



California Dental Hygienists' Association
The Voice of Dental Hygiene

Labor Laws and your Employee Rights

CDHA Government Relations Council

- ✧ Are you paid for all time worked?
- ✧ Is your salary reduced if there are openings in the patient schedule?
- ✧ Are you being asked to clock in and clock out and/or asked to leave the premises?
- ✧ Is your employer telling you that you are an independent contractor rather than an employee?
- ✧ Are you being given a 1099 rather than a W2 to file with your taxes?
- ✧ Are you being asked to participate in a working interview without pay?

Labor laws are extremely complex, often with exceptions and limitations. It is important to know which laws apply to dental hygienists, what your employee rights are, and where to go for help.

In this information document:

- **Who to contact**
- **Basic Employee Rights**
- **Exempt versus Non-exempt Status; Clocking in/out**
- **Pay Reductions (due to fluctuations in patient scheduling)**
- **Working Interviews**
- **Independent Contractor 1099 versus Employee W-2s**
- **Time Limit for Claims**

Who to contact – a very important disclaimer

Dental hygienists are not lawyers; CDHA does not provide legal advice nor can we interpret the laws. For questions and claims regarding employment issues, you should contact the following federal and state agencies:

- **Labor Commissioner**, also known as the Division of Labor Standards Enforcement (DLSE) under the Department of Industrial Relations (DIR) – for questions about your employee rights or work arrangements, worker's compensation or Cal/OSHA, or to file a claim for back wages. Go to www.dir.ca.gov/dlse/DistrictOffices.htm to find your local office
- **Employment Development Department (EDD)** – for information on Unemployment Insurance benefits, State Disability Insurance benefits or if you are unable to work because of sickness, injury or pregnancy including while waiting to receive worker's compensation benefits. www.edd.ca.gov
- The **IRS** can help you with employer matched social security and Medicare payments. www.irs.gov

- **National Labor Relations Board (NLRB)** – contact for advice and possibly free legal assistance. You do not need to belong to a union for the NLRB to help you. To find the nearest regional office: www.nlr.gov

CDHA *has* met with Department of Labor representatives and a wealth of information is also available on the above government websites.

Basic Employee Rights

The Department of Industrial Relations (DIR), California Code of Regulations, Title 8, Section 11040 Order regulates wages, hours, and working conditions in professional, technical, clerical, mechanical and similar occupations.

All employees are guaranteed specific “rights” under the law.

- **Minimum Wage and Overtime**
 - You are entitled to compensation for all time on the job. For hygienists, this includes the morning huddle, operatory set up and break-down, instrument care including sterilization and sharpening, patient care and chart completion, time worked extending into the “lunch hour” and at the end of the day, and so on.
 - You must be paid overtime. This may be for hours over 8 in one day or for over 40 in one week depending on if an alternative workweek schedule has been arranged.
 - Unfortunately, there is a wage ceiling where overtime protection can be denied. In May 2016, the federal government announced that the annual salary threshold when an employer can deny overtime pay is almost \$47,500.
- **Mandatory Rest and Meal Breaks**
 - There should be a 10 minute break for every 4 hours of work;
 - A meal break after no more than 5 hours of work. As explained to CDHA in a meeting with a DIR representative in 2012, at least 30 minutes of this must be a “work free” break which means an office meeting can not take place during this time.
- **Safe and Healthy Jobs, and Benefits if Injured or Unemployed**
 - Employers must make sure the workplace is safe and train you how to work safely, according to Cal/OSHA regulations.
 - Employers must have Workers’ Compensation Insurance and pay for medical care for work-related injuries and illnesses and
 - Post the Cal/OSHA poster, Safety and Health Protection on the Job, in a place where everyone can see.

- If you are unemployed, you may be eligible to receive unemployment insurance benefits while you are unemployed or working less than full time. www.edd.ca.gov/unemployment
- Paid Sick Leave, starting July 1, 2015
 - Employers must provide at least 24 hours or 3 days of paid sick leave for eligible employees to use per year (subject to the guidelines for accumulating sick time)
 - Eligible employees must be allowed to use accrued paid sick leave
- Taking action without being punished
 - You have the right to tell your employer about your rights as an employee.
 - You have the right to complain or file a claim with the state if you think your employer is violating those rights.
 - It is illegal for an employer to fire, discriminate, retaliate, or take any other adverse action against an employee for making a complaint in good faith.

“Exempt” vs. “Non-Exempt” – Clocking in and out

Application of labor laws to dental hygienists is further complicated by whether or not *you* are classified as “exempt” or “non-exempt” employees. The law does not specifically classify dental hygienists as one or the other.

There are pros and cons to both categories -- a balance of good and bad in the law, protecting both employees as well as employers.

- An “Exempt” employee is not guaranteed overtime, reporting time pay, or mandatory rest and meal periods. The other basic rights are still covered. Some issues, such as docked pay due to schedule changes, do not arise.
 - Your salary is not tied to specific work hours. Your salary usually covers all time needed to do your job.
 - There is no rule that says an exempt employee can’t be asked to clock in and out, but this cannot be done for the purpose of reducing the agreed upon salary for an exempt employee.
- “Non-exempt” employees are guaranteed all of the basic employee rights under the law.
 - You should be compensated for all time worked. Clocking in/out documents your time worked, when you arrive and leave for work and for your lunch break. For hygienists, time “worked” includes waiting for a patient to show up. It does not matter if your pay is based on an hourly rate, a daily salary, or commission; the law provides methods for computing the hourly wage equivalent.
 - There is no law requiring an employer to pay you when there is no work for which you were hired. An employer may also change the work schedule at any

time. However, there *are* laws that determine the minimum hours you must be paid for when these changes are made.

