _____

_____

Functions/responsibilities _____

For employment references we may approach:

Your present/last employer? ☐ Yes ☐ No

Your former employees? ☐ Yes ☐ No

List references if different than above on a separate sheet.

PERSONAL INTERESTS AND ACTIVITIES (civic, athletic etc.)

_____

_____

_____

_____

I hereby declare that the foregoing information is true and complete to my knowledge. I understand that a false statement may disqualify me from employment, or cause my dismissal.

Have you attached an additional sheet? ☐ Yes ☐ No

Signature _____ Date _____

APPENDIX C — Employment Contract Checklist

Minimal Requirements

Is this individual a new employee or a current employee?

If they are a current employee, you will need to give them "fresh consideration"; i.e., a ***new****, greater benefit for signing the agreement to ensure the agreement is enforceable. Consideration can include items such as a signing bonus, a raise, a fitness/gym membership credit, or more vacation time.*

What is the title of the employee's position?

What is the employee's start date?

Term of Agreement

What sort of employee are they?

1. Permanent staff? [indefinite term];
2. Staff hired for a specific period of time only? [for e.g., to replace someone on maternity leave. These are called term employees];
3. Staff hired every year for less than 12 months each time?
4. Staff that only come in when you call them? [casual/on-call staff].

Criminal Reference Check

Is a satisfactory criminal reference check a condition of employment?

Would you like the right to end the employee's employment / not hire the employee in the event that the results of a criminal reference check are unsatisfactory?

Reporting

Who does the employee report to?

State the title of this person's position.

Duties and Responsibilities

What are the employee's main duties and responsibilities?

Is there a current job description you can provide?

Hours of Work

How many hours will this individual work per week?

What is the employee's schedule (set hours of work, variable depending on the week, or strictly on a call-in basis)?

Is the employee full-time? Part-time?

Performance Appraisal

Will the performance of the employee be reviewed annually? By whom?

Who sets the criteria against which the employee's performance will be reviewed?

Bonuses

Is this employee entitled to a bonus?

Is the bonus to be paid based on performance, on practice profits, or a combination?

When is the bonus to be paid?

Salary/Hourly Rate

The annual salary of the employee is $ _____ **OR** the hourly rate is $ _____/hr

Check one of the following

Will you reference salary/rate increases in the employment contract? Y _____ N _____

IF YES...

____ The annual salary will be increased by _____% effective on _____ (date);

OR

____ Salary increases will be negotiated;

OR

____ Salary increases are at the complete discretion of the employer.

Overtime Compensation

Does the employee have the obligation to work overtime? When will the employee have to work overtime?

What is the rate of pay for overtime work? The minimum payable under the *Employment Standards Act, 2000* (the "*ESA*") is 1.5 x the hourly rate — would you like to give a greater overtime rate?

Under the *ESA*, overtime is payable when an employee works more than 44 hours per week. Would you like to set a lower overtime threshold (i.e., start paying overtime after a lower number of hours worked per week or after a certain number of hours per day)?

What is the title of the position with the authority to approve overtime?

Would you like to provide overtime as pay, or would you rather provide it as paid time off?

Does the employee ever have to work more than 48 hours/week? If so, do you have approval from the Ministry of Labour?

Group Insurance

Does your organization have a group insurance plan?

If yes, check one of the following

____ The cost of group insurance premiums will be paid 100% by the employer; **OR**

____ The cost of group insurance premiums will be paid 100% by the employer with the exception of the cost of the premium for:

- ☐ Long Term Disability insurance;
- ☐ Accidental Death & Dismemberment;
- ☐ Life Insurance;
- ☐ Other: _____

OR

____ The cost of group insurance premiums will be shared; ____% will be paid by the organization and ____% will be deducted from the employee's pay.

If no benefit plan, do you want to offer:

____ The employee will receive payment equivalent to _____% of salary in lieu of benefits.

Retirement Benefits

Do you have a pension plan or group RRSP?

What is the maximum that the employer pays? The employee?

When is it paid? Every cheque? Once a year?

Sick Leave

Is paid sick leave provided? If so, how many days per year?

Can sick leave be carried over from year to year? If so, how many days can be carried over?

Vacation

How much vacation time do employees receive per year?

How will the vacation entitlement increase with service? (*ESA* minimum is 2 weeks for short service employees, and 3 weeks for employees with five-(5) plus years of service)

Is the employee entitled to take vacation time off within their first year on the job, or only after completing the full year of service?

Are there any restrictions as to the time of year when vacation can be taken?

Is vacation to be taken at a mutually agreeable time, or only when it is convenient to the employer?

Can an employee carry over unused vacation time from year to year? If so, what is the maximum number of days that can be carried over? Is approval needed for an employee to do this?

How do employees receive their vacation pay?

1. On each pay cheque;
2. When they take their vacation; or
3. Their salary is continued without interruption during their vacation.

Years of service completed	Amount of vacation time owing

Parking

Will you provide the employee with a parking spot?

If so, do employees have to pay for their parking spot?

Reimbursement of Expenses

Will the employee be reimbursed by the practice for expenses related to their job duties?

What is the title of the position with the authority to approve expenses?

Professional Memberships and Licenses

Do you intend to pay for professional memberships and licenses on the employee's behalf?

If so, how should the employee request that these memberships/licenses be paid (e.g., by written request, providing copies of the invoice etc.)?

Are there certain professional memberships or licenses that must be maintained by the employee personally as a condition of employment?

Probationary Periods

Do you want to have a probationary period for the new employee, where you can determine if they are a good fit for the organization?

How long will the probationary period last?

> *What is reasonable will depend on how long it could be expected the employee will need to adjust to the job, and how long you expect you will need to assess the employee's suitability. Note that termination without notice is limited to the first* ***three (3)*** *months only under the* ESA.

Non-Competition Clauses — *Note that these clauses are rarely upheld by the Courts*

Do you want to prevent a former employee from working in your field of business after they leave your practice?

Do you want to restrict employees from starting a competing business within a specific geographic area

> *The smaller the area, the better the chance the clause will be enforced by a court. Be as specific as possible — for example, "within 10 km of the employer's [type of business — e.g., dentistry, orthodontics, hygiene] at [address]". Also specify the length of time during which you would like the clause to apply (e.g., three months).*

Non-Solicitation Clauses — *Note that these clauses are preferable to non-competition*

Would you like to prevent a former employee from approaching your patients/other employees/suppliers/referral sources to try to convince them to follow the former employee to a new business?

> *Specify the length of time during which you would like to prohibit the former employee from reaching out to these third parties: X months. The shorter the period, the more likely it is to be enforced by a court.*

Confidentiality Clauses

Would you like to require employees to keep information obtained during their employment confidential?

Specify the information you want to keep confidential: *e.g., patient names, pricing strategies, marketing plans, supplier sources, etc.*

Termination of this Agreement

How much notice of resignation would you like from the employee?

How much notice of termination are you willing to give in the event that you want to terminate the employee's employment?

- Minimum statutory entitlements?
- # of weeks or months per year of completed service?
- A set amount regardless of service (e.g., six (6) months)?

Do you have a payroll (including benefits) of $2.5 million dollars?

APPENDIX D — Ministry of Labour Employment Standards in Ontario

Ministry of Labour

Employment Standards in Ontario

The *Employment Standards Act, 2000* (ESA) protects employees and sets minimum standards for most workplaces in Ontario.

Employers are prohibited from penalizing employees in any way for exercising their ESA rights.

FAIR AT WORK ONTARIO

What you need to know

Minimum wage
Most employees are entitled to be paid at least the minimum wage. For current rates visit: Ontario.ca/minimumwage.

Hours of work and overtime
There are daily and weekly limits on hours of work, and rules around meal breaks, rest periods and overtime. For more information visit: Ontario.ca/hoursofwork and Ontario.ca/overtime.

Public holidays
Ontario has a number of public holidays each year. Most employees are entitled to take these days off work and be paid public holiday pay. For more information visit: Ontario.ca/publicholidays.

Vacation time and pay
Most employees earn vacation time after every 12 months of work. There are rules around the amount of vacation pay an employee earns. For more information visit: Ontario.ca/vacation.

Leaves of absence
There are a number of job-protected leaves of absence in Ontario. Examples include pregnancy, parental and family caregiver leave. For more information visit: Ontario.ca/ESAguide.

Termination notice and pay
In most cases, employers must give advance written notice when terminating employment and/or termination pay instead of notice. For more information visit: Ontario.ca/terminationofemployment.

Learn more about your rights at:

Ontario.ca/employmentstandards

1-800-531-5551 or TTY 1-866-567-8893

@ONlabour @OntarioMinistryofLabour

Other employment rights, exemptions and special rules

There are other rights, exemptions and special rules not listed on this poster including rights to severance pay and special rules for assignment employees of temporary help agencies.

Subscribe to stay up-to-date on the latest news that can affect you and your workplace: Ontario.ca/labournews

Version 8.0

Ontario

APPENDIX E — Leaves Under the *Employment Standards Act, 2000*

Leave	*ESA* Reference	Eligibility/ Qualifying Criteria	Maximum Length	Employee Obligations	Information That can be Requested	Employer Obligations During	Employer Obligations After
Pregnancy	s. 46-47	Pregnant EE who started employment at least 13 weeks before due date	17 weeks (or longer if 17 weeks used and baby not yet born)[1] Can start earlier of live birth OR 17 weeks before due date Must start by later of due date OR birth date	2 weeks' written notice (in advance if possible) to start leave 4 weeks' advanced written notice before changing any stated end of leave to new, earlier date 4 weeks' notice if resigning during or at end of leave	Certificate from doctor, midwife or nurse practitioner re: due date (and date of miscarriage or stillbirth, if applicable)	Continue to pay ER share for EE participation in benefit plans[2] Continue credit for EE's length of employment, service and seniority	Return EE to same job (or, if it no longer exists, a comparable job) Maintain same pay rate Provide any increases EE would have gotten while on leave No reprisals
Parental	s. 48-49	EE is new parent who started employment at least 13 weeks before due date; includes birth parents, adoptive parents, and EEs in a relationship of some permanence with the parent of a child that the EE plans to treat as their own	61 weeks for birth mothers who took pregnancy leave 63 weeks for all other new parents[3] Must start within 78 weeks or later of: birth date, OR date baby first came into EE's care	2 weeks' written notice (in advance if possible) to start leave 4 weeks' advanced written notice before changing end of leave to a new, earlier date 4 weeks' notice if resigning during or at end of leave		Continue to pay ER share for EE participation in benefit plans[4] Continue credit for EE's length of employment, service and seniority	Return EE to same job (or, if it no longer exists, a comparable job) Maintain same pay rate Provide any increases EE would have gotten while on leave No reprisals
Sick Leave	s. 50	Personal illness, injury or medical emergency Employed for at least 2 consecutive weeks	3 days	Oral or written notice ASAP after beginning leave, if not possible before	Evidence reasonable in the circumstances of entitlement, including a note/ certificate from a qualified health practitioner	Continue to pay ER share for EE participation in benefit plans[5] Continue credit for EE's length of employment, service and seniority	Return EE to same job (or, if it no longer exists, a comparable job) Maintain same pay rate Provide any increases EE would have gotten while on leave No reprisals

[1] In case of miscarriage or stillbirth within 17 weeks of due date, pregnancy leave may be taken, but ends on the later of: 17 weeks after pregnancy leave began OR 12 weeks after the miscarriage/stillbirth.

