NEWSLETTER

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1. NHS introduces website to help patients choose their GP

The Government has launched its biggest drive yet to ramp up competition amongst GPs for patients with the long anticipated arrival of practice ratings on its NHS Choices website.

Patients can post feedback online about dealing with their GP's surgery in the latest move to give members of the public more influence over how health services operate.

The site will allow patients to leave anonymous comments, positive or negative, and create mini-league tables to compare surgeries, in an attempt to bring a much bigger element of market forces to play in primary care. Other patients can access the comments before deciding which GP's practice to register with, now that longstanding geographical restrictions on signing up to attend anything other than a nearby surgery are being abolished.

Health Minister Mike O'Brien said the 'restaurant–style' scoring of services of all England's GP practices would be a precursor for allowing patients to switch to rival GPs seen to be offering better services.

He said: 'As we open up real choice in primary care, it is vital we equip patients with enough information to make the right choice for them. We recently announced that we intend to abolish GP practice boundaries.'

'This new tool allows every single GP practice in the country to see the patient's view on what they are doing well and what needs to be improved. It will help drive up quality across the board.'

The new comparison website will show opening times and any additional facilities offered by the GPs and also patient comments about:

- How easy it is to get an appointment
- How highly they would recommend the GP practice
- How well patients are treated by staff
- If patients felt they were involved in decisions about their care

Posters will also be able to describe what they liked about their experience and what they feel could be improved.

Which?, the consumer organisation, said the website would help the public judge one surgery against another in their search for a good quality GP service and urged as many patients as possible to post comments.

But the BMA has warned the internet is the worst place to post comments, claiming the service ignores the views of many elderly patients and the long-term

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sick who are among the highest users of services.

Dr Laurence Buckman, GPC chair, said the launch of the GP online 'scorecard' was not the best way to deliver feedback.

'GPs have been getting feedback, through inviting comments from patients, and via surveys or patient participation groups, for years,' he said.

'We are pleased that many of our initial concerns, such as the potential for malicious postings or the ability to post a right of reply, have been allayed. However, we remain to be convinced how much real value this will have for patients.'

'Such feedback will always be from a self-selected population motivated to post feedback. Unless a significant number of comments are generated - good or bad - it will be impossible to build up a reliable and accurate picture of the practice and its quality.'

'Furthermore, our highest users, the elderly and the long-term sick, who are arguably in the best position to give useful feedback to other patients, are the least likely to post comments, as research shows they have the lowest rate of accessibility to the internet.'

Moderators will vet all comments before publication and reject any which are "racist, libellous, generally offensive or defamatory" or which name an individual member of staff or allege medical negligence. GPs have been reassured by the Department of Health that of the 15,000 postings on a similar hospital comparison website which began this summer, 75% have been positive.

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2. BMA calls for GP pay rise

NHS Employers has called for a 1% increase in general practice funding for 2010/11 and has said this should be enough to deliver inflationary pay lifts for both partners and staff. The move follows Chancellor Alistair Darling's request that practices be given no uplift in funding.

Meanwhile, the BMA has called for a 2% uplift in GP pay, and attacked Chancellor Alistair Darling's decision to call for a salary freeze for next year.

BMA Chair Dr Hamish Meldrum said a 2% rise was 'appropriate and responsible' in light of inflation and doctors' workload, but also took account of the economic downturn.

Dr Meldrum said singling out GPs for a total pay freeze was 'completely the wrong move', and would prove a counterproductive measure. He said the Government should be focusing on cutting back its investment in 'poor value Private Finance Initiatives, expensive ISTC contracts and unnecessary advice from management consultants' rather than targeting frontline staff.

Dr Meldrum said: 'The BMA believes a two per cent increase in basic earnings is appropriate and responsible in light of projected rates of inflation and evidence on doctors' workload. We also feel that a 2% rise takes account of the economic downturn and likely squeezes on public sector finances but still recognises the hard work and dedication of staff at a time when health services are likely to be under even greater pressure.'

He added: 'Doctors do not dispute that the economic crisis necessitates difficult decisions but Mr Darling is choosing the wrong target and using the wrong weapon. Rather than punishing the front-line staff who are achieving better clinical outcomes than ever before, the government needs to fundamentally re-think its health policies to ensure taxpayers' money is not wasted.'

'As the recession takes its toll on people's health, frontline staff will be required to work at greater intensity. This is the time to support and value them, not demoralise and punish them.'

