

MEMORANDUM

TO: New York County Dental Society

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RE: UPDATED COVID-19: Employment Issues with Emergency Practice Closures NYS/NYC

DATE: March 22, 2020

As you may know, on March 17, 2020 our law firm issued a very detailed memo to all dentists and other healthcare providers entitled: "COVID-19: Employment Issues with Emergency Business Closures."

Since that date new emergency laws have been enacted on both the federal and state of New York levels and Governor Cuomo has issued several executive orders. While the legal analysis and recommendations in our March 17, 2020 memo were accurate at the time, much of it has now been superseded by these emergency laws and executive orders.

As you probably already know, Governor Cuomo's "New York State on PAUSE" Executive Order 202.6 of Friday, March 20, 2020, also known as the "Stay-At-Home" Executive Order, (hereinafter referenced as the "Executive Order") requires dental practices to close by 8 PM tonight March 22, 2020, except for emergency services. In this regard we suggest that you refer to the ADA guidance on what is considered emergency dental services. These are the only services which your practices will be permitted to

Mandelbaum Salsburg is providing this memo as counsel to the New York City Dental Society. This memo is for informational purposes only and is not intend to, and should not be relied upon, as legal advice. Such advice may differ depending on the situation of each dental practice and its particular employment policies. Employers' COVID-19 related legal obligations are continuing to evolve as new laws are enacted each day and interpretative advice is issued by various government entities. Employers should consult with one of our attorneys for updates and the latest guidance on these matters.

provide going forward. Please be mindful that Governor Cuomo stated that civil fines will be imposed for violations.

After consulting with your Executive Director, Diane Laurenzo, what follows are our law firm's bottom-line recommendations on what actions dental practices should take to comply with the Executive Order and other state and federal emergency statutes which have been enacted since March 17, 2020.

Temporary Layoffs

Except for those few employees discussed below, we recommend advising all your employees by email tonight that, as required by Governor Cuomo's Executive Order, they are being placed on temporary layoff effective Monday, March 23, 2020. Encourage your employees to apply for unemployment benefits at the New York Department of Labor website, as being temporarily laid off "for lack of work due to COVID-19." At the end of this memo is a list of all the information to provide to employees in this email, so they can apply for unemployment compensation benefits online.

This layoff notice should state that: "it is for an indefinite period of time until the current public health emergency is over. At this time the practice does not know when it will begin recalling employees; who or how many will be recalled; and for how many hours of work. Employees will be notified as far in advance as possible once the practice has made these decisions.

Also, we suggest that this layoff notice include a disclaimer that: "the New York State Department of Labor makes all decisions about employee entitlement to unemployment compensation benefits; the amount of the benefits; and the length of time an employee is entitled to them. These are not decisions that the practice can make; however, obviously, the practice will cooperate as much as it can with your filing for benefits."

Arrangements for Emergency Services

As noted above, the Executive Order does exempt dental emergency services. We suggest the following on arranging the availability of staff to provide such emergency services.

We recommend that you not characterize any employees as being "on-call" to provide emergency services because this status brings into play a number of issues under Wage and Hour laws. Without addressing all the issues, depending on the circumstances of their "on-call" status, the practice might have to pay the employee for all the time they are on this status.

We suggest that you simply have a very short list of only essential clinical support staff (essentially dental hygienists) who are willing to report to work when necessary for emergency care. Then, if an emergency arises, just go down the list of employees who have expressed their willingness to come in for an emergency and see who is available.

Also, having employees on-call and possibly having to pay them, could jeopardize their entitlement to unemployment benefits. A practice may want to consider some form of workaround, if an employee is on unemployment and does report to work, upon request, to handle an emergency.

Staff Working Remotely

This Executive Order, and prior orders by Governor Cuomo, direct that, whenever possible, employers should have their employees working remotely from home. If your practice and certain of your employees have the equipment and internet capabilities necessary to work at home, then we recommend that you make such arrangements with your billing/collection and scheduling staff. Obviously billing to maintain as much cash flow as possible; and scheduling staff to reschedule canceled patients starting after April 20, 2020, when the current Executive Order ends.

Your practice is free to select those employees who will be working remotely on these tasks and who will be laid off. The only caveat is to ensure that these decisions do not give the appearance of discrimination (for example; that a disproportion number of minority staff in these titles are laid off and non-minority staff in the same titles are permitted to work remotely).

The practice, of course, has the managerial authority to reduce the hours of these remotely working employees; to reduce their hourly wages or salaries; or to otherwise change their terms and conditions of employment; or to maintain them as they currently exist. Consider that if you reduce the hours of these remotely working employees, they will be entitled to partial unemployment benefits. However, such partial benefits are exceedingly little in New York State; no more than \$200 to \$300 a week. Consequently, we recommend, if at all possible, that your practice maintain a smaller number of full-time employees in these positions rather than spreading- out the work among a larger number of employees with reduced hours.

