



California Dental Hygienists' Association
The Voice of Dental Hygiene

Labor Laws and your Employee Rights

CDHA Government Relations Council
Updated March 1, 2017

CDHA hopes that hygienists can discuss and negotiate their terms of employment, and maintain mutually respectful relationships with their employers. Unfortunately, that isn't always the case.

To facilitate those discussions, it is important for both you and your employers to understand basic labor laws and employee rights, how they apply to dental hygienists, and where to go for clarification and/or help if necessary.

In this document:

- **What agencies to contact with questions on labor laws or to file a claim**
- **Employee (W-2) versus Independent Contractor (Form 1099)**
Is your employer telling you that you are an independent contractor rather than an employee?
Are you given a Form 1099 rather than a W2 to file with your taxes?
- **Exempt versus Non-exempt Status** – Does a hygienist qualify for exempt employee status?
- **Pay Reductions due to Schedule Changes – Employment Contracts**
Is your salary reduced if there are openings in the patient schedule?
- **Clocking in/out** – Are you being asked to clock in and out, or asked to leave the premises when clocking out?
- **Working Interviews** – Are you being asked to participate in a working interview without pay?
- **Basic Employee Rights, including Paid Sick Leave** - Are you paid for all time worked?
- **Varying Wage Schedules** – Are you paid a different wage rate for different duties or than other hygienists in the same office?
- **Time Limit for Filing Claims –3 years**

DISCLAIMER: OFFICIAL GOVERNMENT AGENCIES YOU SHOULD CONTACT

CDHA has had questions answer by Department of Labor lawyers, most recently in January 2017. However, dental hygienists are not lawyers. CDHA does not provide legal advice nor can we interpret the laws. For questions and claims regarding your individual employment issues, you should contact the following official federal and state agencies or visit their websites for a wealth of information:

- **Labor Commissioner**, also known as the Division of Labor Standards Enforcement (DLSE) under the Department of Industrial Relations (DIR)

www.cdha.org

- Email questions about your employee rights or work arrangements, worker's compensation or Cal/OSHA to dlse2@dir.ca.gov.
- To find the closest local office, to submit a claim or to report a labor law violation, go to www.dir.ca.gov/dlse
- **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.
- **Internal Revenue Service** – if you were misclassified as an independent contractor, you paid social security and Medicare taxes which should have been paid by your employer. To file a claim and recover those funds: www.irs.gov/help-resources/contact-your-local-irs-office
- **National Labor Relations Board (NLRB)** – if your employer is suppressing your rights such as the freedom to discuss salary, the NLRB offers free legal assistance. You do not need to belong to a union. To find the nearest regional office: www.nlr.gov

RDH ARE “EMPLOYEES” NOT “INDEPENDENT CONTRACTORS”

RDH are generally classified as “employees” by the IRS, the DIR and the EDD. Just because an employer says you are an “independent contractors” doesn't make it so.

- While the law doesn't specifically say a dental hygienist can't be classified as an independent contractor, California dental hygienists (except for RDHAPs) invariably fail the many qualifying tests for independent contractor status. Dentists control too many aspects of your job for you to be eligible!
- If you are misclassified as an independent contractor and receive a **Form 1099** for independent contractors rather than a **W-2** as an employee for tax filing, expect a big shock on the amount of Social Security and Medicare contributions that you have to pay with your taxes!
- The CDHA website includes a separate paper with more details on the rules determining Independent Contractor Status.
- The California Dental Association (CDA) advises their members to categorize dental hygienists as non-exempt employees.

Both California and the IRS have taken steps to combat the misclassification of employees as independent contractors.

- Your employer will be subject to significant fines on top of paying the employee taxes they passed on to you!
- File claims with the DIR and the IRS for them to officially verify your employee classification status.
- To recover the employer's portion of taxes such as Social Security and Medicare which you had to pay, you must file **IRS Form SS-8**.

RDH ARE “NON-EXEMPT” EMPLOYEES

Dental hygienists are non-exempt employees, and entitled to all the basic rights of an employee under the law (see below).

- Again, the law does not specifically classify dental hygienists as exempt or non-exempt.
- Although dental hygienists seem to qualify as “**professional**” exempt employees, dental hygienists (or more accurately our employers) fail to meet a key salary test criteria.

To qualify for the “professional” exemption, an employee must meet *all* requirements for duty and salary including but not limited to the following.

