NEWSLETTER
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LOCKHARTS
Solicitors

June News

In the last month, Lockharts were delighted to attend the BDA Conference in Glasgow and the LMC Conference in London.

Any enquiries from these conferences should be directed to Victoria Wheeler who leads our New Enquiries Team at vw@lockharts.co.uk

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1. Patients to be allowed to visit multiple GP practices

Several Primary Care Trusts (PCTs) have been given the go ahead by the Government to introduce a new system under which patients will be able to register for access to GP care at more than one practice.

The plan has been revealed by Ben Dyson, director of primary care at the Department of Health (DH), is part of an NHS drive to widen patient choice and improve access to GPs during office hours. This is particularly for patients who commute.

PCTs will relax rules on registration which will open up boundaries and allow commuters to register near their work rather than where they live. The practice where the patient is registered will be responsible for ensuring arrangements are in place for patients to access home visits.

This latest proposal follows Lord Darzi's NHS Next Stage Review, which highlighted the importance of widening practice boundaries to increase competition among GPs.

Mr Dyson also said the moves by PCTs were 'worth looking at', although he stressed it was 'not something we want to lay down a national blueprint for'.

The proposals apply only to patients who live and work within the same PCT, but the move is viewed by some GPs as dual registration by the back door which the DH has previously expressed concerns over due to cost and continuity of care.

A DH spokesperson told Pulse magazine: 'GP practices can choose to register patients who live outside their normal practice area so long as the practice has made appropriate arrangements for home visits. PCTs are free to explore with practices how to promote choice over which practices they can register with.'

Our view is that "dual registration" (however it is dressed up) even in a single PCT area will be almost impossible to regulate quite apart from the difficulties of allocating payments to separate practices and, potentially, the effect that a reduced share of available income would have on the loosing practices finances.

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2. Short Term Room Licence

In order to increase Surgery revenue, Practices are increasingly hiring out a room or rooms in their building or buildings to clinics and various third parties on an ad-hoc basis, for example, for 3 days a week.

To ensure that Practices get vacant possession once this arrangement has come

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to an end, it is therefore vital to protect their interests by entering into a licence agreement rather than unintentionally creating a lease.

The benefit of the licence is that it does not grant any rights of exclusive occupation to the licensee (i.e. the clinic or the third party hiring out the room/rooms) and the Practice has the ability to terminate the licence at any time. Furthermore, at the end of the licence period, the licensee has not acquired any 'tenant's' rights and cannot continue to operate from the room/rooms after this time. If there is no licence in place however, then the third party could acquire a business tenancy over the room/rooms.

Lockharts have prepared a document specifically for this purpose called a 'Short Term Room Licence' which covers a Practice hiring out any part of their premises to a third party for up to 1 year and enables the Practice to take back the room/rooms hired out at the end of the licence period.

If you are interested in putting a Short Term Room Licence in place or if you require further information then please contact either Varsha Pattni vap@lockharts.co.uk or Richard Gilligan rag@lockharts.co.uk in the Property Team.

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3. Licence to Practise Deadline

The GMC has set a date of 16 November 2009 for all GPs to register for a licence to practise.

By 16 November doctors will, by law, need to be both registered and hold a licence in order to practise medicine in the UK.

GPs will be required to register to undertake any form of medical practice in the UK, including, but not limited to, writing prescriptions, holding a post as a doctor in the NHS, and signing death and cremation certificates.

GMC Chair Professor, Peter Rubin, said the GMC had asked 225,000 doctors whether they wish to apply for a licence to practise in April and almost 50% of doctors have responded, with the 'vast majority' opting to take a licence.

Licensing will be the first step towards the introduction of revalidation. Doctors with a licence will need to undertake a periodic renewal by demonstrating that they remain up to date and fit to practise.

Professor Rubin added: 'Licensing is a major milestone. The next stage is to implement revalidation. Once we have the results back from the pilots we will be in a position to draw together a more coherent revalidation timetable.'

More information can be found on the GMC's website: http://www.gmc-uk.org/index.asp

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4. Making a Gift – IHT Implications

Gifts made in favour of UK registered charities both during lifetime and under a donor's Will on death are exempt from Inheritance Tax (IHT).

The following National Institutions are also exempt:-

- Political parties (at least two members elected as M.P.)
- Registered housing associations
- Universities
- National museums
- National Trust
- Nature Conservancy Council
- Local authorities and government departments

Although the above exemptions appear straightforward to apply, two observations are worth noting:-

1. Gifts by Will (during lifetime) to foreign charities are not exempt and will be subject to IHT as part of the donor's estate.