Determination of whether or not a dental hygienist is considered “exempt” or “non-exempt” employees must be made by the Department of Labor. There are tests to qualify for exemption. For example, a “professional” exemption means you must meet *all* requirements, including but not limited to the following:

- Licensed by the State of California and is primarily engaged in the practice of [dentistry] or primarily engaged in the performance of work requiring knowledge of an advanced type acquired by a prolonged course of specialized intellectual instruction and study;
- Customarily and regularly exercises discretion and independent judgment;
- Earns a monthly salary equivalent to no less than twice the state minimum wage for full time employment;
- Is in accordance with federal law;
- And are not specifically identified as non-exempt such as pharmacists, non-advanced practice registered nurses, and certain computer software employees.

In general, dental hygienists seem to meet these guidelines for a professional exemption and for many decades were treated by their dentist employers as such. That seems to have changed. Most hygienists are now classified as non-exempt.

When you inquire with an agency for clarification of your exempt versus non-exempt employee status, work issues or file a claim, it is very important to explain your particular work situation in detail. Those specifics determine which labor laws apply.

Pay Reductions due to fluctuations in the patient schedule

There is no law against an employer requiring their dental hygienist to clock-in and clock out. However, the labor laws determining whether or not your pay can be reduced for openings or changes in the patient schedule are less clear. There are very complex rules, exceptions and special circumstances involved such as “reporting time pay,” minimum “2nd shift” paid hours, “on-call”, “stand-by” or “engaged to wait” rules, as well as other labor laws which may come into play.

CDHA met with a legal representative from the Employment Development Department (EDD) in 2012. We were advised that if the understanding between the hygienist and the employer is that you are expected to work a certain period, whether that is a full day or partial day, you are entitled to pay for that full period. It did not matter if your salary was based on an hourly or daily rate. And it is not dependent upon the patient schedule.

More recently in 2016 a hygienist, following CDHA recommendations, asked their local DIR Labor Commissioner if their pay could be reduced for patient no shows or

other openings in the patient schedule. The response was no; that hygienist reached an understanding with their employer.

If your salary is being docked for patient “no shows” or holes in the schedule, seek advice from the National Labor Relations Board, providing as much details about your particular work situation as possible including the understanding of the work period you were hired for. If you can not reach an agreement with your employer, you should file an inquiry or a claim with the DIR.

Working Interviews

Dental hygienists asked to do a working interview are considered employees and must be paid for the time providing dental hygiene services. You do not have the ability to sign away those rights.

- You should receive a statement indicating that you are being paid for a working interview at a rate of \$_____;
- You should complete a W4 as well as any other forms necessary for a “new” employee and you should receive a W-2 for tax filing.

The California Dental Association posted a statement for their members with this information.

Independent Contractors

Even if an employer calls you an “independent contractors” dental hygienists other than RDHAP are generally considered to be employees and have all the rights of an employee. Dental hygienists are not specifically restricted from being classified as an independent contractor. However there are strict criteria that must be met to qualify. Dental hygienists invariably fail those tests by the IRS, the DIR and the EDD, because the dentist controls many aspects of your work. The California Dental Association (CDA) advises their members to err on the side of caution and categorize dental hygienists as non-exempt employees.

If you are incorrectly classified as an independent contract and receive a form 1099 rather than a W-2 to file your taxes, expect a big shock on the amount of self-employed Social Security and Medicare contributions that you are expected to pay! Your employer can be hit with high fines as well. Both California and the IRS have taken steps to combat the misclassification of employees as independent contractors. File claims with the DIR and EDD and the IRS to recover the employer’s portion of taxes as well as employer portions of Social Security and Medicare which you had to pay.

The CDHA website includes a separate statement on 1099 Independent Contractor versus Employee Status, found in the member section.

What should you do?

Employee/employer issues need to be addressed. There are serious ramifications for both employees as well as employers if labor laws are not applied correctly. And if we wish legislators or the regulatory agencies to change or strengthen the enforcement of labor laws, they need to know that there are problems.

Do not wait too long to speak up, make inquiries or file a claim if you are experiencing employee issues. It is easier to prove you are owed wages or benefits when events are close in time. Plus there is a statute of limitation. Generally, you have 3 years to bring a formal claim.

And the law is the law. An employee cannot be asked to sign away their rights as a condition of employment.

Reference Sources

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www.dir.ca.gov/dlse/LawsTimeMannerPaymentWages.pdf

www.dir.ca.gov/dlse/Paid_Sick_Leave.htm

www.dir.ca.gov/letf/english_worker_mobile.pdf - DIR Labor Enforcement Task Force, May 2015, "All workers have rights in California"

www.dir.ca.gov/dlse/FAQ_IndependentContractor.htm

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