- Duty test:
 - Licensed by the State of California;
 - Is 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
- Salary test:
 - Earns a monthly salary equivalent to no less than twice the state minimum wage for full time (40 hours) employment, approximately \$800/week in California.
 - That minimum salary must be guaranteed for professional exempt employee status, even if the employee is not working, per DIR lawyer David Balter at our January 2017 meeting.
 - ◇ This is a less known condition of the salary test.
 - ◇ For example, if you take time off for jury duty, vacation, or any reason, your employer *must* still pay you the minimum required salary for that week.

CDHA is not aware of any dentist who guarantees their hygienist the minimum required salary even when that hygienist takes time off. Quite the contrary, some dentists are now docking hygiene salaries for openings in the patient schedule!

PAY REDUCTIONS DUE TO THE SCHEDULE – EMPLOYMENT CONTRACTS

Having your salary reduced for patient “no shows”, cancellations, or unfilled openings in your schedule – is considered a “contract” issue rather than a labor law issue.

- There is no law requiring an employer to pay you when there is no work for which you were hired.
- The law does specify that you must receive a written statement of the terms of employment on the day of hire (Labor code 2810.5). That is your employment contract, and should specify:
 - the rate of pay (whether hourly, daily, commission),
 - hours to be worked i.e. 8am-5pm,

- days of the week,
- Sick leave policy, vacation/holiday pay, etc. etc.

Put simply, if you and your employer come to an agreement that you will work a certain period (say from 8 am to 5 pm, with an hour for lunch, on Monday and Wednesdays), then you are entitled to the agreed upon wage for that period, regardless of the patient schedule.

- Of course, the employer can change the terms of employment or work schedule, with notice, and specify rules for patient cancellations, etc. You should get all terms and changes in writing!
- Important note: Even without notice, if the dental hygienist continues to work after their employer changes the terms of employment, the court may see that as the hygienist “agreeing” to the new terms.

CLOCKING IN-OUT

There is no law against an employer requiring their dental hygienist to clock-in and clock out.

- If your employer doesn’t plan to pay you when you are clocked out, that should be in your employment contract.
- Clocking in/out does help to document all of your time worked and can ensure that you are paid for all time worked, including overtime.
- There *are* many rules that apply to the length of the break between shifts, minimum number of hours that must be paid for shifts, whether or not one is “on call” or “stand by” etc. if base salary is affected by clocking in and out.
- Waiting for a patient to show up is considered “working” as is being “available” in case there is a patient, and you should not clock out.
- Under federal law, an employee can not be asked to clock out unless the break is at least 20 minutes.

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, now can your employer ask you 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.

BASIC EMPLOYEE RIGHTS

All employees are guaranteed specific “rights” under the law. The Labor Commissioner aka 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.

If your employer is in violation of these basic rights, they owe you lost wages plus significant fines.

- **You should be compensated for all time worked.**
 - For hygienists, this includes the morning huddle, operatory set up and break-down, instrument care including sterilization and sharpening, patient care, chart completion, all time worked extending into the “lunch hour” and after the “official” end of the day, staff meetings, required attendance at a specific CE or other events, and so on.
 - 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.
 - Even though the law says the employer is responsible for maintaining accurate time records, if you file a claim for lost wages, the onus will be on you to show meticulous records of your time worked, missed breaks, etc.
- **You must be paid overtime for all hours worked over eight (8) in one day.**
 - “Alternative workweek” agreements specifying 10 hour work days only apply if *you* are employed full time (40 per week) which is not the case for most hygienists.
 - Unfortunately, there is a wage ceiling where overtime protection can be denied. The current threshold is an annual salary of \$23,660 which many hygienists will meet.
 - The Fair Labor Standards Act, which would have gone into effect Dec 1, 2016 in on hold pending legal challenges. If upheld, the annual salary threshold when an employer can deny overtime pay will increase to \$47,476, with that ceiling automatically update every three (3) years, based on US wage growth.
- **You are guaranteed a 10 minute break for every four (4) hours of work.**
 - A break is mandatory once a shift exceeds 3 hours.
 - For hygienists, breaks do not have to be specified in the patient schedule. The burden is upon the employer to demonstrate that a hygienist can reasonably expect to be able to take those breaks.
 - A break is defined as a period completely free of work, when the hygienist can leave if she/he so chooses to take a walk around the block.