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2. Careful drafting of a Will is required to avoid complications where estates (for IHT purposes) comprise both exempt (charity) and non-exempt (brothers, sisters, children etc.) gifts made out of the residuary estate. To avoid such complications, it is recommended to leave gifts by way of percentage shares. Charities can be quite demanding in ensuring their (IHT) exempt share is maximized; it is important that the intention of the wording contained in the Will is clear cut.

The Finance Acts 2007 & 2008 reduced significantly any opportunity arising to limit individual pension plans from exposure to IHT where the pension plan (investment fund) remains intact at aged 75 years. In other words, no pension benefit has yet been taken. These plans, once the pension holder has attained 75 years, are known as Alternative Secured Pensions (ASP).

However, it is still possible to nominate the pension (investment fund) in favour of a (UK) registered charity, following the death of the pension holder and such transfer of benefits will be exempted from IHT. This could provide an alternative estate planning opportunity where an individual's Will may previously have provided for a proportion of the estate to pass to charity, rather than immediate family.

Income Tax

Lifetime gifts to charity incorporate a significant income tax advantage. Under the Gift Aid provisions (Finance Act 1990, section 25) an individual is entitled to income tax relief when making charitable gifts. Donations are made net of basic rate tax (20%) and the income tax deducted is reclaimed from HMRC by the charity. For those donors who are higher rate taxpayers, they will be eligible to claim relief against their highest rate of income tax. This reclaim is applied through the Self Assessment process.

For further information please contact Associate Solicitor Andrew Murdoch at am@lockharts.co.uk.

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5. Tougher rules to prevent personal conflicts affecting revalidation

Doctors have expressed concerns that revalidation could be blocked if doctors were in dispute with responsible officers who oversee the revalidation process in medical organisations.

However, tougher rules that aim to protect doctors who are in conflict with those revalidating them have been welcomed by the BMA. The Department of Health has insisted that responsible officers, likely to be medical directors of NHS organisations, could themselves face fitness-to-practice proceedings if they prevent a doctor being revalidated on the basis of a personal conflict.

The Government's response to its consultation, *The Role of the Responsible Officer*, agrees to devise statutory guidance on the issue. It says: 'We have always taken the view that if a responsible officer allowed a conflict with a doctor to affect adversely the career of a doctor, the responsible officer should be subjected to the GMC's fitness-to-practice processes.'

BMA Council GMC working party chairman, Brian Keighley, welcomed the Government's response as 'helpful and useful'. He added that the revalidation system had 'to be capable of not only reassuring patients but also having the confidence of doctors'.

The Government response also agrees that responsible officers should undergo relicensing in order to maintain credibility. The UK's four chief medical officers are likely to act as each others responsible officers for the purposes of revalidation and therefore the rational approach is that responsible officers undergo the same system that they are administering.

One issue which the BMA are keen to see, but that is yet to be addressed by the Government is whether there will be an appeals mechanism for all stages of the process.

More information can be found on the Department of Health's website www.dh.gov.uk.

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6. Contracts of Employment – Necessity or Luxury?

A contract of employment is an agreement governing the employment relationship between an employer and employee. It will set out the obligations, rights, responsibilities and duties of both the employer and the employee. For example, an employee has the right to be paid for the work that is carried out and an employer has the right to give an employee reasonable instructions to carry out certain work.

It is commonly thought that if there is no express written contract then no contract of employment exists. This is in fact incorrect. Although The Employment Rights Act 1996 requires employers to provide most employees with a written statement of the main terms within two calendar months of starting work, the particulars of employment is not a contractual document. The contractual terms are those which are expressly agreed and the majority of contracts of employment do not need to be in writing to be legally valid as they can also be made verbally between an employer and employee. A contract will exist when an offer of job is made and that offer is accepted. Therefore, irrespective of whether or not it is in writing, a legal contract of employment exists.

More often than not the employment relationship is left undocumented. Employers will therefore rely on verbal understandings and agreements as developed over the working relationship. Over a passage of time, employers may be reluctant to suddenly introduce written contracts to their staff not only because they are time-consuming to prepare and implement but also for fear of alienating staff by presenting a formally written document which can be perceived to be inflexible. It is undeniable however that a written contract of employment is paramount to any employer/employee relationship.

All employers should have a written contract of employment so that they can be certain about the terms on which their employees operate. The value of any written documentation is simple – it enables parties to have a clear understanding of what has been agreed, the promises each has made to the other and that each party is dedicated to performing their obligations under the contract.