But the NHS Employers also said that practices should expect to make a 1%

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efficiency saving, adding: 'The extent to which general medical practitioners will be able to increase their profits will largely depend on their ability to deliver efficiencies and improved productivity.'

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3. Dispensing payment changes could leave practices out of pocket by up to £24,000

The Dispensing Doctors Association (DDA) has warned that changes to dispensing payments could leave practices out of pocket by up to £24,000 a year.

Chief Executive Dr David Baker warned that a near 9 per cent cut in dispensing fees from October would cost an average dispensing practice up to £850 a month.

Combined with proposed reductions in the category M tariff - the reimbursement deal for generic drugs - practices could be as much as £2,000 a month worse off, he added.

'We'll all be taking lower drawings and many practices could lose a staff member. We don't want to start shroud waving. But we do want to show that the shroud is ready to be waved.'

NHS Employers and the GPC had revealed that dispensing fees would fall by 8.7 per cent from October. The drop for the remaining six months of 2009/10 is designed to deliver an overall fall of 4.9 per cent for the year. From 1 April 2010 there will be an uplift to produce a figure 'appropriate for the full new financial year', NHS Employers said.

A DoH spokeswoman said dispensing incomes would be investigated as part of a cost-of-service inquiry next year. She added: 'We have been seeking a review of dispensing doctors' profits for several years but have only now reached an agreement with the DDA to do so.'

But Dr Baker said he had been seeking a review of dispensing costs for some time. 'At present whenever you write a prescription for an undiscounted item, you're effectively writing a cheque to the DoH,' he added.

The DDA now plans to gather more evidence of lost income.

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4. GMC revamps guidance on confidentiality

Doctors must tell the police or social services whenever they treat a victim of knife or gun crime, according to new GMC guidance on confidentiality.

They will also be able to share confidential genetic information about patients in order to protect their relatives – even if patients object – under the guidance that came into effect on Monday, October 12.

For the first time, the GMC is clearly telling doctors they should report all gunshot wounds and knife crime to police or social services, particularly in the case of patients who are under 18. Doctors should make a "professional judgment" about whether disclosing personal patient information is justified. In some cases doctors would be able to give police a patient's name and confidential information without their consent "if it is probable a serious crime has been committed, or staff or the public are at risk".

Dr Henrietta Campbell, who chaired the GMC's working group on confidentiality, said: "We are not asking doctors to force patients to speak to the police, but we are asking them to pass on information which will help the police to help protect patients, the public and staff from risks of serious harm."

Confidentiality was produced following a three-month consultation by the GMC with the public, medical professionals, employers and patients. The document also offers guidance on warning relatives of the risks of a patient's genes. The GMC has said doctors could, for example, tell the relatives of a patient with a hereditary form of cancer of the potential risk of

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inheriting the disease – without the patient's consent.

The guidance also advises doctors to ask patients what information they would like to share and with whom, to help them deal with patients with diminished capacity.

Dr Campbell added: "This guidance makes clear that, in the first instance, doctors should explain to a patient if their family might be at risk of inheriting a condition. In those circumstances, most will readily share information about their health. However, if a person refuses, it is the responsibility of the doctor to protect those who may be at risk."

Other areas dealt with in the guidance include:

- Reporting to the DVLA concerns about patients' fitness to drive
- Responding to criticism in the press
- Disclosing information for insurance, employment and benefit claims
- The use of confidential information for research or health service management

The guidance, *Confidentiality*, can be accessed by clicking here.

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5. ISA Employment Checks

The Independent Safeguarding Authority's (ISA) vetting and barring scheme began on 12 October 2009. However, the registration of individuals will not start until July 2010 and employers cannot begin to check potential employees until November 2010.

The ISA will have overall responsibility for making barring decisions and all applications to the scheme will be administered by the Criminal Records Bureau (CRB).

It should be noted that it will not only apply to all GPs, but also practice staff who may work in an area with access to potentially vulnerable adults or children, and to any employee who could have access to records and personal information relating to potentially vulnerable individuals. In essence, anyone working in a practice, including receptionists and cleaners, will require checking via the new scheme. It will be a requirement for anyone wishing to apply for these positions to be registered with the ISA.

All new entrants to regulated activities involving working or volunteering with children and/or vulnerable adults and existing staff changing jobs will legally be required to register with the scheme *before* they can take up appointment.

Employers and voluntary organisations working with vulnerable groups will not be able to appoint anyone into a regulated activity without ensuring they are registered with the scheme before they allow them to take up that appointment.

Fees will apply to carry out the checks, and more information can be found in the NHS Employers FAQs.