[2] Except if EE advises in writing that they will not continue to pay their share of the premiums.

[3] For EEs whose children were born or came into their care, custody and control for the first time before December 3, 2017, parental leave is limited to 35 weeks for birth mothers who took pregnancy leave and 37 weeks for all other new parents.

[4] Except if EE advises in writing that they will not continue to pay their share of the premiums.

[5] Except if EE advises in writing that they will not continue to pay their share of the premiums.

Leave	*ESA* Reference	Eligibility/ Qualifying Criteria	Maximum Length	Employee Obligations	Information That can be Requested	Employer Obligations During	Employer Obligations After
Family Responsibility Leave	s. 50.0.1	Illness, injury, medical emergency or urgent matter of defined individuals[6] Employed for at least 2 consecutive weeks	3 days	Oral or written notice ASAP after beginning leave, if not possible before	Evidence reasonable in the circumstances of entitlement, including a note/ certificate from a qualified health practitioner	Continue to pay ER share for EE participation in benefit plans[7] Continue credit for EE's length of employment, service and seniority	Return EE to same job (or, if it no longer exists, a comparable job) Maintain same pay rate Provide any increases EE would have gotten while on leave
Bereavement Leave	s. 50.0.2	Death of defined individuals[8] Employed for at least 2 consecutive weeks	2 days	Oral or written notice ASAP after beginning leave, if not possible before	Evidence reasonable in the circumstances of entitlement, including a note/ certificate from a qualified health practitioner	Continue to pay ER share for EE participation in benefit plans[9] Continue credit for EE's length of employment, service and seniority	Return EE to same job (or, if it no longer exists, a comparable job) Maintain same pay rate Provide any increases EE would have gotten while on leave
Family Caregiver	s. 49.3	EE providing care or support[10] to family member[11] with serious medical condition	8 weeks per family member (need not be consecutive)	Written notice (in advance if possible)	Medical certificate from doctor, RN or psychologist stating that identified family member has a serious medical condition	Continue to pay ER share for EE participation in benefit plans[12] Continue credit for EE's length of employment, service and seniority	Return EE to same job (or, if it no longer exists, a comparable job) Maintain same pay rate Provide any increases EE would have gotten while on leave No reprisals

[6] Spouse, parent, step-parent, foster parent, child, step-child, foster child, grandparent, step-grandparents, grandchild or step-grandchild of EE or their spouse, spouse of EE's child, EE's sibling or EE's relative that is dependent on EE for care or assistance.

[7] Except if EE advises in writing that they will not continue to pay their share of the premiums.

[8] As above.

[9] Except if EE advises in writing that they will not continue to pay their share of the premiums.

[10] Includes psychological or emotional support, arranging for third-party care, and directly providing or participating in care.

[11] Spouse, parent, step-parent, foster parent, child, step-child, foster child, grandparent, step-grandparents, grandchild or step-grandchild of EE or their spouse, spouse of EE's child, EE's sibling or EE's relative that is dependent on EE for care or assistance.

[12] Except if EE advises in writing that the EE providing care or support to family member with serious medical condition will not continue to pay their share of the premiums.

Leave	*ESA* Reference	Eligibility/ Qualifying Criteria	Maximum Length	Employee Obligations	Information That can be Requested	Employer Obligations During	Employer Obligations After
Family Medical	s. 49.1	EE providing care or support[13] to family member[14] with serious medical condition and significant risk of death within 26 weeks	28 weeks in a 52-week period Must begin by first day of first week of 26-week period set out in certificate Must end by earliest of: last day of the week in which family member dies, OR last day of the week the 52-week period expires, OR last day of the 28 weeks of leave	Written notice (in advance if possible)	Medical certificate from doctor or RN stating that identified family member has a serious medical condition with significant risk of death within 26 weeks If leave taken in respect of someone "considered to be like a family member", completed compassionate care benefits attestation form	Continue to pay ER share for EE participation in benefit plans[15] Continue credit for EE's length of employment, service and seniority	Return EE to same job (or, if it no longer exists, a comparable job) Maintain same pay rate Provide any increases EE would have gotten while on leave No reprisals
Critical Illness	s. 49.4	EE employed for 6 or more months and providing care or support to critically ill[16] minor child[17] or adult family member[18]	17 weeks in a 52-week period to care for adult 37 weeks in a 52-week period to care for child Need not be consecutive	Written notice (in advance if possible)	Medical certificate from doctor, RN or psychologist stating that identified minor child or family member is critically ill or injured and requires care or support of a family member for a defined period If leave taken in respect of someone "considered to be like a family member", completed compassionate care benefits attestation form	Continue to pay ER share for EE participation in benefit plans[19] Continue credit for EE's length of employment, service and seniority	Return EE to same job (or, if it no longer exists, a comparable job) Maintain same pay rate Provide any increases EE would have gotten while on leave No reprisals

[13] Includes psychological or emotional support, arranging for third party care, and directly providing or participating in care.

[14] Spouse, parent, step-parent, foster parent, child, step-child, foster child, child under legal guardianship, grandparent, step-grandparents, grandchild, step-grandchild, sibling, step-sibling, son-in-law, daughter-in-law, uncle, aunt, niece or nephew of EE or their spouse, the spouse of the EE's grandchild, uncle, aunt, niece or nephew, or a person the EE considers to be like a family member.

[15] Except if EE advises in writing that the EE providing care or support to family member with serious medical condition will not continue to pay their share of the premiums.

[16] Meaning their baseline health has significantly changed and their life is at risk as a result of an illness or injury. Note: does not include chronic conditions.

[17] Child, step-child, foster child or child under EE's legal guardianship who is under 18.

[18] Spouse, parent, step-parent, foster parent, child, step-child, foster child, child under legal guardianship, grandparent, step-grandparents, grandchild, step-grandchild, sibling, step-sibling, son-in-law, daughter-in-law, uncle, aunt, niece or nephew of EE or their spouse, the spouse of the EE's grandchild, uncle, aunt, niece or nephew, or a person the EE considers to be like a family member.

[19] Except if EE advises in writing that the EE providing care or support to family member with serious medical condition will not continue to pay their share of the premiums.

Leave	*ESA* Reference	Eligibility/ Qualifying Criteria	Maximum Length	Employee Obligations	Information That can be Requested	Employer Obligations During	Employer Obligations After
Organ Donor	s. 49.2	EE started employment at least 13 weeks before due date and is undergoing surgery to donate all or part of an organ[20] to another person	13 weeks (or up to 26 weeks, if medical certificate requires)	2 weeks written notice (in advance if possible)	Medical certificate from surgeon confirming any of the following, as needed: 1) that the EE has undergone or will undergo surgery to donate an organ, 2) when leave is to begin and 3) for how long leave must be extended beyond 13 weeks	Continue to pay ER share for EE participation in benefit plans[21] Continue credit for EE's length of employment, service and seniority	Return EE to same job (or, if it no longer exists, a comparable job) Maintain same pay rate Provide any increases EE would have gotten while on leave No reprisals
Reservist	s. 50.2	EE has been employed for 6 months and is a reservist deployed to a Canadian Forces operation to provide assistance in dealing with an emergency or its aftermath, including pre- and post-international deployment activities	As necessary	Reasonable written notice (in advance if possible)	Reasonable evidence of entitlement	Continue credit for EE's length of employment, service and seniority	Return EE to same job (or, if it no longer exists, a comparable job)[22] Maintain same pay rate Provide any increases EE would have gotten while on leave No reprisals

[20] Kidney, liver, lung, pancreas or small bowel.

[21] Except if EE advises in writing that the EE providing care or support to family member with serious medical condition will not continue to pay their share of the premiums.

[22] Reinstatement may be postponed to the later of: 2 weeks after the leave ends, OR the first pay day after the leave ends.

Leave	*ESA* Reference	Eligibility/ Qualifying Criteria	Maximum Length	Employee Obligations	Information That can be Requested	Employer Obligations During	Employer Obligations After
Child Death	s. 49.5	EE has been employed for 6 months and child[23] dies Exception: child died as a result of a crime and the EE is charged with the crime or it is probable that the child was a party to the crime	104 consecutive weeks, to be taken within 105 weeks of the death	Written notice (in advance if possible)	Reasonable evidence of entitlement	Continue to pay ER share for EE participation in benefit plans[24] Continue credit for EE's length of employment, service and seniority	Return EE to same job (or, if it no longer exists, a comparable job) Maintain same pay rate Provide any increases EE would have gotten while on leave No reprisals
Crime-related Child Disappearance	s. 49.6	EE has been employed for 6 months and it is probable that their child[25] disappeared as a result of a crime Exception: EE is charged with the crime or it is probable that the child was a party to the crime	104 consecutive weeks, to be taken within 105 weeks of the disappearance	Written notice (in advance if possible)	Reasonable evidence of entitlement	Continue to pay ER share for EE participation in benefit plans[26] Continue credit for EE's length of employment, service and seniority	Return EE to same job (or, if it no longer exists, a comparable job) Maintain same pay rate Provide any increases EE would have gotten while on leave No reprisals
Domestic or Sexual Violence	s. 49.7	EE has been employed for at least 13 weeks and EE or their child[27] has experienced or been threatened with domestic or sexual violence Leave to be taken for specified purposes[28] Exception: if EE committed the violence	10 days and 15 weeks per year (1st 5 days are paid)	For 10-day entitlement or part thereof: oral or written notice (in advance if possible) For 15-week entitlement or part thereof: written notice (in advance if possible)	Reasonable evidence of eligibility	Pay, if applicable Continue to pay ER share for EE participation in benefit plans[29] Continue credit for EE's length of employment, service and seniority	Return EE to same job (or, if it no longer exists, a comparable job) Maintain same pay rate Provide any increases EE would have gotten while on leave No reprisals

[23] Child, step-child, foster child or child under EE's legal guardianship under age 18.

[24] Except if EE advises in writing that they will not continue to pay their share of the premiums.

[25] Child, step-child, foster child or child under EE's legal guardianship under age 18.

[26] Except if EE advises in writing that they will not continue to pay their share of the premiums.

[27] Child, step-child, foster child or child under EE's legal guardianship under age 18.

[28] To seek medical attention for EE or their child because of physical or psychological injury or disability caused by domestic or sexual violence, to access services from a victim services organization for the EE or their child, to have psychological or other professional counselling for the EE or their child, to move, or to seek legal or law enforcement assistance (including making a police report or preparing to attend court) related to domestic or sexual violence.