Our only other recommendation on this topic, is to ensure that these employees log-in with your practice when they begin the workday; log-in and out whenever they take a break lasting longer than 20 minutes; and log-out when they stop working at the end of each workday. Your practice needs to have this time keeping information to comply with federal and state Wage & Hour Laws

Personnel Policy Sick/ Personal Leave & Vacation (PTO)

This topic addresses the various types of paid time off which are not mandated by Federal and State law but are provide by the practice in its Personnel Policy Manual (Employee Handbook), other written polices, or as personnel practices without a formal written policy. These benefits obviously vary widely from practice to practice. Our general recommendation is to not reference these benefits at all in any communications with employees. Only if employees ask about their ability to use these benefits at this time, do

we suggest responding as follows: “while employees are receiving unemployment benefits, they will not be able to use any vacation or sick/personal leave or other paid time off (PTO) which is provided by the practice as a benefit of employment. The practice cannot permit you to take any of this paid time off because, if you were permitted to do so, it may jeopardize your entitlement to unemployment compensation benefits.”

Paid Time Off Required by State Law

We know that the obligation to now pay employees for paid time off is of great concern to members because of the financial impact of greatly reduced revenue. What follows are our opinions on what obligations a dental practice has to pay employees for any accrued paid time off with this temporary layoff (this information is for the benefit of the practice owners only).

New York City Paid Sick Leave

In sum, this City law requires employers to provide one hour of paid sick leave for every 30 hours an employee works up to a maximum of 40 hours in any calendar year. The obligation to provide this paid sick leave now applies to essentially all dental practice employees. This is our conclusion because: (1) employees can use this leave when their workplace is closed due to a public health emergency declared by either the City or the State and when employees need to care for children because their school or childcare provider is closed due to such an emergency; and (2) schools have been order closed and, under the Executive Order, dental practices must close as of Sunday night, 8PM, March 22, except for emergency services.

However, the City law on Paid Sick Leave is clear that employees are not entitled to be paid for any accrued sick leave when they are terminated from employment. A layoff is, in effect, a termination of employment, even though temporary, due to the lack of work. The City has not amended this law. Accordingly, at this time our opinion is that dental practices are not required to pay laid off employees any accrued New York City Paid Sick Leave. We will monitor the situation and advise if any actions by the Mayor change our opinion.

New York State Paid Family Leave & Disability Leave

Employees are entitled to this leave only to bond with a newly born, adopted or fostered child; to care for a close relative with a serious health condition; or to assist with family situations when a family member is deployed abroad on active military service.

This statute was amended by the State on March 18, 2020 to expand the situations in which an employee can use Paid Family Leave to include caring for a family member who is quarantined or placed in isolation due to COVID-19 (the New York State Short-Term Disability Law was also amended so employees can obtain disability benefits if they are quarantined or placed in isolation).

With the Executive Order essentially requiring all employees of nonessential businesses to “stay at home;” and with dental practices declared nonessential, except for emergency services, nearly all dental practice staff would be eligible for these benefits.

However, all these statutory benefit programs are administered by the State of New York Department of Labor, and all these compensation benefits are paid by the Department from its program funds. Consequently, dental practices are not at all involved in any aspect of administering these benefit programs; nor paying any of the benefits (while employers do make payroll tax contributions to fund these programs, there is currently no direct cost to your dental practice for employees who may now qualify for any of these benefits).

Considering the above, if any employee asks about their entitlement to any of these benefits or raises any other question about them, our recommendation is to advise that all these programs are administered by the New York State Department of Labor, and employees should check the Department’s [website](#) on their possible entitlement to these benefits and how to apply for them online.

One final point is that all these laws contain non-retaliation provisions which prohibit an employer from taking any adverse employment actions against an employee because they took advantage of the benefits provide by these laws.

New York State COVID–19 Sick Leave

This statute was enacted on March 18, 2020 and was effective immediately. Boiling it down to its essence, any dental practice with 10 or fewer employees that had a net income of more than \$1 million in 2019, and any dental practice with between 11 and 99 employees as of January 1 2020, is required to pay five days sick leave to any employee who is under an order of quarantine or isolation issued by the State of New York or the City.

The COVID-19 Sick leave Law has to be considered in conjunction with the Executive Order which excludes dental practice employees from State ordered quarantine only when they are providing emergency dental care. Our analysis of these two enactments is that, except for these emergency dental providers, all a practice’s staff are now under State order isolation; but only as of Monday, March 23, 2020, with the Executive Order’s required isolation being effective at 8PM Sunday night, March 22, 2020.

Since we are recommending that all dental practices immediately lay off all their employees, with only the exceptions discussed above, our opinion, at this time, is that dental practices are not required to comply with this Law; except for individual employees, if any, who may have been under a personal order of quarantine or isolation by the State or City prior to todayⁱ. Again, a note of caution, this opinion may change as we receive more guidance from the State of New York on the COVID-19 Sick Leave Law. We are monitoring developments as this Law is implemented and interpreted and will advise if our opinion changes due to these developments.

