

## CONSIDERING DSO AFFILIATION AS AN EMPLOYMENT OPTION

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Dental Service Organizations or dental support organizations (“DSOs”) are continuing to experience growth in the marketplace. In 2022, DSO affiliation in the U.S. increased to 13 percent from 10.4 percent in 2019, according to the American Dental Association Health Policy Institute (“ADA HPI”).<sup>1</sup> Based on this same source, 11 percent of pediatric dentists are affiliated with a DSO. Increased visibility due to this growth makes them more recognized as a competitive marketplace employer. Their presence is also evident at national dental conferences as corporate sponsors and through their participation in vendor and exhibit halls. **All of this means they are present, growing, and can be considered as an available employment option for pediatric dentists.**

### Growth of DSOs in the Marketplace

While DSOs offer employment for all levels of hire in dentistry, they may be particularly attractive for entry level employment. In contrast to the overall 13 percent DSO affiliation noted above, 27 percent of dentists, zero to five years out of dental school were affiliated with a DSO and 23 percent of dentists, up to ten years out of dental school were affiliated with a DSO.<sup>1</sup> According to the ADEA 2023 survey of U.S. dental school seniors, affiliation with a DSO is a growing choice for respondents planning on entering private practice immediately upon graduation. In 2018, 16 percent of respondents planning to go immediately into private practice intended to affiliate with a DSO; it jumped to 34 percent in 2023.<sup>2</sup>

The Association of Dental Support Organizations reports on its website that their membership includes over 80 DSO companies that support more than 11,000 dentists at over 6,000 supported practices.<sup>3</sup> Some factors that may influence the decision of entry level dentists to pursue DSO employment include: 1) providing opportunities to work in desirable locations across the U.S.; 2) making an increased number of employment opportunities available; and 3) offering competitive compensation and benefit packages. While DSO affiliation is an alternative to working in a traditional dental practice, there are many issues to consider.<sup>4</sup>

DSOs are now located in every state in the United States.<sup>1</sup> The states with the lowest percentage of dentists affiliated with a DSO are Alaska (2 percent), South Dakota (2 percent), Hawaii (3 percent), North Dakota (3 percent), Maine (4 percent), Montana (4 percent), Rhode Island (4 percent), and West Virginia (4 percent). The highest percentage of dentists affiliated with a DSO are located in Nevada (23 percent), Arizona (21 percent), Colorado (21 percent), Texas (21 percent), Georgia (20 percent), Wisconsin (20 percent), Florida (19 percent), and New Mexico (19 percent).<sup>1</sup>

This variation may be the result of the state laws regulating the “corporate” practice of dentistry or the definition of the practice of dentistry. Some state laws may prove to be more challenging for a DSO to legally operate a dental practice.<sup>5</sup> For example, South Dakota’s law is more restrictive and provides that “[d]entists have the *exclusive* responsibility for ... [t]he management, ownership, or operation of a business, corporation, organization, or entity through which dentistry ... is offered or provided to the public.” (emphasis added)<sup>6</sup> In contrast, the Dental Health Care Act in New Mexico specifically provides for licensure of a “non-dentist” owner<sup>7</sup>

The variation in the populous of DSOs may also be the result of the population size of a state. Of the eight states with the lowest percentage of dentists affiliated with a DSO, six are counted in the ten least populated states according to the 2020 census. Three of the states with the highest percentage of dentists affiliated with a DSO are in the ten most populous states.<sup>8</sup> DSOs often acquire practices of a certain revenue level which tends to increase their presence in more urban versus rural locations and leads to the acquisition of larger versus smaller practices. It has been reported that DSO affiliated practices are more commonly found in large urban areas with populations that have higher income and education levels, are more racially and ethnically diverse, and are younger.<sup>9</sup>