[29] Except if EE advises in writing that they will not continue to pay their share of the premiums.

APPENDIX F — Checklist: Conducting a Termination

Pre-termination:

☐ Review the personnel file and especially the employment agreement, if any

☐ Consider consulting with legal counsel

☐ Decide whether the employee is being terminated with or without cause

☐ If the termination is for cause:

- Ensure a thorough and objective investigation
- Identify any evidence that supports the decision to terminate
- Consider mitigating circumstances:
  - Apology
  - Employer condonation
  - Failure to warn that a breach of the rule could result in termination
  - Compassionate grounds
  - Reasonable excuse
  - Rehabilitative potential
  - Economic hardship
  - Previous good record
  - Length of service
  - Seriousness of offence

Tips for the Termination Meeting:

☐ Avoid Mondays, Fridays and special days (e.g., holidays, birthdays, anniversaries)

☐ Schedule the meeting earlier in the week, so the employee has time to obtain counselling, and/or financial or legal assistance

☐ Consider scheduling the meeting later in the day, at such a time as to avoid interactions with members and other staff following the meeting

☐ Conduct the meeting in private

☐ Have two employer representatives present

☐ Arrange for security to be onsite if necessary

Conducting the Meeting:

- ☐ Prepare a script in advance
- ☐ Advise the employee in clear and candid language at the beginning of the meeting that their employment is being terminated
- ☐ Briefly explain the reason for termination
- ☐ State the effective date of the termination
- ☐ Be clear that the decision is final, and avoid "debating" with an upset or distressed employee
- ☐ Provide the employee with the termination letter and any release agreement
- ☐ Explain any payments to be made and on what conditions
- ☐ Minimize the emotional impact for the employee — be calm, respectful and sensitive
- ☐ Ask for any access cards, keys, credit cards and other company-owned property to be returned
- ☐ If the employee is subject to any confidentiality, non-solicitation or non-competition agreements, remind them of these obligations and that they survive the termination of their employment
- ☐ Keep the meeting short

Departing the Workplace:

- ☐ Allow the employee to leave immediately
- ☐ Avoid embarrassing the employee or making any negative comments about the employee or their departure
- ☐ Consider offering a taxi to the employee (but do not ask another employee to drive them home)
- ☐ Discretely observe the employee collecting their belongings, arrange to have any personal belongings packed up and sent to them, or allow the employee to come in to retrieve their belongings after hours
- ☐ Make notes of the meeting during and immediately afterwards and confirm the notes with the other employer representative

APPENDIX G — Communicating With Employees During an Organizing Drive

Every dental office and every union organizing campaign presents unique issues. Please consult with your labour law counsel before you do or say anything.

What You Can Do

Remember that everything you say or do during a union organizing campaign may ultimately be scrutinized by the Ontario Labour Relations Board. Always assume that everything you and your managers say or do will be heard by or repeated to the union. Information meetings with employees must always be "attendance optional", and should never be during working hours.

1. Tell employees they do not need union bargaining. You may tell employees that it is **your opinion** that a union does not necessarily work to their best advantage.
2. Tell employees of the good working relationships that exist at your office.
3. Tell employees that your office prefers to deal with them individually and directly rather than through third parties regarding their work activities.
4. Tell employees that you are always willing to discuss with them any subject of interest to them or any problem that may arise from day to day.
5. Advise employees of the disadvantages of belonging to a union, such as loss of income due to strikes, requirements to serve on picket line, union dues, union fines, and possible union assessments. Advise them to talk to friends and family who are union members.
6. Tell employees about any unhappy experiences you may have had with unions in the past, as long as they are factual. Avoid, however, linking layoffs or closings at other businesses to union organizing.
7. Tell employees a union cannot guarantee them anything, including job security.
8. Tell employees that a union cannot guarantee extra hours, extra shifts, or more work.
9. Tell employees that they don't have to talk with union organizers, even if the organizer visits them at home. The union cannot coerce an employee into signing a card.
10. You can prevent union solicitation during working hours on your premises.
11. You can enforce normal office rules and policies during an organizing campaign, as long as you follow past practice with respect to enforcement and treat all employees consistently.

What You Cannot Do

Managers and supervisors cannot threaten or in any way intimidate or coerce employees in order to prevent them from joining a union. Particular care must be had to any statements or actions that could, in the eyes of an employee, be seen as a threat to job security or terms and conditions of employment in the event that the employee supports a union.

1. You cannot promise employees a pay increase, promotion, betterment of working conditions, additional employee benefits, or special favours if they do not participate in union activities.
2. You cannot threaten employees with loss of job, reduction of wages, or the discontinuance of any privilege or benefit presently enjoyed, or use any threatening or intimidating language to influence an employee in the exercise of their right to belong or refrain from belonging to a union.
3. You cannot threaten or even imply that, if a union gets in, the office may move or close. You also cannot hint, suggest, or raise the possibility that, if a union gets in, the office may move or close and then later decline to answer questions from employees about the possibility of the office moving or closing.

4. You cannot threaten through a third party any of the above acts of interference.
5. You cannot conduct yourself in a way that would indicate to employees that you are watching them to determine whether or not they are participating in union activities.
6. You cannot discriminate against employees who are actively supporting the union by intentionally assigning undesirable work to them.
7. You cannot transfer employees from desirable work to undesirable work because of their union sympathies.
8. You cannot engage in any preferential treatment towards non-union employees in respect of any term or conditions of employment.
9. You cannot discipline or discharge employees actively supporting the union for an infraction of office rules that non-union employees are permitted to commit without being likewise disciplined or discharged.
10. You cannot make a work assignment for the purpose of causing an employee who has been interested in the union to quit their job.
11. You cannot take any action that is intended to destroy the status of or affect an employee's job in a negative way because of their activities on behalf of the union.
12. You cannot intentionally assign work or transfer employees so that those active for the union are separated from those you believe are not interested in the union.
13. You cannot select employees to be laid off with the hope of curbing the union's strength or to discourage union activity.
14. You cannot ask employees how they are going to vote in a secret ballot representation vote.
15. You cannot ask employees when they are hired or after hiring whether they belong to a union, carry a union card, or have ever signed a union authorization card.
16. You cannot ask employees about the internal affairs of the union, such as when they are going to meet, where they are meeting, or how many employees attended their meetings. (Some employees may, of their own free will, walk up and tell you about these things. It is not an unfair labour practice to listen, but you must not ask questions to obtain additional information.)
17. You cannot urge employees to try to persuade other employees to oppose the union or to vote against it. (Some employees may, of their own free will, do this on your behalf.)
18. You cannot visit the home of employees for the purpose of urging them to get out of the union or to vote against it.
19. You cannot ask employees if they have signed union cards.
20. You cannot ask an employee for an expression of thought about the union or its officers.
21. You cannot interview employees, individually or in small groups, in your offices about the union.
22. You cannot use lie detector tests if the purpose is to find out who is behind the union organizing activity or to enforce a broad no-solicitation rule.
23. You cannot deny merit or automatic wage increases if the purpose is to discourage union activity.
24. You cannot initiate a "not to have a union" petition for employees to sign.
25. You cannot solicit employees to withdraw or get out of the union; for example, you cannot encourage employees to demand return of their signed union authorization cards.

In short, you have a right to speak freely about the issue of unionization, so long as your statements or activities do not involve a promise or threat, particularly with respect to job security or terms and conditions of employment. You must not discriminate against employees because of their union sympathies. You must not question or interrogate employees about union activities. You must not interfere, restrain or coerce employees with regard to their right to participate and assist in union organizing activities.

APPENDIX H

NOTES REGARDING SAMPLE EMPLOYMENT AGREEMENT FOR EMPLOYEES WITH AN HOURLY RATE:

This sample employment agreement may be used as a starting point for a dentistry business wishing to develop its own individualized employment agreements. It does not constitute legal advice.

An employment agreement is a legal contract and such contract should be developed and implemented by the business only following receipt of legal advice in relation to the appropriate terms and conditions for new employees of that particular business.

SAMPLE EMPLOYMENT AGREEMENT

Dated this day of [Month], 20XX

[NOTE: Insert the date the agreement is issued]

BETWEEN:

[Name of Dentist/Professional Corporation/Clinic]

(the "Employer")

and

[Name of Associate Dentist]

(the "Employee")

(Collectively, the "Parties")

WHEREAS the Employer wishes to employ the Employee and the Employee wishes to be employed by the Employer on the terms and conditions herein set forth;

NOW THEREFORE IN CONSIDERATION of the promises and mutual covenants herein contained and other good and valuable consideration, the Parties hereto agree as follows:

ARTICLE 1-APPOINTMENT; PROBATIONARY PERIOD; CONDITIONAL OFFER

1.1 The Employer shall employ the Employee as a **[Position Title, e.g., Dental Hygienist]** upon the terms set out below, commencing on **[Start Date — at least seven (7) days after employee is given the agreement (to ensure the Employee has sufficient time to read and consider the contract, and seek independent legal advice if desired). Note also that the Agreement must be signed and returned to the employer at least one day before the Start Date]** and terminating as hereinafter provided in Article 8 of this Agreement.

1.2 The Employee will serve a probationary period for the first three (3) months of employment, during which time the Employee's suitability for indefinite employment will be assessed.

1.3 The Employee states that the Employee is not subject or party to any employment agreement, restrictive covenant, non-competition agreement, or any other restriction that in any way directly or indirectly limits the Employee's ability to perform all of the duties and responsibilities of the position set out above.

1.4 This offer of employment is strictly conditional upon provision of reference and Criminal Record Checks satisfactory to the Employer. The Employee hereby authorizes the Employer to contact the references provided and agrees to obtain a Criminal Record Check immediately.

ARTICLE 2 — REMUNERATION

2.1 The Employee shall be paid [amount] dollars $[XX.00] per hour worked, less the usual and necessary statutory and other authorized deductions.

2.2 The Employee shall be paid in accordance with the normal payroll practices of the Employer, which may be altered from time to time at the Employer's sole discretion.

2.3 Any increases to the hourly rate of pay shall be at the sole discretion of the Employer, and the Employee shall be notified in writing of same. Any new hourly rate of pay shall form part of this Agreement.

ARTICLE 3 — HOURS OF WORK AND OVERTIME

3.1 The working hours shall be as established from time to time by the Employer in accordance with its operational requirements. Currently, the Employee's hours of work are from [time] a.m. until [time] p.m., Monday to Friday. The Employee shall be provided with notice in advance of any changes to scheduled hours of work or the Employer's hours of operation, and such changes shall not constitute a constructive dismissal.

3.2 The Employee shall be entitled to a thirty (30) minute unpaid lunch break each shift of five (5) or more hours worked. Lunch shall be scheduled based on the exigencies of patient care.