- Being able to run to the bathroom while waiting for the doctor exam does not qualify as a break.
- **You are guaranteed a meal break after no more than five (5) hours of work.**
 - If the doctor schedules a staff meeting during the lunch hour, that is considered “working.”
 - You must be guaranteed at least 30 minutes of “work free” 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 (2014 AB 304, effective July 1, 2015)**
 - Paid sick leave can be used for yourself or a family member, for preventive care or diagnosis, care or treatment of an existing health condition, or for other specified purposes.
 - To be eligible, you must work for your employer for at least 30 days within a year, and satisfy a 90-day employment “probation” period before using any sick leave.
 - Employers must provide at least 24 hours or 3 days of paid sick leave per year to eligible employees.
 - Employers may choose to provide an “**up front**” **sick leave policy** making at least 3 days paid sick leave available for use at the beginning of each year (12 months) of employment.
 - The employer determines if that 12 month period is a calendar year, fiscal year or other 12 month period.
 - Under upfront policies, the employer does not have to roll over unused sick leave at the end of the year.
 - OR Employers may choose an “**accrual**” **sick leave policy**.
 - In general, one (1) hour sick leave is accrued for every 30 hours worked.
 - You can accrue more than 24 hours of sick leave per year of employment (tracked usually from the anniversary date of employment), but your employer can limit your use to 24 hours or 3 days per year.

- Unused accrued sick leave can be rolled (carried) over to subsequent years, but your employer can limit the total accrued sick leave to no more than 48 hours or six days.
- Employers may choose a **combined sick leave/vacation policy** (as long as it is at least 24 hours or 3 days)
 - This can affect carry over rules but may also allow for payout upon termination of employment.
- Your employer can have a different sick leave policy if it satisfies the state law's requirements.
 - Employer policies can provide more paid sick leave but not less than state law.
- Cities and counties with their own sick leave policies, which meet or exceed the state requirements, will take precedence.
- For more details and FAQ, go to www.dir.ca.gov/dlse/Paid_Sick_Leave.htm
- **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.

VARYING WAGES FOR HYGIENISTS WITHIN AN OFFICE

- Employers are allowed to pay their employees a different rate for work that is distinct from their primary duties.
 - For hygienists, that could apply to staff meetings or mandatory attendance at CE events. Those alternate rates of pay must be disclosed in advance with the type of work/circumstances clearly defined, and should be included in your written terms of employment.
- Dentists may pay different wages to the hygienists in their office, based upon a variety of criteria including but not limited to seniority, merit, quantify to quality of services, education, and experience.
 - If bonuses are based on production, the employer must document why one employee gets more than another.
- **Employees are ALLOWED to discuss their wages and bonus with other employees, by law.**

WHAT SHOULD YOU DO IF YOUR EMPLOYEE RIGHTS HAVE BEEN VIOLATED?

Employee/employer issues need to be addressed.

First, you should try to calmly discuss any potential labor law issues with your employer, and hopefully a satisfactory resolution can be agreed upon.

- You should decide what issues are important to you, and which rights you want to fight for.
- The law says your employer can't retaliate against you for bringing up labor issues.
 - Keep in mind that dental hygienists are "at will" employees and can be fired with no reason given.
 - You must decide if this is worth the risk.
 - You will need to show that you were fired because you complained.

Don't wait too long to speak up, make inquiries or file a claim if you are experiencing employee issues and can't get the issue resolved by talking with your employer.

- The government agencies to notify were listed on the first page of this document.
- There are serious ramifications for both employees as well as employers if labor laws are not applied correctly.
- 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.
- 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.

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

REFERENCE SOURCES

www.dir.ca.gov/t8/11040.html - DIR sites last accessed 2/18/2017

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

CDA. "Dentist 'working interviews' can be complex" Oct 30, 2014.

<http://www.cda.org/news-events/dentist-working-interviews-can-be-complex>.

Accessed May 26, 2016

CDA. "How to stay in compliance with dental independent contractors" Sept 18, 2014.

<http://www.cda.org/news-events/how-to-stay-in-compliance-with-dental-independent-contractors> Accessed May 26, 2016

DIR "California Paid Sick Leave: Frequently Asked Questions" – handout, January 18, 2017 presentation by Labor Commissioner legal representative, Redwood City