### What is Best, Employment or Independent Contracting?

A pediatric dentist’s pursuit of a position with a third party should include consideration of the legal relationship that will exist between the parties after the hire. The two pos-

sible dentist options are to be hired as an employee or as an independent contractor. Which is preferable depends on the goals of the hiring and hired party. These two legal relationships are entirely different and are most notably distinguished by one key aspect, which is the focus of an Internal Revenue Service (“IRS”) classification perspective: who assumes the risk in the relationship and whether or not the “payor” controls what work will be done and how it is performed.<sup>10</sup> An employee works for an employer who: 1) provides all that is needed for the work to be performed; 2) retains ownership over all of the business assets including all revenue; and 3) assumes the business risk. The work that the employee performs does is for the benefit of the employer. In contrast, an independent contractor: 1) is paid for the work requested and performed; 2) is not provided any benefits; 3) may be required to provide their own staff support, instruments, and materials to perform the work; 4) maintains a level of autonomy separate from the hiring party and determines what and how their work will be performed; and 5) controls their work schedule and may work for multiple parties at one time. From a tax perspective, the IRS views the relationships differently and may reclassify an independent contractor to an employee if it determines that the independent contractor classification does not apply. The result can be quite negative for the hiring party who was not paying employer taxes on the compensation paid to the hired dentist, which may accrue penalty and interest over the time period that this has continued.

Additionally, the hired dentist’s earnings would be subject to FICA (i.e. Social Security and Medicare taxes) and income withholding. Historically, dental associating has not often met the risk shift or control test necessary to withstand IRS scrutiny if tested, and as a result, there has been a reluctance of hiring parties to hire associate dentists as independent contractors. Examples of when independent contracting may be supportable include: 1) when a specialist works out of several general dentistry offices providing specialty services to those practices’ patients; and 2) when a selling dentist works for the buyer for a short transition period after the closing of a practice sale. This article will focus on the pediatric dentist being employed.

### **Employment in a Traditional Private Practice versus a DSO**

Comparing and contrasting DSO affiliation to a traditional practice model allows for a closer look at some key aspects of employment offered by each type of employer. While there are similarities in employment terms, there are also some important differences. Below are some of the key

elements to consider regarding employment in pediatric dentistry. While not an exhaustive list, it provides a construct for comparing and contrasting these two models of dental employment.

**Organizational Structure and Legal Compliance.** The organizational structure of a traditional dental practice generally consists of a single legal entity (professional corporation or limited liability company) owned by one or more dentists who run one or more locations from the singular employing entity. Because the ownership of the traditional practice model resides with licensed dentists in the state in which the practice is located, compliance with state laws that prohibit the “corporate” practice of dentistry is usually not a concern. On the other hand, there is considerable variation among DSOs and their organizational structure; with some primarily owned by dentists, some owned by some dentists and non-licensed persons, and some having unlicensed private equity investors. This variation away from predominately dentist ownership can create compliance challenges for the DSO and the dentist seeking employment. For example, the Florida dental practice act provides that:

*“No person other than a dentist licensed pursuant to this chapter, nor any entity other than a professional corporation or limited liability company composed of dentists, may: (a) Employ a dentist or dental hygienist in the operation of a dental office”, (emphasis added)*<sup>11</sup> and

*“Being employed by any corporation, organization, group, or person other than a dentist or a professional corporation or limited liability company composed of dentists to practice dentistry” is grounds for denial of a license or disciplinary action. (emphasis added)*<sup>12</sup>

It is important to be familiar with and comply with the laws in the state in which DSO employment is being considered.

Secondly, a traditional dental practice is more likely to be located and operated in one state, county, and city. In contrast, many DSOs will have their principal offices located in one state, yet operate in various locations outside of the principal place of business or registration. This often makes it more challenging to obtain accurate information about the organization of the DSO. Requesting an organizational chart from the DSO to better understand who the dentist will actually be working for and how that entity fits into the larger organizational structure of the DSO is recommended. The multi-state arrangement also leads to “controlling state law” and “choice of venue” issues as it relates to contract

terms interpretation and dispute resolution provisions. There is also significant state-by-state variation with regard to employment related laws (e.g., benefits and taxes) and ensuring the DSO's compliance with the state in which work is performed should be specifically noted as a contractual obligation of the DSO employer.

