



Hiring and Terminating Associates:

TIPS & TRAPS

Thinking of hiring or terminating an associate?
Find out what tips to follow, what traps to avoid,
and how to possibly bypass costly legal disputes.

TIP: Put the associate agreement in writing.

Associate agreements should include:

- Duties and responsibilities
- Hours of work
- Payment
- Termination clause(s)
- Dispute resolution mechanism

It is in your, and your associate's best interest to write everything down.

TRAP: Hiring the associate as an independent contractor instead of an employee.

Independent contractors operate as separate businesses that supply services to their clients. Unlike employees, independent contractors typically control the way they provide services, own their own tools and have the ability to make profit or loss. Independent contractors file and pay their own taxes and are responsible for making their own Canada Pension Plan (CPP) contributions.

Given this scenario, it seems as though a dentist could save a lot of money by hiring an associate as an independent contractor instead of as an employee. That way, the dentist would simply pay the associate what he or she earned, without paying for their income taxes, Canada Pension Plan (CPP) contributions, or Employment Insurance (EI) premiums.

For EI, there are two costs involved: one for the employee and one for the employer. For instance, in 2011, if the employee makes \$50,000, the employee associate would have to pay \$786 out of his or her own pocket and the employer dentist would have to pay \$1,101 out of pocket. For CPP, there are also two costs involved: using the above example, the employee associate and the employer dentist would each have to pay \$2,217 out of pocket. Therefore the total out-of-pocket expenses for the dentist in this situation would be \$3,318.

So what could go wrong? Well, a number of things. The independent-contractor relationship could be challenged by the Canada Revenue Agency (CRA) and the associate could be found to be an employee according to the law. An associate who is controlled by another dentist, receives a regular salary with benefits, does not set his or her own schedule, does not own his own dental equipment and treats another dentist's patients, is more likely to be found by a court to be an employee than an independent contractor.

In such a case, the dentist would then have to collect \$3,003 in CPP and EI from the associate. Worse still, if the associate doesn't pay income tax, the dentist could be liable to the CRA for that too. It can all add up quickly – particularly if the dentist is being assessed for several years

This was the case, for example, in *Carovar Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [1989] T.C.J. No. 405. There, the Tax Court of

Canada found that a corporation (owned by an orthodontist and his wife to provide management and administrative services to his practice) owed EI premiums from 1984 to 1986 for associates who were found to be employees and not independent contractors. The court reasoned that the associates had no opportunity to profit, bore no risk in treating patients, did not lease premises or own their own equipment, and performed routine and repetitive work.

TIP: Give proper notice when terminating an employee.

Employees are entitled to notice (or payment in lieu of notice) if they are terminated without cause. Under the *Employment Standards Act, 2000*, an associate with three years of employment would be entitled to three weeks notice (or payment in lieu of notice); here, the matter could proceed through the Ontario Labour Relations Board and the dentist may need to retain a lawyer's services. Alternatively, the associate could sue in Superior Court on the basis that, under the common law, he or she did not receive reasonable notice or payment in lieu thereof.

Courts use various factors to determine what constitutes reasonable notice. For example, in *Abramson v. Windsor-Essex County Health Unit* [2006] O.J. No. 3406, a 66-year-old dentist who had been forced to retire after 12 years of employment was given 18 months pay in lieu of notice — approximately \$137,000 plus benefits. In coming to its decision, the court cited the dentist's age, exemplary employment performance and difficulty in obtaining meaningful employment after being terminated.

In addition to paying damages to an associate employee who has been wrongfully dismissed, an employer may be ordered to pay for his or her legal fees as well.

Dentists may protect themselves from costly awards, based on what a court determines is "reasonable notice," by including a clear termination provision in the original contract. To terminate an independent contractor, the dentist-employer would simply need to ensure that the independent-contractor agreement is valid and that the termination sections have been followed appropriately.

TIP: Make your non-solicitation clause enforceable.

Non-solicitation clauses are used to restrict associates from soliciting employees, patients, and referring dentists during and after the term of the relationship. For the clause to be enforceable associates must be given

some kind of benefit in exchange for waiving their right to solicit; this benefit is usually money paid as part of the associate agreement or termination agreement.

Furthermore, the non-solicitation clause must be clear and complete enough to interpret and enforce. A sentence that is vague and missing important details (for instance, time limits, geographic scope, or prohibited activities) or definitions (for terms such as "soliciting," "employees," "patients," etc.) will generally not be enforceable.

Finally, the non-solicitation clause must be reasonable in terms of time limit, geographic scope, prohibited activities and the public interest. Trying to prevent an entry-level associate from soliciting patients in the

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Province of Ontario over a 10-year period after they leave will generally not be enforceable. Only ask for what you need in order to protect your legitimate proprietary interests.

TIP: Do not discriminate against an associate.

Discriminating against an associate, (for example, in the hiring or firing process) on the basis of a prohibited ground such as age, sex, race, ethnic origin or disability (among other things) could lead to prosecution and penalties from the Human Rights Tribunal of Ontario.

TIP: Have a termination agreement to settle disputes and obtain releases.

When it's time for you and your associate to part ways, put it in writing. A written termination agreement can be used to settle disputes and release the parties from claims. Those claims can arise under the associate agreement, provincial legislation, or at common law (for instance, failing to treat the employee with good faith, decency and fairness during the course of employment or upon termination). A non-solicitation clause can also be included in a termination agreement. 

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