3.3 The Employer shall pay the Employee overtime pay of one and one-half (1.5) times the Employee's regular hourly rate of pay for each hour worked in excess of forty-four (44) hours in each work week or, with the written agreement of the Parties, the Employee may be compensated at one and one-half (1.5) hours of paid time off for each hour of overtime worked in excess of forty-four (44) hours per work week. This time off work must be taken within three (3) months of the work week in which the overtime was earned or, with the written agreement of the Parties, within twelve (12) months of that work week. All overtime must be authorized in writing in advance of being worked. [***NOTE: for Positions that qualify for overtime under the Employment Standards Act, 2000 (Ontario)***]

ARTICLE 4 — PUBLIC HOLIDAYS, VACATION, LAY OFFS AND LEAVES

4.1 The Employee will be provided with public holiday entitlements in accordance with the public holiday provisions of the *Employment Standards Act, 2000* (Ontario) as amended.

For ease of reference, the following constitute public holidays:

New Year's Day	Family Day	Good Friday
Victoria Day	Canada Day	Labour Day
Thanksgiving Day	Christmas Day	Boxing Day

4.2 The Employee shall be entitled to two (2) weeks' vacation time per year accumulated at the rate of 0.833 days per month of service. Vacation pay is calculated at four percent (4%) of wages earned in the vacation accrual period during which vacation time is earned. Employees with five (5) or more years' service with the Employer shall be entitled to three (3) weeks' vacation time per year accumulated at the rate of 1.25 days per month of service. Vacation pay for employees entitled to three (3) weeks' vacation time is calculated at six percent (6%) of wages earned in the vacation accrual period during which vacation time is earned.

No vacation time may be taken without prior approval of the Employer, and the Employer reserves the right to schedule the Employee's paid vacation.

4.3 The Employer reserves the right to temporarily shut down the practice from time to time at its sole discretion and upon advance written notice to the Employee. The Employee may schedule their paid vacation during this time. If the Employee does not schedule their paid vacation while the practice is shut down, the Employee will be deemed to be on unpaid leave while the office is temporarily closed.

4.4 The Employer may temporarily lay off the Employee in accordance with the provisions of the *Employment Standards Act, 2000* (Ontario) as amended, and such lay off will not constitute a constructive dismissal.

4.5 Provided this Agreement does not provide a greater right or benefit, the Employee shall be entitled to the leaves provided for by the *Employment Standards Act, 2000* (Ontario) as amended in accordance with the qualifying terms and conditions contained in the *Employment Standards Act, 2000* (Ontario) as amended.

ARTICLE 5 — CONTINUING EDUCATION AND LICENSING

5.1 In the event that the Employer requires the Employee to attend a continuing education course, the Employee will be paid the Employee's regular hourly rate of pay for all hours in attendance at the continuing education course, in addition to the fee for the course. Fees for any courses that the Employee attends that are not considered mandatory by the Employer may be reimbursed by the Employer at its sole discretion, provided that the Employee obtained advanced written approval from the Employer, and only upon receipt of written confirmation that the Employee has successfully passed the course.

5.2 The Employee is solely responsible for the payment of any License and Association fees required to maintain the Employee's professional standing [**IF APPLICABLE:** including but not limited to fees to the College of Dental Hygienists of Ontario]. These fees must be paid in a timely manner, and the Employer reserves the right to require proof of valid registration. Failure to maintain the required License and Association fees and/or to be in good professional standing is just cause for termination of employment in accordance with Article 8.2 of this Agreement.

ARTICLE 6 – BENEFITS

6.1 Upon the successful completion of the Employee's probationary period pursuant to Article 1.2 of this Agreement, dental services for the Employee, the Employee's spouse and dependent children, if any, will be rendered without charge, save and except the payment of applicable laboratory fees. The scheduling of the appointments for these dental services is subject to approval by the Employer in accordance with operational requirements. For the purposes of this Agreement, "dependent children" means children in attendance at school until age twenty-one (21).

6.2 The Employee is entitled to [number (#)] paid sick days per calendar year starting on January 1st each year in the event of personal illness or to attend to a sick child of the employee. Sick leave may not be carried forward to the next calendar year and will not be paid out upon retirement, resignation, termination of employment, or for any reason whatsoever.

6.3 The Employer reserves the right to request information with respect to medical limitations, restrictions, and prognosis in such manner as it deems necessary in the circumstances with respect to any request for paid or unpaid sick leave, subject to the requirements of the *Employment Standards Act, 2000* (Ontario) as amended.

6.4 An annual uniform allowance of [amount] dollars ($XX.00) dollars will be paid after [number of year(s)/months] of employment. Uniforms must be worn during work, and the Employee is responsible for the care and maintenance of same.

6.5 Following the successful completion of the Employee's probationary period pursuant to Article 1.2 of this Agreement, the Employee shall be entitled to participate in the Group Health and Welfare Benefits Plan generally available to all full-time employees of the Employer from time to time, in accordance with the terms and qualifying conditions thereof. The Employer reserves the right, at any time, to change to a different benefit carrier or plan, and the Employee will not have any right to compensation as a consequence, nor will such switch or cancellation constitute a constructive dismissal. The Employer shall be responsible for payment of [amount] percent ([XX]%) of the premium costs associated with the Group Health and Welfare Benefits Plan, save and except long term disability and life insurance premiums. The Employee shall be solely responsible for the payment of the long term disability and life insurance premiums, and the Employee agrees and authorizes the Employer to deduct from the Employee's wages the cost of such premiums, as amended from time to time. Any decisions with respect to entitlement are at the sole discretion of the Insurer.

ARTICLE 7 — DUTIES, REPRESENTATIONS AND WARRANTIES

7.1 The Employee agrees to perform and faithfully carry out all the work, services, instructions and responsibilities as may be assigned to the Employee by the Employer from time to time.

7.2 In the discharge of the Employee's duties, the Employee shall observe and comply with all policies, rules, regulations and directions as may, from time to time, be given by the Employer, and as may be amended at the sole discretion of the Employer. The Employee shall devote the whole of the Employee's time and attention during the regular work week, or during such hours as required from time to time by the Employer, to fulfilling such duties.

7.3 The Employee agrees to act in the best interests of the Employer and to faithfully and diligently serve the interests of the Employer. Without limiting the generality of the foregoing, the Employee warrants and agrees that the Employee shall not, at any time during the Employee's employment: (i) engage in (or assist any other person or organization) in any other business or employment or activities that is in any way competitive with the Employer's dentistry or dental hygiene business or that otherwise detrimentally impacts on the Employee's ability to perform the Employee's work and other obligations under this Agreement; (ii) solicit, divert or hire away or attempt to solicit, divert or hire away any person who is employed by the Employer; or (iii) solicit or divert away or attempt to solicit or divert away any patient of the Employer.

7.4 **[IF APPLICABLE:]** The Employee warrants and represents to the Employer that the Employee is a member in good standing of the College of Dental Hygienists of Ontario (the "College"), is duly qualified and licensed to practice as a dental hygienist in the Province of Ontario, and that the Employee shall remain so throughout employment with the Employer. Without limiting the generality of the foregoing, the Employee shall abide by all legislation, professional standards, Codes of Ethics and guidelines of relevance to members of the College.

7.5 The Employer reserves the right to cross train staff at its discretion and to require employees to be flexible in terms of performing any duties and responsibilities for which they have received training or orientation.

ARTICLE 8 — TERMINATION

8.1 **Without Cause**

The Employee's employment may be terminated without cause, at any time and for any reason, by the Employer providing the Employee with notice in writing or payment in lieu of notice, severance pay (if applicable) and all other entitlements in accordance with and limited to the minimum requirements of the *Employment Standards Act, 2000*, (Ontario) as amended. For clarity, the Employee will continue to receive all benefits to which the Employee is ordinarily entitled for the minimum notice period required by the *Employment Standards Act, 2000*, (Ontario) as amended, and only for such period. The written notice or pay in lieu thereof and severance pay (if applicable) referenced in this Article 8.1 is in full and final satisfaction of all notice and severance pay obligations. [***NOTE: The Termination Clauses and amounts are for sample purposes only; amounts to be offered on termination should only be inserted after having received legal advice***]

8.2 **With Cause**

The Employer may terminate the Employee's employment for cause at any time and without providing notice or payment in lieu of notice; however, the Employer will provide the Employee with any entitlements that are minimally required by the *Employment Standards Act, 2000* (Ontario) as amended. For the purpose of this Agreement, "cause" shall include, but is not limited to:

(a) a material breach of the provisions of this Agreement;

(b) an act of dishonesty, reckless carelessness, or grossly negligent performance of the Employee's duties;

(c) disobeying or disregarding any instruction or order of the Employer;

(d) a material breach of a policy, procedure or rule of the Employer;

(e) conviction for any criminal offence prosecuted by indictment and involving moral turpitude, which might adversely affect the reputation of the Employer in the eyes of its patients or the public in general;

(f) theft of any property of the Employer or any other Employee of the Employer;

(g) breach of the Employee's duty of confidentiality; and

(h) any act or omission of the Employee which would in law permit an employer to, without notice or payment in lieu of notice, terminate the employment of an employee.

8.3 **Resignation**

The Employee shall provide two (2) weeks' notice in writing of the Employee's intention to resign the Employee's employment with the Employer and the Employee's employment and related entitlements will cease at the end of the two (2) weeks' notice period (the "Resignation Date"). The Employer reserves the right to waive the resignation notice period, in whole or in part, by providing the Employee with regular pay and continuation of benefits and vacation pay accrual for the period that is waived.

8.4 **Termination Date**

Upon termination of the Employee's employment, whether it be with or without cause, the date established by the Employer as the Employee's last day of providing services for the Employer will be considered the date of the termination of the Employee's employment (the "Termination Date").

ARTICLE 9 — EMPLOYER PROPERTY AND CONFIDENTIAL INFORMATION

9.1 The Employee agrees that all materials relating to the business and affairs of the Employer including, without limitation, all manuals, documents, reports, equipment, working materials and lists of patients prepared by the Employer or by the Employee in the course of the Employee's employment, are confidential and are for the benefit of the Employer and all such materials shall remain the property of the Employer and, upon the Resignation Date or Termination Date as applicable, the Employee shall surrender to the Employer all such materials without retaining any copy (whether electronic or hard copy).

9.2 The Employee agrees that the Employee will not, during the Employee's employment hereunder or at any time thereafter, use for the Employee's own purposes or for any purpose other than those of the Employer, or divulge or convey to others, or aid or abet others to divulge or to convey to others, any of the Employer's information, knowledge, data or property relating to the affairs of the Employer or its patients, and any of its other confidential information, other than previously published material properly in the public domain.

9.3 To the fullest extent permitted by applicable law, the Employee hereby assigns and shall assign, without additional compensation or other consideration, to the Employer or its nominee, all rights, title and interests in and to any and all inventions (and all proprietary rights with respect thereto) whether or not patentable or registerable under copyright or similar statutes, whether or not authored, made or conceived or reduced to practice, and whether or not made alone or jointly with others, which relate to the actual or anticipated business or work of the Employer or which result from or are suggested by any services performed for the Employer, whether or not made during or after working hours and whether or not resulting from the use of the premises or property of the Employer. The Employee also hereby waives any moral rights which the Employee may have with respect to the above.