Thirdly, as with any contract review, engaging legal representation to assist the dentist in their due diligence regarding the DSO as an employer is strongly advised. Talking to others who have engaged with the subject DSO being considered is also recommended.

**A Definitive Term of Employment.** Currently all states in the U.S., but Montana, still recognize some form of "Employment - at- Will"<sup>13</sup> Although recognized in most states, state policies or other state exceptions impact the employment-at-will in those states. By way of example only but not to fully discuss, many of these states are also "Right to Work States" which allows an employee a choice on whether or not to join an existing union or participate in unionization during employment. The benefit of employment-at-will to employers in states that are also "Right to Work States" may be diminished. The essence of being employed -at- will is that the employee does not have a promised term or time of employment. In other words, the employment continues until it is terminated by either the employee or the employer. Termination may not require notice and can be for no reason, subject to laws prohibiting termination based on discrimination, including but not limited to, race, color, religion, sex (i.e. pregnancy, sexual orientation, and gender identity), national origin, age (40 or older), disability, and genetic information including family medical history).<sup>14</sup> These "protected classes" may be further expanded by state laws.

Whether a traditional practice model or DSO affiliation, it is generally advisable for both the employee and employer to include a definitive term in the employment agreement rather than hire the pediatric dentist on an employee-at-will basis. Employment term periods for pediatric dentist employees are often for one or two years. It can be beneficial for the employment agreement to allow for its automatic renewal when the initial term ends. If the employment agreement does not allow for automatic renewal or the ability, with notice, to renew the agreement, then it will terminate by its term.

**Termination provisions.** These provisions should be in any employment agreement, whether with a DSO or traditional practice model. They should allow for termination of the employment relationship under four circumstances: 1) without cause by either party with a negotiated notice period; 2) for cause (generally by employer and they should be objective occurrences not subjectively determined); 3) for a breach by either party with opportunity to first cure the breach; and 4) all contracts are terminable by the mutual agreement of the parties whether the contract specifically provides for it or not. Notice is of importance to both the employer and the employee. Notice benefits the employer by supporting continuity of patient care and scheduling, while it benefits the pediatric dentist employee by providing sufficient time to pursue new practice opportunities. The amount of time required for notice is a negotiable point, but for dental employment agreements it usually ranges from 30 to 120 days. The notice time period may be less negotiable with a DSO employer. Some employment agreements, traditional practice model and DSO affiliation, will not allow for the unilateral termination by the employee for the initial term of the agreement, which may be for more than a year. This is not a desirable provision for an employee dentist.

**Compensation and benefits.** As reported from a survey of pediatric dentists with experience as a dental associate, the most important factor in being attracted to an employment relationship was income. Income was also selected as a common reason for leaving employment.<sup>15</sup> It is important to fully understand any compensation arrangement (see, American Dental Association online guidance).<sup>16</sup> The DSO employer and the traditional practice model employer will in most circumstances offer similar compensation packages for payment for work performed. Compensation models for a pediatric dentist may include the following: 1) a commission based on work performed unless contrary to state law; 2) salary based on an annual rate; and 3) an initial period of a guaranteed base salary with enhancement of commission if it exceeds the guaranteed salary. The difference in the compensation between the DSO employer and the traditional practice model employer is in the opportunity for the pediatric dentist to negotiate compensation that includes a combination of models in or to meet their goals and needs. There may also be more likelihood for singularly rewarding individual performance in traditional practice employment. The reason for the difference in opportunity for negotiation is generally a result of the DSO's organizational complexity, constraints, and profitability requirements.

The DSO affiliation may offer more benefits than a traditional practice model employer, such as access to free continuing dental education courses, insurance coverage (e.g., health care, disability and malpractice, and retirement plan participation.) Time off is generally provided in similar amounts in both the traditional practice model and the DSO affiliation.

