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Taking a Bite Out of Employment Law

What to look for when transitioning employees between practice owners

Dentists usually preach good oral hygiene to prevent gingivitis and tooth decay, but preventative maintenance applies equally to employment law and, in particular, buying or selling a practice.

Strategic planning, enforceable contracts, effective workplace policies, and properly implemented procedures are the employment-law equivalent of brushing and flossing, and can be tremendously beneficial in avoiding legal claims from employees. This is true of both day-to-day practice operations and practices in transition.

The sad reality is that in many, if not most, cases dentists buying or selling a practice don't turn their minds to employment issues until it is too late. It is not uncommon for people to buy a practice and find themselves stuck with undesirable staff, only to realize that their choices are to continue to employ these staff members or pay out substantial severance packages.

We have also seen situations in which a professional who was selling a practice did not negotiate terms regarding severance obligations with current employees. When the purchaser chose not to keep the staff, the vendor had to pay out a hefty portion of the purchase price in severance.

One thing is consistent in all of these scenarios: during the negotiations, parties discuss issues such as the purchase price, transition, and restrictions on competition, but no one turns their mind to what will happen to the existing staff, and who will be responsible for any severance payments.

Key flags to look for when transitioning employees

The primary issue is the type of transaction. A corporation can be purchased in two different ways — as an asset purchase, where the buyer is effectively picking and choosing the business assets they will take, or as a share purchase, where buyers are purchasing the business in its entirety, including the employees. The nature of the transaction is a key factor in deciding who is responsible for potential employment issues.

If a practice's assets are being purchased, then the purchase of a practice by a new owner automatically terminates the employment of any existing employees. Most practice owners (or any business owners, for that matter) and most employees fail to realize this and expect the status quo to continue. Employees may simply continue coming in to work as if nothing has changed, despite significant transformations having occurred that directly impact them. The employees often do not realize that they have, technically, been fired and may then be entitled to termination or severance pay, depending on their employment agreements.

Yet, just allowing the employees to keep showing up to work with no formal arrangements may have unforeseen consequences. If purchasers do not put new contracts of employment in place, they may be on the hook for a significant amount of termination pay when the employment relationship ends.

If employers are purchasing the shares of a business, then they are effectively buying the business as is. This includes all existing staff — the good, the poor performing, and the disgruntled. In order to correct this, a purchaser can negotiate a period of time to evaluate the employees' performance and who will be responsible for any termination pay: the buyer, the seller, or some method of sharing the costs. Alternatively, awareness of these issues ahead of time may be factored in via an adjustment in the purchase price. Spending time to address these issues at the outset will help avoid unpleasant surprises (the root canals of employment law).

When there's a new leader

From the employees' perspective, it may seem that very little is altered when a practice changes hands, but again this depends on the nature of the transaction. For a share purchase, the day-to-day business operations usually carry on unaffected, save for the fact that there is a new employer, or leader. That new employer, the purchaser, is now responsible for those employees and for their working conditions. Any changes a purchaser makes to the employees' working conditions need to be in line with any existing employment contracts, or the purchaser can seek legal advice on how to properly issue new agreements. Any significant changes made unilaterally by a purchaser in these situations can give rise to an employee's claim of constructive dismissal.

If a purchaser in an asset purchase wishes to change the working conditions, new employment agreements are the best way to do this. Purchasers have the power to assume full control of the working relationship, but are always advised to start off on the right foot. This requires any new contract to have sufficient consideration, which should be something valuable enough to entice the employee to remain with the practice. While there is no set amount that legally defines "sufficient consideration," offering employees something of real value will be far more attractive than a small token amount, which may not be appealing.

Points to consider when buying or selling a practice

- Do the current employees have enforceable employment agreements that limit severance obligations?
- Will the purchaser have the opportunity to assess which staff they intend to keep, before and/or after closing? If so, how long will they have?
- Who will be responsible for severance obligations to those who are not kept on?
- When will the new employment agreements be introduced?
- What if the employees choose not to go with the purchaser? Who will be responsible for the resulting costs?

Although a corporate lawyer or consultant will be the primary deal broker in the sale of a practice, having an employment lawyer on your team is critical. Employment lawyers can review the existing employment relationships and assess potential liabilities. They can then ensure that those responsibilities are properly addressed so that there are no surprises. Addressing these assessments will protect you, whether you are the buyer or seller.

While not always top of mind, the employment issues that come with buying or selling a practice can take a bite out of your bottom line; a bit of preventative maintenance can ward off significant problems in the long run — just like brushing and flossing can. OD

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