ARTICLE 10 — NON-SOLICITATION

10.1 The Employee agrees that for a period of twelve (12) months following the Resignation Date or the Termination Date, as applicable, the Employee will not, either directly or indirectly, on the Employee's own behalf or in the service or on behalf of others, solicit, divert or hire away or attempt to solicit, divert or hire away, to any competing dental practice or business, any person who, at any time during the ninety (90) days prior to the Resignation Date or Termination Date, as applicable, was employed by the Employer.

10.2 The Employee further agrees that for a period of twelve (12) months following the Resignation Date or Termination Date, as applicable, the Employee will not, either directly or indirectly, whether as a principal, agent, associate, employee, independent contractor, director, officer or shareholder of a company or otherwise, solicit or aid in the solicitation of any patient of the Employer for whom the Employee has provided dental services in the twelve (12) month period preceding the Resignation Date or Termination Date, as applicable, and of which provision of dental services the Employee was aware. [***NOTE: these amounts are for sample purposes only; a non-solicitation clause and application amounts should only be inserted after having received legal advice***]

ARTICLE 11 — NON-COMPETITION

11.1 The Employee acknowledges and agrees that the Employee would cause irreparable harm to the Employer were the Employee to compete, either directly or indirectly, with the Employer in the six (6) month period immediately following the Resignation Date or the Termination Date, as applicable. Accordingly, the Employee agrees that the Employee will not, for a period of six (6) months following the Resignation Date or the Termination Date, as applicable, directly or indirectly, whether as a individual, partner, employee, independent contractor, consultant, shareholder, agent, officer and/or director for any person, corporation, firm, organization, company or association, carry on, be engaged in, advise, permit the Employee's name to be used or be employed by any person, business, firm, association, company, organization or corporation concerned with or engaged in a practice or business that is competitive with the dentistry or dental hygiene business of the Employer within a five (5) kilometre [***NOTE: these amounts are for sample purposes only; a non-competition clause and application amounts should only be inserted after having received legal advice***] radius of the municipal address of the Employer's dental office on the Resignation Date or Termination Date, as applicable.

ARTICLE 12 — COVENANTS REASONABLE

12.1 The Employee acknowledges that a breach of any of Articles 9, 10 or 11 of this Agreement will give rise to irreparable harm and injury not compensable in damages alone. Accordingly, the Parties agree that the Employer is entitled to injunctive relief against the breach or threatened breach of any part of those Articles, in addition to any other legal remedies that may be available. The Employee further acknowledges and agrees that the enforcement of a remedy under this Agreement by way of injunction will not prevent the Employee from earning a livelihood. The Employee further acknowledges and agrees that the covenants contained in this Agreement are necessary for the protection of the Employer's legitimate business interests and are reasonable in scope and content.

ARTICLE 13 — SURVIVAL

13.1 Notwithstanding the termination of the Employee's employment and this Agreement for any reason, the provisions of Articles 9, 10, 11, 12 and 13 shall survive such termination.

ARTICLE 14 — GENERAL

14.1 This Agreement constitutes the entire Agreement between the Parties. There are no oral or written representations, warranties, forms, conditions, undertakings or collateral agreements, expressed, implied or statutory, between the Parties other than as expressly set forth in this Agreement.

14.2 This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Employer. Without limiting the generality of the foregoing, the Employee agrees that the Employer may assign this Agreement to any entity to which the Employer sells or transfers its business.

The rights of the Employee under this Agreement are not assignable or transferable in any manner.

14.3 This Agreement shall be construed and interpreted in accordance with, and governed by, the laws of the Province of Ontario and the laws of Canada applicable therein, and the Parties attorn to the jurisdiction of the courts of Ontario.

For clarity, it is intended that all aspects of this Agreement will comply with the *Employment Standards Act, 2000* (Ontario) as amended. In the event that the *Employment Standards Act, 2000* (Ontario) as amended provides the Employee with superior entitlements than provided for in this Agreement, the Employer shall provide the Employee with such statutory entitlements in substitution for the Employee's corresponding right under this Agreement.

14.4 Any notice required to be given hereunder shall be in writing and may be delivered personally or be sent by registered mail to the Employee at the Employee's last known address on file with the Employer, or to the Employer at its business address. Any notice sent by registered mail shall be deemed to have been received by the Party to whom it is addressed on the third (3rd) business day following such mailing, and any notice delivered personally is deemed received upon delivery.

14.5 Each article, sub article, paragraph and provision of this Agreement is distinct and severable. The illegality, invalidity or unenforceability of any article, sub article, paragraph or provision of this Agreement or covenant herein contained shall not affect the legality, validity or enforceability of any other article, sub article, paragraph or provision or covenant herein contained.

14.6 This Agreement may be amended by mutual agreement of the Parties in writing and such amendment shall form part of this Agreement. No amendment to or waiver of this Agreement shall be valid or binding unless set forth in writing and duly executed by both of the Parties hereto.

14.7 The Employee acknowledges that the Employee has read and understood the terms of this Agreement and that the Employee has had independent legal advice or the opportunity to obtain independent legal advice prior to signing same. The Employee further agrees that all the terms of this Agreement are reasonable and that the Employee is signing this Agreement freely, voluntarily and without duress.

14.8 The Parties agree that this Agreement may be executed in any number of counterparts (including counterparts by electronic PDF or facsimile), and all such counterparts taken together shall be deemed to constitute one and the same instrument.

14.9 This offer is open for acceptance until [***date that is at least seven (7) calendar days following issuance***], at which time it will expire if not accepted. [***NOTE: Always keep this paragraph on the same page as all of the signatures and ensure signatures occur prior to expiry date.***]

_____ _____

[Employee's Name] **Date Signed**

_____

Witness to Signature of Employee

_____ _____

[Name of Signatory for Employer] **Date Signed**

[***NOTE: To be signed by the Employer prior to issuance***]

NOTES REGARDING SAMPLE ASSOCIATE DENTIST INDEPENDENT CONTRACTOR AGREEMENT:

This sample Independent Contractor Agreement may be used as a starting point for a dentistry business wishing to develop its own individualized independent contractor agreements. It does not constitute legal advice.

An independent contractor agreement is a legal contract and such contract should be developed and implemented by the dentistry business only following receipt of legal advice in relation to the appropriate terms and conditions for engaging the services of independent service providers. This sample Independent Contractor is exclusively, for engaging the services of any individual who in law is not an employee of the dentistry business.

In determining whether an individual is truly an independent contractor as opposed to an employee, it is advisable to seek legal advice. Reference may also be had to Part II of the ODA's Employment Guidelines for the Dental Office.

SAMPLE ASSOCIATE DENTIST INDEPENDENT CONTRACTOR AGREEMENT

Dated [Date]

[NOTE: Insert the date the offer of this Agreement is issued]

BETWEEN:

[NAME OF CONTRACTING DENTIST/PROFESSIONAL CORPORATION/CLINC]

(the "Principal")

and

[NAME OF ASSOCIATE DENTIST]

(the "Associate")

(Collectively, the "Parties")

WHEREAS the Principal is a member of the Royal College of Dental Surgeons of Ontario (the "College") and is duly qualified and licensed to practice dentistry in the Province of Ontario;

AND WHEREAS the Principal operates a dental practice in [City/Town] at [Municipal Address], Ontario (the "Practice");

AND WHEREAS the Principal desires to retain the professional services of the Associate on the terms and conditions set forth in this Independent Contractor Agreement (this "Agreement");

AND WHEREAS the Associate is a member of the College, is duly qualified and licensed to practice dentistry in the Province of Ontario, and desires to make the Associate's professional services available to the Principal on the terms and conditions set forth in this Agreement;

NOW THEREFORE in consideration of the mutual covenants and agreements hereinafter contained, the Parties hereby agree as follows:

1. ENGAGEMENT AND SERVICES

(a) The term of this Agreement and the Associate's engagement hereunder (the "Engagement") shall be for an indefinite term commencing on ***[insert first day on which Services are to be provided; ensure it is at least 7 days following date this Agreement is issued and ensure it is signed and returned prior to the expiry date at the end of this Agreement and in any event PRIOR to any services being rendered]*** (the "Effective Date") and shall continue thereafter, unless terminated in accordance with the provisions of Article 8 of this Agreement.

(b) Commencing on the Effective Date, the Principal shall engage the Associate as a Dentist to provide exclusively [***list all services to be provided, e.g., dental examinations to assess surgical requirements, dental surgery, pain control measures, hygiene and postoperative checks and diagnostic procedures***] services (the "Services") to patients of the Principal. The Associate agrees to render the Services in compliance with the *Regulated Health Professions Act, 1991*, the Codes of Ethics of the College and the Ontario Dental Association and the Canadian Dental Association, and to do all things reasonably necessary to maintain the Associate's professional knowledge, including, without limitation, to maintain the required continuing education requirements of the College at the Associate's own expense.

(c) The Associate warrants and represents that the Associate is a member in good standing of the College, is duly qualified and licensed to practice dentistry in the Province of Ontario, and that the Associate shall continue to be during the entire Engagement. The Associate shall immediately advise the Principal of any complaint made against the Associate to the College.

(d) The Associate shall provide the Services during regular hours of operation as mutually agreed with the Principal.

(e) The Associate will provide whatever surgical instruments and equipment that the Associate requires that are not otherwise available in the Practice.

(f) The Associate shall adhere to all business practices, policies and procedures of the Practice.

(g) The Associate warrants and represents that the Associate is not subject or party to any contract, restrictive covenant, non-competition agreement or any other restriction that in any way directly or indirectly limits the Associate's ability to enter into this Agreement or to provide the Services.

2. PAYMENT OF FEES

(a) In consideration of the Services provided pursuant to the terms of this Agreement, the Principal agrees to pay the Associate a fee (the "Fee for Services"), as follows:

(i) The Associate shall be entitled to [number] percent (#%) of the fees billed and collected for the Services rendered, less any lab fees and disbursements for the Services rendered. The Associate shall also be entitled to [number] percent (#%) of the recall examination fee collected from billings to hygiene patients that the Associate examines in the course of rendering the Services. The remaining [number] percent (#%) of fees billed and collected for the Services rendered shall be the Associate's contribution to the usual and customary services and operating expenses of the Practice including, without limitation, the cost of employee wages and benefits, insurance, rent, supplies and equipment related to the operation of the Practice.

(ii) The Associate will be paid monthly within ten (10) calendar days of the end of the month. The Principal shall deliver to the Associate a statement of fees in relation to the Services rendered in the preceding month, including patient fees charged and collected, less laboratory fees, and other adjustments along with payment (the "Statement of Fees for Services Rendered"). Patient and laboratory fees shall be in accordance with the current Fee Schedule set out by the Ontario Dental Association or as otherwise determined by the Principal.