**Opportunity for professional mentoring.** A DSO affiliation may offer more exposure to various clinical procedures because of the size of the DSO and its affiliation with many dentists across multiple locations. It is likely to offer more exposure to dentists in other regions of the country if it has a national presence. It may offer less legacy one-on-one mentoring unless the DSO has acquired the employer practice from a selling doctor who is still actively working in that purchased practice.

**Restrictive covenants and non-disparagement clauses.** Both the DSO and the traditional practice employer include these types of provisions in their employment agreements. Since the recent Federal Trade Commission (“FTC”) rule (April 2024) banning non-compete agreements, restrictions on employees from working for a competitor business for a period of time **after** the end of the employment relationship may no longer be enforceable after September 4, 2024.<sup>17</sup> However, the FTC ban is under legal fire with lawsuits having already been filed and its enforcement is still not certain. Non-solicitation, non-disclosure of confidentiality and trade secrets provisions remain enforceable in most jurisdictions providing they are not drafted to have the effect of a non-compete. Non-disparagement clauses remain enforceable and should have mutual obligations not to disparage the other’s business and professional reputation.

**Other factors.** Several other factors impacting either the selection of affiliation opportunity or the desire to leave a particular opportunity were identified by pediatric dentists and reported in 2020.<sup>15</sup> The factors included “practice lifestyle philosophy” and “practice treatment philosophy”. More than 40 percent of the respondents to the survey indicated that the lifestyle that the practice affiliation allowed for was an important consideration for accepting a particular affiliation. This included flexibility of schedule, expected hours to work per week, and the desired amount of autonomy or mentorship the practice allowed for or provided. Alternatively, more than a third of the survey respondents reported that “practice treatment philosophy”, which includ-

ed things like treatment quotas, treatment planning (more or less aggressive), procedure/service mix, and insurance mix or patient population, was the main reason identified for leaving a practice affiliation. These factors may differ significantly between traditional practice model and DSO employers.

## The Negotiation Process and Legal Documents

**Time and complexity of documents.** While the negotiation process is similar with both a traditional private practice employer and a DSO, it may take longer with traditional practice employment because the process, at least for smaller practices, usually allows for more individualized negotiation. In comparison, negotiations with a DSO may be more limited. While the resulting employment agreements may be similar in length and types of provisions, the DSO terms when compared to comparable terms in traditional practice employment, may be more employer friendly. For example, they may include more constrained post-employment restrictions, longer than one year employment terms, limitations on the employee’s ability to terminate, and dispute resolution provisions that mandate arbitration and forego an initial mediation step.

**Use of templated documents.** DSOs and larger traditional practices with multiple associates may use templated documents with all of their dental associates. This can provide for consistency among associates regarding the terms of their hire, but tends to limit negotiation at least as to the significant terms of the employment agreement – a take it or leave approach. In regard to DSOs and as earlier mentioned, out-of-state courts (courts in a state other than the state of employment) are often identified as the designated court for purposes of arbitration and litigation regarding any dispute that arises under the employment agreement. This could disadvantage an employee in terms of the cost to pursue or defend any legal claim arising under the employment agreement.

In summary, affiliating with a DSO may be an advantageous way to enter dentistry for a pediatric dentistry resident or pediatric dentist early in their career. Because of what they offer they may better meet the expectations of pediatric dentists on their early career trajectory. In contrast, affiliation with a DSO may be more difficult for a dentist with years of experience in a traditional private practice to successfully adapt. Like any opportunity there are risks and



benefits that may vary between and among the different DSO organizational models/structures and across companies. Such diversity makes it more challenging to evaluate as part of the dentist's due diligence review and evaluation. Obtaining legal counsel to advise the pediatric dentist and assist in their review and understanding of the legal complexities and documents presented for their employment with a DSO or with traditional practice employment is recommended.

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