If you have any further queries please contact employmentchecks@nhsemployers.org.

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6. Final provisions of Companies Act 2006 come into force

The Companies Act 2006 (2006 Act) came into force in stages between its Royal Assent in November 2006 and 1 October 2009, when the remaining provisions took effect. All private companies will need to ensure that they comply with the 2006 Act. This article summarises some of the key changes under the 2006 Act for small, private unlisted companies. It is by no means exhaustive and companies must continue to monitor the Companies House website to ensure that they are complying with their statutory obligations.

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One of the main aims of the 2006 Act was to simplify the regulation of private companies. A number of formalities have been relaxed, although in most cases companies will need to make constitutional changes in order to take advantage of these. There have also been changes to administrative and procedural rules with which companies must comply.

Memorandum and Articles of Association

Under the 2006 Act, a company's memorandum of association contains much less information than required under the Companies Act 1985 (1985 Act), and is essentially to be a 'snapshot' of part of the company's constitution at the point of incorporation. Those parts of the memorandum of companies in existence prior to 1 October 2009 which are no longer required (most notably the objects clause and the statement of authorised share capital) will be deemed to be part of the company's articles of association.

There are new model articles which are shorter and contain simplified procedures which reflect the relaxation of the statutory rules. Unless the articles are amended, a company cannot take advantage of many of the simplified procedures which are outlined below.

Directors and secretaries

Directors' duties have now been codified. All directors must understand the statutory code of directors' duties and what they mean in practice as breaches can result in criminal penalties. Information is available on the Companies House website: www.companieshouse.gov.uk.

A private company no longer needs to appoint a secretary unless required to do so under its articles. However, if there is no secretary, the directors will need to ensure that the secretary's functions are carried out by someone else.

Registers

Company registers must be available for inspection at the registered office or a single alternative inspection location (SAIL). A SAIL must be notified to Companies House. Every company must now keep separately a register of directors, a private register of directors' residential addresses, and a register of secretaries (where the company has a secretary) as well as the other registers that they were previously required to maintain. **LLPs should note that they are now required to maintain a register of members.**

Under the 2006 Act, any person may ask to inspect the company registers, but must tell the company why it wishes to do so and whether the information will be disclosed to a third party. The company has five days in which to comply or request a court order refusing the request on the grounds that the inspection is not sought for a "proper purpose".

Directors are now able to choose to have a service address other than their residential address, however a residential address must also be provided albeit not to go on the public record.

Accounts and audit

There is no longer a requirement for private companies to lay accounts at a general meeting, although members must still receive copies of the accounts.

Forms

New Companies House forms came into use on 1 October 2009 for documents filed in relation to matters arising on or after that date. In total, there are around 200 new forms.

Resolutions and meetings

Private companies are no longer required to hold an annual general meeting (AGM) but may choose to hold one. If the articles provide that there must be an AGM, then the company must continue to hold one unless the articles are changed. The notice period for calling general meetings is now 14 days in all cases (including where a

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special resolution is being considered), unless the articles provide for a longer period, and the majority of members required to call a meeting at short notice has been reduced to 90% (unless the articles provide for a higher majority).

Share capital

The concept of authorised share capital (ASC) has been abolished. However, the statement of ASC in the memorandum of existing companies will be deemed to be incorporated into the articles and will need to be removed if companies with to take advantage of this relaxation.

Where there is only one class of share, directors can allot shares unless the articles prohibit this without shareholder authority. Existing companies will need to pass an ordinary resolution authorising directors to use their statutory power.
Provisions regarding pre-emption rights are largely unchanged.

Companies must submit a statement of capital to Companies House whenever there is a change, such as an allotment or redemption.

Company name

The 2006 Act permits a company to provide in its articles for the directors to change the company name or for the shareholders to change it by ordinary resolution.

Checklist

All companies should:

- Educate board members about their statutory duties as directors
- Consider whether resolutions and/or amended articles are needed to take advantage of the regulatory relaxations
- Consider procedures for authorisation of directors' conflicts
- Agree who will be responsible for statutory filing requirements and company records if there is no secretary
- Ensure that company procedures reflect new rules, especially in respect of written resolutions and maintenance of statutory registers
- Review procedures for authorising share allotments and consider whether changes to the articles or member resolutions are required
- Review financial reporting timetable to ensure compliance with new filing deadlines
- Ensure administrative team is familiar with the new forms and filing procedures.

Lockharts can conduct a basic update to your articles so that they are based on the new statutory model articles for £750 + VAT (this price includes only updates to bring the articles into line with the new model articles and excludes any departures of substance from your existing articles for which a separate estimate will be required).