(iii) The Principal may make adjustments to the Fees for Services, taking into account any bad debts, administrative charges or other costs associated with the collection of fees, and these adjustments will be properly charged to the Associate on the next month's Statement of Fees for Services Rendered and deducted from the Fees for Services.

(b) The Associate acknowledges that the Principal has made no guarantees as to the volume of work or the amount of Fees for Services to be generated by the Associate.

3. CONTRIBUTIONS, TAXES AND INDEMNITY

(a) The Associate shall be responsible for and shall pay all income taxes, Employment Insurance premiums, Canada Pension Plan contributions, Ontario Health premiums, and any other applicable premiums, taxes, contributions or charges, statutory or otherwise, in respect of the provision of the Services provided by the Associate to the Principal and the Fees for Services earned by the Associate during the Engagement.

(b) The Associate hereby covenants and agrees to indemnify the Principal and save it harmless from and against all liabilities and claims whatsoever against the Principal, including fines, penalties and interest thereon, for, by reason of, or in any way arising out of: (i) the Associate's failure to pay as referenced in Article 3(a) above; or (ii) the Principal's failure to deduct, withhold, remit or contribute any amount in respect of the Principal's payment of the Fees for Services to the Associate. For clarity, such liabilities and claims shall include, without limiting the generality of the foregoing, federal or provincial income taxes, applicable HST, federal or provincial pension plan contributions, Employment Insurance premiums, and other premiums, and contributions under any federal or provincial social insurance or income security programs.

4. PATIENT RECORDS, LICENCES, INSURANCE

(a) The Associate agrees to maintain up-to-date patient records in respect of the provision of the Services as are customary or otherwise required by College guidelines, and any other such records as the Principal may request from time to time. The Associate agrees to make such records available at any time for inspection by the Principal. The Associate agrees not to disclose such records to any third parties without the prior written consent of the Principal.

(b) The Associate shall be responsible for obtaining all necessary licences and, in particular, paying all annual license and insurance fees to the College. The Associate shall, when requested, provide the Principal with adequate evidence of Associate's compliance with these obligations.

(c) During the term of the Engagement, the Associate will be responsible for carriage of adequate malpractice and liability insurance of not less than two (2) million dollars to perform dentistry in the Practice. The Associate will provide proof of policy within ten (10) calendar days of the Effective Date and thereafter immediately upon request by the Principal.

5. RELATIONSHIP OF THE PARTIES

(a) This Agreement does not constitute and shall not be construed as constituting a partnership, joint venture, principal/agency or employment relationship between the Parties. The Associate is and will at all times remain an independent contractor. Neither Party by virtue of this Agreement shall have the right, power or authority to act or to create any obligations, express or implied, on behalf of the other Party.

(b) The Associate shall in no sense be considered an employee of the Principal, nor shall the Associate be entitled or eligible to participate in any benefits or privileges given or extended by the Principal to its employees, nor deemed to be an employee of the Principal for purposes of any contribution due on behalf of itself, its employees or its representatives.

6. CONFIDENTIAL INFORMATION AND PROPERTY OF THE PRINCIPAL

(a) The Associate agrees that all materials relating to the business and affairs of the Principal, including, without limitation, all manuals, documents, reports, patient records, equipment, working materials and lists of patients prepared by the Principal or by the Associate in the course of the Engagement are confidential and for the benefit of the Principal and shall remain the property of the Principal and, upon the termination of the Engagement, the Associate shall immediately surrender to the Principal all such materials, documents (whether written or electronic) without retaining any copy (whether electronic or hard copy), keys, access cards and any other equipment of the Practice.

(b) The Associate agrees that the Associate will not, during the Engagement or at any time thereafter, use for the Associate's own purposes or for any purpose other than those of the Principal, or divulge or convey to others, or aid or abet others to divulge or to convey to others, any of the Principal's information, knowledge, data or property relating to the affairs of the Principal or its patients, and any of its other confidential information, other than previously published material properly in the public domain.

(c) To the fullest extent permitted by applicable law, the Associate hereby assigns and shall assign, without additional compensation or other consideration, to the Principal or its nominee, all rights, title and interests in and to any and all inventions (and all proprietary rights with respect thereto) whether or not patentable or registerable under copy right or similar statutes, whether or not authored, made or conceived or reduced to practice, and whether or not made alone or jointly with others, which relates to or result from or are suggested by the Services, whether or not made during or after hours and whether or not resulting from the use of the premises or property of the Principal. The Associate also hereby waives any moral rights which the Associate may have with respect to the above.

7. INDEMNITIES

(a) The Associate shall indemnify and hold the Principal and its directors, officers, employees, and agents harmless from and against all acts or omissions of the Associate, all claims, actions, liabilities, damages, losses, awards, judgments, settlements, proceedings, demands and expenses (including reasonable legal fees) in respect of any personal injury claim, action or cause of action by reason of any claim made by any patient in respect of any treatment received by such patient from the Associate or those under the Associate's direct control, or loss of or damage to tangible property, or loss of data related to, arising out of or in connection with the Associate's performance or non-performance under this Agreement, and the Associate will pay all resulting settlements and/or costs, claims, damages or charges whatsoever.

(b) The Associate shall indemnify and hold the Principal and its directors, officers, employees and agents harmless from and against all claims, actions, liabilities, damages, losses, awards, judgments, settlements, proceedings, demands and expenses (including reasonable legal fees) arising out of or in connection with the Associate's acts or omissions that are made against the Principal or its directors, officers, employees or agents: (i) by any employee of the Principal; or (ii) by any person affiliated in any way with the Associate.

8. TERMINATION

(a) This Agreement may be terminated in each of the following circumstances:

(i) by either the Principal or the Associate, for any reason and at any time, upon sixty (60) calendar days prior written notice to the other Party;

(ii) by the Principal immediately and without further liability to the Associate for notice or otherwise, if the Associate ceases to conduct business in the normal course, becomes insolvent or bankrupt, or makes an assignment for the benefit of the Associate's creditors, or if a receiver is appointed in respect of the Associate's property, or if the Associate is otherwise unable to provide the Services, or upon the death of the Associate; or

(iii) by the Principal immediately and without further liability to the Associate for notice or otherwise, if the Associate fails to attend at the Practice and provide the Services for the period of two (2) consecutive weeks or more (exclusive of any approved period of absence agreed upon by the Parties in writing), or if the Associate acts contrary to the best interests of the Principal in the provision of the Services, or if the Associate engages in misconduct that would bring the reputation of the Principal into disrepute or impair the goodwill of the Practice, or if the Associate breaches any of the provisions of this Agreement (including but not limited to those provisions related to being qualified and licenced to practice dentistry, carrying the required insurance, keeping the required records, abiding by the Principal's polices and practices, confidentiality and non solicitation).

(b) Upon the effective date of termination of this Agreement, the Engagement shall cease and the Associate shall discontinue provision of the Services. The Associate shall promptly return all confidential information including, without limitation, all charts and patient files and all other materials, equipment and documents that have been provided to the Associate, without retaining a copy (whether hard copy or electronic).

(c) Final adjustments to the Fees for Services shall be made within ninety (90) calendar days of the date of termination of this Agreement, with a holdback equal to [number] percent (#%) of Fees for Services owed, with such holdback to be applied in the event that the Principal is required to render subsequent treatment to patients on account of substandard treatment by the Associate prior to termination. The holdback shall be paid after the expiry of the ninety (90) calendar day period following the date of termination of this Agreement.

9. NO SOLICITATION OF PATIENTS OR EMPLOYEES

(a) The Associate agrees that for a period of twelve (12) months following the date of the termination of this Agreement by either Party and for any reason whatsoever, the Associate will not, directly or indirectly, on the Associate's own behalf or in the service or on behalf of others, solicit, divert or hire away or attempt to solicit, divert or hire away, to any competing dental practice or business, any person who, at any time during the Engagement, was employed by the Principal.

(b) The Associate further agrees that the Associate will not at any time during a period of twelve (12) months following the date of the termination of this Agreement by either Party and for any reason whatsoever, directly or indirectly, whether as a principal, agent, associate, employee, independent contractor, director, officer or shareholder of a company or otherwise, solicit or aid in the solicitation of any patient of the Principal for whom the Principal has provided dental services during the Engagement, and of which provision of dental services the Associate was aware.

(c) The Associate further agrees that all patients that are seen by the Associate or the Principal during the Engagement are patients of the Principal.

10. ACKNOWLEDGEMENT

The Associate acknowledges that the above prohibitions contained in Article 9 are reasonable in scope and content, fair and essential to the preservation of the Principal's current patient and employee goodwill, as well as to the preservation of the Principal's Practice, and do not unduly impede the Associate's future ability to earn a livelihood as a practising Dentist. The Associate further acknowledges that a breach of the Associate's obligations pursuant to Article 9 will cause to the Principal irreparable damages that will be difficult to quantify, and that the Principal will be entitled to immediate judicial redress in the form of an injunction against the Associate or any person or entities with whom the Associate is engaged in relation to any breach or threatened breach of the foregoing provisions, in addition to any other legal remedies available.

11. GENERAL

(a) The Services shall be performed by the Associate. The Associate agrees not to assign or transfer any rights or obligations under this Agreement or any interest herein, voluntarily or involuntarily, without the prior written consent of the Principal. The Principal may assign or transfer any of its rights or obligations or any interest herein at its discretion.

(b) No waiver by the Principal of any rights arising from the breach of this Agreement shall be construed as a continuing waiver, nor shall failure to assert a breach be deemed to waive that breach or any further breach. No waiver shall be binding unless executed in writing.

(c) The provisions of Articles 3, 4, 5, 6, 7, 8, 9, 10 and 11 of this Agreement shall survive the termination or expiration of this Agreement for any reason whatsoever.

(d) Any notice, demand or other communication (in this section, a "Notice") required or permitted to be given or made hereunder shall be in writing and shall be sufficiently given or made if:

(i) hand delivered to the other Party in person during normal business hours during which the Practice is open for business; or

(ii) sent by registered mail;

In the case of a notice to the Associate, addressed to the Associate at:

[Address]

Attention: [Associate's Name]

In the case of a notice to the Principal, addressed to it at:

[Address]

Attention: [Name]

Each such Notice sent shall be deemed to have been received:

(iii) on the day it was received if delivered in person; or

(iv) on the fifth calendar day after it was mailed, excluding each day during which there existed any general interruption of postal services due to strike, lockout or other cause.

Either Party may change its address for notice by giving notice to the other Party as provided in this section.

(e) Time shall be of the essence in this Agreement.

(f) This Agreement shall be construed and interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein. In any judicial proceeding involving a dispute arising from or with respect to this Agreement, the Associate agrees to submit to the jurisdiction of the courts located in the Province of Ontario.