Paid Time Off Required by the Federal Families First Coronavirus Response Act

Again, describing just the essence of this Act, it provides two specific benefits for employees of companies with less than 500 employees and down to employers with just one employee. First, it provides paid sick leave of up to ten (10) days in addition to whatever paid sick leave states may have already granted by statute. Second, it provides for ten (10) weeks of paid family leave, but only under very limited circumstances; specifically, when an employee has to stay at home to care for children who are unable to go to school or daycare because of closings due to the coronavirus. Employers are permitted to take a tax credit, dollar for dollar, in their payroll tax payments for every dollar they spend providing these benefits. In addition, there are dollar maximums on the benefits the employer is required to pay per employee, which we will not now address.

Fortunately, the Act does provide an exemption for “health care providers.” Without addressing all the details, the “bottom-line” is that, under the current regulations for the Federal family leave law, dentists and probably also dental hygienists are considered healthcare providers who are exempt from coverage by the Act. As a result, in our opinion, dental practices are not required to pay either of these benefits to their dentist employees or dental hygienists. In addition, a practice can decide on its own to exempt these employees from this coverage and does not have to seek permission from the Secretary of Labor to do so.

The Act does give the Secretary of Labor the ability to issue new regulations on this exemption. We will continue to monitor this situation and will advise on any changes in regulations that may affect the opinions we have given herein.

Obviously, this exemption for healthcare providers does not apply to a dental practice’s clerical staff and possibly also its clinical technical staff (e.g.; dental technicians or assistants). However, with dental practices in New York State being under the Executive Order to essentially layoff their employees at this time, it is possible that these staff members may also not be entitled to the Act’s paid leave benefits.

The Act specifically states that it is to take effect no later than 15 days after it was enacted, on March 18, 2020. Unless the Secretary of Labor determines that there should be an earlier effective date, the current date is April 2, 2020. Assuming, that all the dental practices in New York State now layoff all their employees, except as discussed above, then our opinion is that these practices will also have no obligation to provide the Act’s paid leave benefits for their laid off clerical and technical staff after the Act’s effective date of April 2, 2020. This is our current opinion precisely because all these employees will have been terminated as of Monday, March 23, 2020, eleven days before the Act takes effect (a layoff, even a temporary layoff, is, in effect, a termination of employment).

The Secretary of Labor has been directed to provide guidance on the implementation of the Act. While some limited guidance has been provided to date, it does not address the above issues. Consequently, our opinions on whether dental practices are exempt from

compliance with the Act for their dentists, dental hygienist, clerical and technical clinical support staff may be subject to change as we receive such guidance. Again, we will provide updates as additional information becomes available.

The final issue of concern is the possible exemption for employers with less than 50 employees. This possible exemption is available to all employers. However, it is not automatic. Employers with less than 50 employees are required to file a request with the Secretary of Labor for this exemption.

The Secretary has not yet issued any guidelines, nor any forms, for applying for this exemption. As soon as they become available, we will provide them to you. Please be mindful that the standard for obtaining this exemption is that having to comply with the paid leave requirements of the Act “would jeopardize the viability of the business as a going concern.” Again, at this time we have no guidance from the Secretary on how the Department of Labor will interpret and apply this standard. As soon as we have such guidance, we will advise.

Health Insurance Continuance

On health insurance, as every dentist owner knows, the premium is paid at the beginning of the month for that month. So, March is not a problem. Being placed on layoff is an event which triggers COBRA, or the state equivalent for smaller employers with less than 20 employees. Consequently, all employees who are currently participating in the practice’s group health insurance plan, and who are being laid off, need to receive the necessary notification and forms to decide whether they want to exercise their option to continue their health insurance totally at their expense starting in April, while they are on layoff. Usually, the practice’s insurance broker will take care of sending this notice and administering the employee’s transition to COBRA, or the state equivalent, of health insurance continuance.

Even though your practice’s insurance broker will probably handle this matter for you, it is still very important to check that the broker has correctly and timely done so. This is because, if employees do not timely receive this notice of their option to elect health insurance continuance at their expense, the practice could have liability. This liability would be for any uninsured medical expenses the employee or their dependents incur which would have been covered by the insurance had the employee timely received the notice and had an opportunity to exercise this option.

Applying for Unemployment Benefits Online

Employees can apply for unemployment benefits through New York State's unemployment program:

www.labor.ny.gov/signin

NYS Unemployment helpline: 1-888-209-8124

Information you will need:

- Employer EIN located on your W2
 - Employer Name:
 - Employer address:
 - Hourly Employees: last day you physically worked
 - State "Lack of work due to COVID-19" on the application form
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