Lockharts runs a specialist company secretarial service and can also provide one-off company administration advice. Details are available from csd@lockharts.co.uk

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7. Structures for GP Federations

More and more practices are coming together to form alliances whereby they retain their independent status as GMS or PMS providers but cooperate for the purposes of various functions.

There a many different forms of cooperation. Some practices share premises or "backroom" services in order to enjoy economies of scale. Others come together to influence the commissioning process and help shape the way that services are provided in their PCT area. Others provide services which are beyond the scope of their individual practices collectively. The list goes on.

Alliances of these kinds have, of course, been around for some time, but the RCGP's (and more recently the BMA's) advocacy of the "Primary Care Federation" in response to Lord Darzi's polyclinics has spurred many more practices into action.

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We have been approached by numerous groups of practices around the country wanting to "federate" and needing advice on the best structure. Possible options suggested by the RCGP include informal associations, charities and "social enterprises" as well as companies and limited liability partnerships (LLPs). In fact, charities and "social enterprises" are not types of structure at all: charitable status can apply to any organisation (subject to satisfying the requirements of the Charity Commission) regardless of its organisational structure, and "social enterprise" is not a defined structure in its own right, but a term which can be used to describe a business (of any structure) which has a social aim.

In practice, the options will be some kind of unincorporated structure, a company (limited by shares – probably private - or limited by guarantee) or a limited liability partnership (LLP). These four options are considered briefly below.

To incorporate, or not to incorporate?

This is really the first main question. A corporate structure is one that is legally recognised in its own right. Companies and LLPs are corporate structures. The main advantage of incorporation is that the liability of the members is limited to the value of their share in the capital of the corporate structure (or the value of the guarantee given in the case of a company limited by guarantee). A corporate structure, as a distinct legal "person", can own property, enter contracts, employ people, be sued etc in its own name.

For non-corporate structures, individual members are personally liable for the organisation's debts and obligations. For this reason, we would not advise conducting anything other than the most basic kinds of service sharing through an informal structure. Even then, it is essential to have a written agreement which sets out the terms of the arrangement.

What kind of corporate structure?

The three main options are a company limited by shares, a company limited by guarantee or an LLP. These structures are compared briefly in the table below:

Share Company	Guarantee Company	LLP
Shareholders own shares in the company and liability is limited to the fully paid up value of the shares held by them.	Members undertake to contribute a predetermined nominal sum to the liabilities of the company which becomes due in the event of the company being wound up. Liability of members is limited to the amount of the guarantee.	Liability of members is limited to any capital contribution made by them.
Profits may be distributed to shareholders as dividends.	Generally used for non-profit purposes, but profits may be distributed to members if the constitution permits this.	Profits may be distributed to members.
Run by directors with strict statutory duties.	Run by directors with strict statutory duties.	Run by the members.
Requirement to file certain information (e.g. annual return, directors' details) with Registrar of Companies.	Requirement to file certain information (e.g. annual return, directors' details) with Registrar of Companies.	Requirement to file certain information (e.g. annual return, members' details) with Registrar of Companies

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Constitution set out in memorandum and articles of association – public documents. Often also have private shareholders' agreement.	Constitution set out in memorandum and articles of association – public documents. Often also have private members' agreement.	Constitution set out in LLP agreement – optional and private (in absence of agreement, statutory default provisions apply).
Rigid statutory framework.	Rigid statutory framework.	More flexible statutory framework.
Subject to corporation tax + shareholders pay income tax on distributions	Subject to corporation tax + members pay income tax on distributions.	Taxed as a partnership

The choice of corporate structure is likely to be determined in the first place by whether you intend to hold GMS contracts or PMS agreements and whether you wish to be an "employing authority" for the purposes of the NHS Pension Scheme. If you want to do any of these things, companies limited by guarantee and LLPs are out of the question as these are not permitted vehicles under the relevant regulations.

The only permitted corporate structure for these purposes is a company limited by shares. To satisfy the regulations, only certain people are allowed to hold shares and to be directors. It is necessary to have tailored articles of association that contain the relevant mechanisms and a shareholders' agreement that sets out the detail of how the company will be run and managed.

"Commissioning" Bodies

If the purpose of your federation is to make commissioning recommendations, this is not a category of work which allows you to be an "employing authority" under the NHS Pension Scheme. However, you may still in some circumstances be granted "direction employer" status which may allow some employees access to the Scheme where they have previously been members of the Scheme. There are detailed criteria to be met and being non-profit making is one element of this. It is possible for any of the corporate structures described above to be non-profit making, although companies limited by guarantee are commonly used for non-profit making enterprises.