(g) This Agreement represents the full and complete understanding between the Parties hereto with respect to the subject matter hereof, and supersedes all prior or representations, warranties, forms, conditions, agreements and understandings, whether oral or written.

(h) The Associate acknowledges that the Associate has had the opportunity to obtain independent legal advice with respect to the terms and conditions hereof.

(i) In the event that any provision or part of this Agreement is determined by a court of competent jurisdiction to be unenforceable, such provision or part thereof shall be deemed to be severed from this Agreement and the remaining provisions of this Agreement shall continue in full force and effect and shall be binding upon the Parties hereto as though such severed provision had not formed part of this Agreement.

(j) The obligations of the Parties under this Agreement shall be binding upon and shall enure to the benefit of the Parties here to and their respective successors and permitted assigns.

(k) The Parties agree that this Agreement may be executed in any number of counterparts (including counterparts by electronic PDF or facsimile), and all such counterparts taken together shall be deemed to constitute one and the same instrument.

12. ACCEPTANCE

This offer is open for acceptance until ***[date – at least seven (7) days after date of issuance; ensure this Agreement is signed and returned at least one full day prior to Effective Date and prior to expiry date]***, at which time it will expire if not accepted.

IN WITNESS WHEREOF the Parties hereto have executed this Agreement on the date as shown below.

[Name of Contracting Dentist/ Professional Corp/ Clinic] [***NOTE: To be signed prior to issuance***]	**Date Signed**
[Associate's Name]	**Date Signed**

NOTES REGARDING SAMPLE EMPLOYMENT AGREEMENT FOR SALARIED STAFF:

This sample employment agreement may be used as a starting point for a dentistry business wishing to develop its own individualized employment agreements. It does not constitute legal advice.

An employment agreement is a legal contract and such contract should be developed and implemented by the business only following receipt of legal advice in relation to the appropriate terms and conditions for new employees of that particular business.

SAMPLE ASSOCIATE DENTIST EMPLOYMENT AGREEMENT

Dated this day of [Month], 20XX

[NOTE: Insert the date the agreement is issued]

BETWEEN:

[Name of Dentist/Professional Corporation/Clinic]

(the "Employer")

and

[Name of Associate Dentist]

(the "Employee")

(Collectively, the "Parties")

WHEREAS the Employer is a member of the Royal College of Dental Surgeons of Ontario (the "College") and is duly qualified and licensed to practice dentistry in the Province of Ontario;

AND WHEREAS the Employer operates a dental practice in [City/Town] at [Municipal Address], Ontario;

AND WHEREAS the Employee is a member of the College and is duly qualified and licensed to practice dentistry in the Province of Ontario;

AND WHEREAS the Employer wishes to employ the Employee and the Employee wishes to be employed by the Employer on the terms and conditions herein set forth;

NOW THEREFORE IN CONSIDERATION of the promises and mutual covenants herein contained and other good and valuable consideration, the Parties hereto agree as follows:

ARTICLE 1-APPOINTMENT; PROBATIONARY PERIOD; CONDITIONAL OFFER

1.1 The Employer shall employ the Employee as a **Dentist** upon the terms set out below, commencing on [***Start Date – at least seven (7) days after employee is given the agreement (to ensure the Employee has sufficient time to read and consider the contract, and seek independent legal advice if desired). Note also that the Agreement must be signed and returned to the employer at least one day before the Start Date***] and terminating as hereinafter provided in Article 8 of this Agreement.

1.2 The Employee will serve a probationary period for the first six (6) months of employment, during which time the Employee's suitability for indefinite employment will be assessed.

1.3 The Employee states that the Employee is not subject or party to any employment agreement, restrictive covenant, non-competition agreement, or any other restriction that in any way directly or indirectly limits the Employee's ability to perform all of the duties and responsibilities of the position set out above.

1.4 This offer of employment is strictly conditional upon provision of reference and Criminal Record Checks satisfactory to the Employer. The Employee hereby authorizes the Employer to contact the references provided and agrees to obtain a Criminal Record Check immediately.

ARTICLE 2 — REMUNERATION

2.1 The Employee shall be paid an annual gross salary of $_____ less the usual and necessary statutory and other authorized deductions.

2.2 The Employee shall be paid in accordance with the normal payroll practices of the Employer, which may be altered from time to time at the Employer's sole discretion.

2.3 Any increases to the annual gross salary shall be at the sole discretion of the Employer, and the Employee shall be notified in writing of same. Any such new annual gross salary amount shall form part of this Agreement.

ARTICLE 3 — HOURS OF WORK

3.1 The working hours shall be as established from time to time by the Employer in accordance with its operational requirements. Currently, the Employee's hours of work are from [time] a.m. until [time] p.m., Monday to Friday. The Employee shall be provided with notice in advance of any changes to scheduled hours of work or the Employer's hours of operation, and such changes shall not constitute a constructive dismissal.

ARTICLE 4 — PUBLIC HOLIDAYS, VACATION, LAY OFFS AND LEAVES

4.1 The Employee will be provided with public holiday entitlements in accordance with the public holiday provisions of the *Employment Standards Act, 2000* (Ontario) as amended.

For ease of reference, the following constitute public holidays:

New Year's Day	Family Day	Good Friday
Victoria Day	Canada Day	Labour Day
Thanksgiving Day	Christmas Day	Boxing Day

4.2 The Employee shall be entitled to three (3) weeks' vacation time per year accumulated at the rate of 1.25 days per month of service. Vacation pay is calculated at six percent (6%) of wages earned in the vacation accrual period during which vacation time is earned.

No vacation time may be taken without prior approval of the Employer, and the Employer reserves the right to schedule the Employee's paid vacation.

4.3 The Employer reserves the right to temporarily shut down the practice from time to time at its sole discretion and upon advance written notice to the Employee. The Employee may schedule their paid vacation during this time. If the Employee does not schedule their paid vacation while the practice is shut down, the Employee will be deemed to be on unpaid leave while the office is temporarily closed.

4.4 The Employer may temporarily lay off the Employee in accordance with the provisions of the *Employment Standards Act, 2000* (Ontario) as amended, and such lay off will not constitute a constructive dismissal.

4.5 Provided this Agreement does not provide a greater right or benefit, the Employee shall be entitled to the leaves provided for by the *Employment Standards Act, 2000* (Ontario) as amended in accordance with the qualifying terms and conditions contained in the *Employment Standards Act, 2000* (Ontario) as amended.

ARTICLE 5 — CONTINUING EDUCATION AND ANNUAL FEES

5.1 In the event that the Employer requires the Employee to attend a continuing education course, the Employee will be paid the Employee's regular salary for all hours in attendance at the continuing education course, in addition to the fee for the course. Fees for any courses that the Employee attends that are not considered mandatory by the Employer may be reimbursed by the Employer at its sole discretion, provided that the Employee obtained advanced written approval from the Employer, and only upon receipt of written confirmation that the Employee has successfully passed the course. Notwithstanding the foregoing, the Employee is solely responsible for ensuring that they comply with all continuing education requirements to maintain their professional standing, at their own cost and on their own time.

5.2 The Employee is solely responsible for obtaining all necessary licenses and for payment of all annual license and insurance fees required to maintain the Employee's professional standing including, but not necessarily limited to, fees to the College. These fees must be paid in a timely manner, and the Employer reserves the right to require proof of valid, current registration. Failure to maintain the required License and Association fees and/or to be in good professional standing is just cause for termination of employment in accordance with Article 8.3 of this Agreement.

5.3 During the term of the Agreement, the Employee will be responsible for carriage of adequate malpractice and liability insurance of not less than two (2) million dollars to perform dentistry for the Employer. The Employee will provide proof of policy when requested by the Employer to do so.

ARTICLE 6 — BENEFITS

6.1 Upon the successful completion of the Employee's probationary period pursuant to Article 1.2 of this Agreement, dental services for the Employee, the Employee's spouse and dependent children, if any, will be rendered without charge, save and except the payment of applicable laboratory fees. The scheduling of the appointments for these dental services is subject to approval by the Employer in accordance with operational requirements. For the purposes of this Agreement, "dependent children" means children in attendance at school until age twenty-one (21).

6.2 The Employee is entitled to [number (#)] paid sick days per calendar year starting on January 1st each year in the event of personal illness or to attend to a sick child of the employee. Sick leave may not be carried forward to the next calendar year and will not be paid out upon retirement, resignation, termination of employment, or for any reason whatsoever.

6.3 The Employer reserves the right to request information with respect to medical limitations, restrictions, and prognosis in such manner as it deems necessary in the circumstances with respect to any request for paid or unpaid sick leave, subject to the requirements of the Employment Standards Act, 2000 (Ontario) as amended.

6.4 An annual uniform allowance of [amount] dollars ($XX.00) dollars will be paid after [number of year(s)/months] of employment. Uniforms must be worn during work, and the Employee is responsible for the care and maintenance of same.

6.5 Following the successful completion of the Employee's probationary period pursuant to Article 1.2 of this Agreement, the Employee shall be entitled to participate in the Group Health and Welfare Benefits Plan generally available to all full-time employees of the Employer from time to time, in accordance with the terms and qualifying conditions thereof. The Employer reserves the right, at any time, to change to a different benefit carrier or plan, and the Employee will not have any right to compensation as a consequence, nor will such switch or cancellation constitute a constructive dismissal. The Employer shall be responsible for payment of [amount] percent ([XX]%) of the premium costs associated with the Group Health and Welfare Benefits Plan, save and except long term disability and life insurance premiums. The Employee shall be solely responsible for the payment of the long term disability and life insurance premiums, and the Employee agrees and authorizes the Employer to deduct from the Employee's salary the cost of such premiums, as amended from time to time. Any decisions with respect to entitlement are at the sole discretion of the Insurer.

ARTICLE 7 — DUTIES, REPRESENTATIONS AND WARRANTIES

7.1 The Employee agrees to perform and faithfully carry out all the work, services, instructions and responsibilities as may be assigned to the Employee by the Employer from time to time.

7.2 In the discharge of the Employee's duties, the Employee shall observe and comply with all policies, rules, regulations and directions as may, from time to time, be given by the Employer, and as may be amended at the sole discretion of the Employer. The Employee shall devote the whole of the Employee's time and attention during the regular work week, or during such hours as required from time to time by the Employer, to fulfilling such duties.

7.3 The Employee agrees to act in the best interests of the Employer and to faithfully and diligently serve the interests of the Employer. Without limiting the generality of the foregoing, the Employee warrants and agrees that the Employee shall not, at any time during the Employee's employment: (i) engage in (or assist any other person or organization) in any other business or employment or activities that is in any way competitive with the Employer's dentistry or dental hygiene business or that otherwise detrimentally impacts on the Employee's ability to perform the Employee's work and other obligations under this Agreement; (ii) solicit, divert or hire away or attempt to solicit, divert or hire away any person who is employed by the Employer; or (iii) solicit or divert away or attempt to solicit or divert away any patient of the Employer.