The overriding objective of a written contract is to cut down on disagreements at a later date. While all contracts are potentially subject to litigation in the event of a dispute, this can be limited by putting the agreement in writing. Even where there is uncertainty on either side, recourse can be made to a written document rather than having to rely on verbal understandings, which can by their very nature be difficult to prove. In case of a dispute, a written contract shows exactly what the parties' rights and obligations are and prevents a "he said, she said" situation from arising. The lack of a written contract of employment can leave individuals exposed and less able to defend themselves in the event of employment difficulties.

In order to ensure that both employer and employee are aware of their rights and duties, a written contract of employment should be professionally drawn up in order to ensure that both parties are adequately protected. There are numerous contractual relationships that neither an employer nor an employee would ever enter into without a properly executed written document and the same philosophy should be applied to the employer/employee relationship.

Taking a more formal approach and relying on properly drafted contracts might be regarded by some as an overreaction, particularly where the working relationship is stable and happy, but this is not the case. It is important to remember that having a contract of employment is not a sign of distrust but simply a way to document in writing the duties of both the employer and employee so that each party is fully aware of what they have agreed to. It is important that both the employer and employee work together to agree a contract that is best for both parties.

It is important to make sure that specialist legal advice is taken at an early stage for the drafting of the contract and prior to signing the contract as this will be less time-consuming and costly than say, in the event of a dispute, trying to enforce a poorly drafted contract or, even worse, if there is no written contract and the matter has to be resolved through the Courts.

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The need to have a written contract of employment has been highlighted by the British Veterinary Association ("the BVA"), who has teamed up with the Royal College of Veterinary Surgeons, the Society of Practising Veterinary Surgeons and the Veterinary Practice Management Association. The campaign is targeted, in particular, at recent graduate employees and employers following online research on the Young Network which discovered that 24% of the BVA's recent graduate members did not have a written contract of employment in place, and over 40% had been in a job where for over 6 months they did not have one in place.

In similar fashion, the British Medical Association ("the BMA") has started a campaign for junior doctors to raise awareness of the key areas of their employment contract. As well as releasing a guide, *Junior Doctors – getting the most out of your contract,* the BMA provides other resources as a step-by-step guide to using the contract to the employee's advantage.

For advice on employment contracts and other matters on employment law please contact Paul Werrell, pw@lockharts.co.uk or Michael Rourke, mbr@lockharts.co.uk.

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7. The Agency Workers Directive

A draft of the Agency Workers Directive was agreed by Employment Ministers of EU member states on 9 June 2008 and was adopted by the EU in late 2008. Member States must implement it by December 2011.

On 8 May 2009, the Department for Business Innovation and Skills (BIS), which was formerly known as the Department for Business, Enterprise & Regulatory Reform (BERR), issued its consultation paper on the implementation of the Directive. This will be the first stage of the consultation, with a second consultation on the actual regulations at the end of the year.

The Directive provides that:

"The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at the user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job."

The definition of worker is "a worker with a contract of employment or an employment relationship with a temporary agency with a view to being assigned to a user undertaking to work temporarily under its supervision or direction".

Temporary workers are to be informed about permanent employment opportunities in the user enterprise and given equal access to collective facilities (e.g. canteen, child care facilities, transport service).

Consultation

BIS has identified some key concerns and issues that need to be addressed. It is now seeking views on the proposed implementation of the Directive and the consultation period opens up this debate. Responses to this initial consultation must be provided by 31 July 2009.

The current proposal includes:

- The right to equal treatment will apply after 12 weeks, in line with the CBI/TUC agreement. This will be calculated as 12 calendar weeks regardless of working patterns.

- Workers who are genuinely self-employed will be outside the scope of the legislation.

- Equal treatment is to include:
  - Duration of working time;
  - Rest; and
  - Holiday – including where more generous than statutory minimums.

- Pay is to include:
  - Basic pay;
  - Holiday pay;
  - Overtime, shift allowances, unsocial hours premiums/bonuses; and
  - Certain bonuses which apply to personal and individual performance.

- The comparator is a "comparable worker doing broadly similar work in the same organisation".

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Some areas which are unclear and may need further clarity are:

- The treatment of temporary workers employed by an employment business, in particular their pay and hours when not on assignment with a client;
- Determination of a "comparable worker"; and
- Calculation of 12 weeks, and particularly how breaks between assignments should be dealt with.

It is estimated that around 50% of temporary assignments in the UK are under 12 weeks' duration and, on the face of it the pay of most temporary workers is already on a par with permanent employees. If this is the case, the impact will be on those employers who use temporary workers at below permanent equivalent market rates for periods in excess of 12 weeks.

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