Community Interest Companies

A CIC is a special type of company. It can be a company limited by guarantee or a company limited by shares but, in either case, must satisfy a "community interest test". The CIC Regulator will determine at the outset and on an annual basis whether the test is satisfied. A CIC is permitted to make profits and distribute these to members, but this is subject to a statutory cap on dividends. There is also an "asset lock" which prevents assets being used other than for the benefit of the community that the CIC serves. A company cannot cease to be a CIC so it is important you are sure this is the right structure for you before going down this route.

Getting it right

It is important to get your structure right from the outset, particularly if you are acquiring assets or entering contracts. It can be expensive to rectify structural problems later on, and it is possible you could lose contracts you have been awarded if you have the wrong structure. Timely specialist advice can set you on the right track and prevent costly mistakes. If you would like further information please contact Alison Oliver on ao@lockharts.co.uk

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8. Trust situations and charitable gifts arising under the residuary estate

A trust situation can occur in two instances:

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If a beneficiary has not attained 18 years (and therefore cannot give a valid receipt to the executors); the executors will be directed to hold that share of the residuary estate "upon trust" for the beneficiary until he or she attain 18 years. The executors then become Trustees (at least two individuals are required) of that share of the residuary estate and are subject to various duties and obligations (regarding the assets underlying the share of residue subject to the trust); not least taxation and investment considerations.

In law, the Trustees owe a fiduciary duty to the beneficiary effectively to properly look after the share of residue subject to the Trust – if they are lay persons acting as Trustees then they should seek proper professional advice; this is a mandatory obligation under the Trustee Investments Act 2000.

A well drawn Will should contain default provisions to allow for the situation should the beneficiary fail to attain 18 years; as advised last month, if the beneficiary is a child of the testator then statute (Section 33(1) Wills Act 1837) will automatically intervene unless words showing a contrary intention are included when the Will is drawn up.

The second situation is known as a life interest and usually provides for the surviving spouse to receive all the income arising from the residuary estate for the remainder of his/her life with the capital then passing to the testator's children on the death of the surviving spouse - known as the Life Tenant.

A well drawn Will should incorporate provision for capital to be advanced to the Life Tenant, subject to the discretion of the Trustees; a letter of wishes (addressed to the Trustees by the testator) should provide guidance to the Trustees but cannot be binding upon them.

A life interest situation could cope with the situation where there may be a significant age gap (between the spouses) and the testator is concerned that his widow could remarry without leaving adequate provision for children of the first marriage. Once again – if a life interest situation arises the executors become Trustees and must fulfil their fiduciary obligations to both the Life Tenant and the (longer term) capital beneficiaries. If lay trustees are appointed, there are prime obligations placed upon them to take proper professional advice; crucially with regard to the investment of the residuary trust fund where a balance should be maintained between the income interest of the Life Tenant and the maintenance of the underlying capital held for the children of the testator.

Given that a widow could be aged say 70 years when her husband died – it is feasible she could live for a further 20-25 years before the capital then passes to the ultimate beneficiaries. In investment terms this is a significant period and Trustees, who ignore such responsibilities and obligations, do so at the peril of subsequent litigation against them by disgruntled (adult) children of the testator!

Default provisions

A well drawn comprehensive Will should incorporate a "long stop" provision to guard against a situation where an entire immediate family is lost through a common accident etc. Whilst, fortunately, such scenarios are rare: nevertheless a "Herald of Free Enterprise" or the recent Air France A330 disaster sadly demonstrates that such tragic losses can occur.

The long stop can provide for the residuary estate to pass to more distant family relatives and/or charity as so required by the testator.

Charitable Gifts

It is straightforward to incorporate provision for a share (or shares) of the residuary estate to pass to registered charities. Comprehensive drafting will allow for the situation where a particular charity may be wound up; but an alternative charity (with similar objects) is in existence and so could receive benefit.

Generally speaking, if charities are registered (either in the UK or within the

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EC) they should attract charitable relief under UK Inheritance Tax Act 1984.

Care is required with drafting of Wills where gifts of residue pass between both exempt parties (i.e. charities) and non exempt parties (i.e. children or brothers/sisters of the deceased). This is known as the incidence of how capital taxes should bear against the estate; these days charities are particularly vigilant over such issues; to ignore such drafting expertise again is to invite onerous (and expensive) litigation!

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

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