7.4 The Employee warrants and represents to the Employer that the Employee is a member in good standing of the College, is duly qualified and licensed to practice dentistry in the Province of Ontario, and that the Employee shall remain so throughout the Employee's employment with the Employer. The Employee shall immediately advise the Employer of any complaint made against the Employee to the College.

7.5 Without limiting the generality of the foregoing, the Employee shall abide by all legislation (including, but not limited to, the *Regulated Health Professions Act, 1991* and the *Dentistry Act, 1991*), professional standards, codes of ethics and guidelines of relevance to members of the College.

ARTICLE 8 — TERMINATION

8.1 **Without Cause**

The Employee's employment may be terminated without cause, at any time and for any reason, by the Employer providing the Employee with notice in writing or payment in lieu of notice, severance pay (if applicable) and all other entitlements in accordance with and limited to the minimum requirements of the *Employment Standards Act, 2000*, (Ontario) as amended. For clarity, the Employee will continue to receive all benefits to which the Employee is ordinarily entitled for the minimum notice period required by the *Employment Standards Act, 2000*, (Ontario) as amended, and only for such period. The written notice or pay in lieu thereof and severance pay (if applicable) referenced in this Article 8.1 is in full and final satisfaction of all notice and severance pay obligations.

8.2 **Additional Payment in Exchange for a Release Agreement**

In the event the Employee's employment is terminated on a "without cause" basis and conditional upon the Employee's execution and return of a Full and Final Release Agreement (in favour of the Employer) in the form provided by the Employer upon termination, the Employer will, in addition to the entitlements provided to the Employee pursuant to Article 8.1 above, provide the Employee with an additional payment equivalent to the greater of: (i) six (6) weeks of regular salary less the usual and statutory deductions; or (ii) one (1) week of regular salary per year of completed service to a maximum of sixteen (16) weeks of regular salary less the usual and statutory deductions. [***NOTE: The Termination Clauses and amounts are for sample purposes only; amounts to be offered on termination should only be inserted after having received legal advice***]

8.3 **With Cause**

The Employer may terminate the Employee's employment for cause at any time and without providing notice or payment in lieu of notice; however, the Employer will provide the Employee with any entitlements that are minimally required by the *Employment Standards Act, 2000* (Ontario) as amended. For the purpose of this Agreement, "cause" shall include, but is not limited to:

(a) a material breach of the provisions of this Agreement;

(b) an act of dishonesty, reckless carelessness, or grossly negligent performance of the Employee's duties;

(c) disobeying or disregarding any instruction or order of the Employer;

(d) a material breach of a policy, procedure or rule of the Employer;

(e) conviction for any criminal offence prosecuted by indictment and involving moral turpitude, which might adversely affect the reputation of the Employer in the eyes of its patients or the public in general;

(f) theft of any property of the Employer or any other Employee of the Employer;

(g) breach of the Employee's duty of confidentiality; and

(h) any act or omission of the Employee which would in law permit an employer to, without notice or payment in lieu of notice, terminate the employment of an employee.

8.4 **Resignation**

The Employee shall provide six (6) weeks' notice in writing of the Employee's intention to resign the Employee's employment with the Employer and the Employee's employment and related entitlements will cease at the end of the six (6) weeks' notice period (the "Resignation Date"). The Employer reserves the right to waive the resignation notice period, in whole or in part, by providing the Employee with regular pay and continuation of benefits and vacation pay accrual for the period that is waived.

8.5 **Termination Date**

Upon termination of the Employee's employment, whether it be with or without cause, the date established by the Employer as the Employee's last day of providing services for the Employer will be considered the date of the termination of the Employee's employment (the "Termination Date").

ARTICLE 9 — EMPLOYER PROPERTY AND CONFIDENTIAL INFORMATION

9.1 The Employee agrees that all materials relating to the business and affairs of the Employer including, without limitation, all manuals, documents, reports, equipment, working materials and lists of patients prepared by the Employer or by the Employee in the course of the Employee's employment, are confidential and are for the benefit of the Employer and all such materials shall remain the property of the Employer and, upon the Resignation Date or Termination Date as applicable, the Employee shall surrender to the Employer all such materials without retaining any copy (whether electronic or hard copy).

9.2 The Employee agrees that the Employee will not, during the Employee's employment hereunder or at any time thereafter, use for the Employee's own purposes or for any purpose other than those of the Employer, or divulge or convey to others, or aid or abet others to divulge or to convey to others, any of the Employer's information, knowledge, data or property relating to the affairs of the Employer or its patients, and any of its other confidential information, other than previously published material properly in the public domain.

9.3 To the fullest extent permitted by applicable law, the Employee hereby assigns and shall assign, without additional compensation or other consideration, to the Employer or its nominee, all rights, title and interests in and to any and all inventions (and all proprietary rights with respect thereto) whether or not patentable or registerable under copy right or similar statutes, whether or not authored, made or conceived or reduced to practice, and whether or not made alone or jointly with others, which relate to the actual or anticipated business or work of the Employer or which result from or are suggested by any services performed for the Employer, whether or not made during or after working hours and whether or not resulting from the use of the premises or property of the Employer. The Employee also hereby waives any moral rights which the Employee may have with respect to the above.

ARTICLE 10 — NON-SOLICITATION

10.1 The Employee agrees that for a period of twelve (12) months following the Resignation Date or the Termination Date, as applicable, the Employee will not, either directly or indirectly, on the Employee's own behalf or in the service or on behalf of others, solicit, divert or hire away or attempt to solicit, divert or hire away, to any competing dental practice or business, any person who, at any time during the ninety (90) days prior to the Resignation Date or Termination Date, as applicable, was employed by the Employer.

10.2 The Employee further agrees that for a period of twelve (12) months following the Resignation Date or Termination Date, as applicable, the Employee will not, either directly or indirectly, whether as a principal, agent, associate, employee, independent contractor, director, officer or shareholder of a company or otherwise, solicit or aid in the solicitation of any patient of the Employer for whom the Employee has provided dental services in the twelve (12) month period preceding the Resignation Date or Termination Date, as applicable, and of which provision of dental services the Employee was aware. [***NOTE: these amounts are for sample purposes only; a non-solicitation clause and application amounts should only be inserted after having received legal advice***]

ARTICLE 11 — NON-COMPETITION

11.1 The Employee acknowledges and agrees that the Employee would cause irreparable harm to the Employer were the Employee to compete, either directly or indirectly, with the Employer in the six (6) month period immediately following the Resignation Date or the Termination Date, as applicable. Accordingly, the Employee agrees that the Employee will not, for a period of six (6) months following the Resignation Date or the Termination Date, as applicable, directly or indirectly, whether as a individual, partner, employee, independent contractor, consultant, shareholder, agent, officer and/or director for any person, corporation, firm, organization, company or association, carry on, be engaged in, advise, permit the Employee's name to be used or be employed by any person, business, firm, association, company, organization or corporation concerned with or engaged in a practice or business that is competitive with the dentistry or dental hygiene business of the Employer within a five (5) kilometre [***NOTE: these amounts are for sample purposes only; a non-competition clause and application amounts should only be inserted after having received legal advice***] radius of the municipal address of the Employer's dental office on the Resignation Date or Termination Date, as applicable.

ARTICLE 12 — COVENANTS REASONABLE

12.1 The Employee acknowledges that a breach of any of Articles 9, 10 or 11 of this Agreement will give rise to irreparable harm and injury not compensable in damages alone. Accordingly, the Parties agree that the Employer is entitled to injunctive relief against the breach or threatened breach of any part of those Articles, in addition to any other legal remedies that may be available. The Employee further acknowledges and agrees that the enforcement of a remedy under this Agreement by way of injunction will not prevent the Employee from earning a livelihood. The Employee further acknowledges and agrees that the covenants contained in this Agreement are necessary for the protection of the Employer's legitimate business interests and are reasonable in scope and content.

ARTICLE 13 — SURVIVAL

13.1 Notwithstanding the termination of the Employee's employment and this Agreement for any reason, the provisions of Articles 9, 10, 11, 12 and 13 shall survive such termination.

ARTICLE 14 — GENERAL

14.1 This Agreement constitutes the entire Agreement between the Parties. There are no oral or written representations, warranties, forms, conditions, undertakings or collateral agreements, expressed, implied or statutory, between the Parties other than as expressly set forth in this Agreement.

14.2 This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Employer. Without limiting the generality of the foregoing, the Employee agrees that the Employer may assign this Agreement to any entity to which the Employer sells or transfers its business.

The rights of the Employee under this Agreement are not assignable or transferable in any manner.

14.3 This Agreement shall be construed and interpreted in accordance with, and governed by, the laws of the Province of Ontario and the laws of Canada applicable therein, and the Parties attorn to the jurisdiction of the courts of Ontario.

For clarity, it is intended that all aspects of this Agreement will comply with the *Employment Standards Act, 2000* (Ontario) as amended. In the event that the *Employment Standards Act, 2000* (Ontario) as amended provides the Employee with superior entitlements than provided for in this Agreement, the Employer shall provide the Employee with such statutory entitlements in substitution for the Employee's corresponding right under this Agreement.

14.4 Any notice required to be given hereunder shall be in writing and may be delivered personally or be sent by registered mail to the Employee at the Employee's last known address on file with the Employer, or to the Employer at its business address. Any notice sent by registered mail shall be deemed to have been received by the Party to whom it is addressed on the third (3rd) business day following such mailing, and any notice delivered personally is deemed received upon delivery.

14.5 Each article, sub article, paragraph and provision of this Agreement is distinct and severable. The illegality, invalidity or unenforceability of any article, sub article, paragraph or provision of this Agreement or covenant herein contained shall not affect the legality, validity or enforceability of any other article, sub article, paragraph or provision or covenant herein contained.

14.6 This Agreement may be amended by mutual agreement of the Parties in writing and such amendment shall form part of this Agreement. No amendment to or waiver of this Agreement shall be valid or binding unless set forth in writing and duly executed by both of the Parties hereto.

14.7 The Employee acknowledges that the Employee has read and understood the terms of this Agreement and that the Employee has had independent legal advice or the opportunity to obtain independent legal advice prior to signing same. The Employee further agrees that all the terms of this Agreement are reasonable and that the Employee is signing this Agreement freely, voluntarily and without duress.

14.8 The Parties agree that this Agreement may be executed in any number of counterparts (including counterparts by electronic PDF or facsimile), and all such counterparts taken together shall be deemed to constitute one and the same instrument.

14.9 This offer is open for acceptance until [**date that is at least seven (7) calendar days following issuance**], at which time it will expire if not accepted. [***NOTE: Always keep this paragraph on the same page as all of the signatures and ensure signatures occur prior to expiry date.***]

[Employee's Name] **Date Signed**

Witness to Signature of Employee

[Name of Signatory for Employer] **Date Signed**

[NOTE: To be signed by the Employer prior to issuance]