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VAT Liability and Partnership Deeds

From 1 May 2007 partnerships have to register for VAT if they exceed or are likely to exceed the VAT registration threshold, which is currently £64,000, in respect of certain classes of services. Recent information from HMCE appears to indicate that where a VAT liability arises in respect of such services, it should be made clear whether the VAT liability falls on either the partnership or the individual partner providing the services. If this is not clarified in the Partnership Deed it appears that HMCE will deem the liability to fall on the partnership. This may result in the practice reaching the level where registration for VAT payments is necessary, which would not otherwise have been the case.

It is of course a matter for the practice as a whole as to how liabilities should fall but Ros Parkin – rap@lockharts.co.uk will be happy to

advise on changes that may be necessary to practice Partnership Deeds.

Please see issue 2 for further details on the upcoming changes to VAT liability.

Practice Based Commissioning and Partnership Deeds

Although the Department of Health's November 2007 Guidance "Practice Based Commissioning: Practical Implementation" lacks a certain amount of clarity there is a clear intention that the DES Towards Practice Based Commissioning Scheme, which was terminated on 31 March 2007, is, for all practical purposes, to be replaced by a comparable local incentive scheme.

As a result it is suggested that where a practice Partnership Deed deals with Practice Based Commissioning, a number of revisions are now necessary in order to reshape the operative provisions.

There will be a number of older Partnership Deeds which were entered into before the PBC Scheme came into existence at all and, in these cases, it would be appropriate for a Deed of Variation to be entered into so as to regulate the partnership's position.

In both instances Ros Parkin – rap@lockharts.co.uk – will be happy to advise.

Directed Enhanced Services

There have been many reports of PCTs reneging on Practice-based commissioning agreements concerning the payment of Directed Enhanced Services ("DES") money due to practices. Without a clear contract setting out the terms on which the PCT is bound to pay DES money, a PCT may fall back on deficits to reduce the payment. A carefully drafted contract can provide the group involved with certainty through the knowledge of what payments are due and when. With a contract in existence, the failure to pay a sum owed is a breach of the contract and this presents a viable method for retrieving money owed.

Lockharts have a great deal of experience of drafting such contracts for PBC agreements over the last few years and the specialist team are able to offer assistance to PBC groups regarding this matter.

For further information on Practice Based Commissioning and contracts with PCTs please contact Mark Jarvis at mj@lockharts.co.uk.

Mergers and Acquisitions

Ever increasingly, practices are consulting us with regard to the possible merger of their practice with a nearby practice or tendering for a PCTMS practice. Alternatively, when a sole practitioner retires, a neighbouring practice may seek to take the practice over.

In these cases a number of complex issues arise. Where the practice being acquired employs staff, obligations in respect of these staff

will usually pass to the practitioners taking over the patient list under the Transfer of Undertakings (Protection of Employment) Regulations and procedures must be followed to ensure that the new practice does not incur liabilities in respect of staffing matters relating to the former practice.

It is necessary to conduct due diligence checks to ensure that assets and contracts necessary to the running of the practice can be transferred without encumbrances and that the practice as a whole is functioning properly. There are also likely to be related property issues such as the need for the grant or assignment of a lease, or the purchase of premises.

With our specialist knowledge of the health sector, we are well equipped to handle all these aspects of the transaction while ensuring that the NHS regulatory requirements are complied with in order to avoid jeopardising the continuation of the provider contract.

Enquiries and further information about our services in this area should be addressed to Alison Oliver on ao@lockharts.co.uk.

Enduring Powers of Attorney and Lasting Powers of Attorney

Since the first Issue of the Lockharts Legal Update there has been considerable interest in the Enduring Power of Attorney ("EPA") and the transition to a Lasting Power of Attorney ("LPA"). An EPA is subject to a less onerous registration and charging structure than the incoming LPA and, if created before the change

over date, will continue in its present form and treated as a valid attorney document

In the light of a Government decision, the change-over date has recently been put back until 1 October 2007 giving a further 5 months for clients to consider the benefits of taking out an EPA. An EPA can save a considerable amount of money, time and stress; should the donor become unable to deal with their own financial matters. In the absence of an executed EPA document; an individual's assets will be 'frozen', in the event of incapacity arising, to manage his/her financial affairs. (In that situation, either a relative or a professional person will have to be appointed to apply to the Court of Protection to be appointed as the donor's receiver. This is a cumbersome, costly and time consuming procedure).

If you would like any further information regarding creating an EPA (a simple and straightforward exercise); or any of our private client services, including wills, trusts and probate, please contact Andrew Murdoch on am@lockharts.co.uk.

Flexible Working

On April 6, new legislation came into force extending the right to ask for flexible working. For the last four years, all parents of children under the age of 6, and disabled children under the age of 18, have had a statutory right to ask for flexible working. Under the new legislation, this statutory right has been extended to include carers.

To whom do the changes apply?

If an employee is the carer for an adult living at the same address who is a:

- Spouse;
- Civil partner; or
- Close relative

In order to apply for flexible working, either as a parent or carer, the employee must have at least 26 weeks service.

The procedure

An employee must set out clearly in writing their application for flexible working, stating how they meet the criteria. The employer must hold a meeting within 28 days of the application being submitted to discuss the application.

The employer must then provide a written notice of their decision within 14 days and, if the application has been accepted, the notification must include the new working pattern, when the pattern will take effect and the date of the notification.

If the application is refused, the notification must be dated and must include the ground for refusal and an explanation of why it applies in the circumstances, information about the right and the process to appeal.

Grounds for refusal

The legislation does not compel an employer to grant an application for flexible working but they must give careful consideration to the application and it can only be turned down on the grounds of a 'business decision'.

A business decision

The Employment Act 2002 sets out the definitive grounds on which an application can be refused:

- The burden of additional costs
- Detrimental effect on ability to meet customer demands
- Inability to reorganise work among existing staff
- Inability to recruit additional staff
- Detrimental impact on quality
- Detrimental impact on performance
- Insufficiency of work during the periods the employee proposes to work.
- Planned structural changes
- Such other grounds as the Secretary of State may specify by regulations.

For further information on requests for flexible working please contact Paul Werrell at pw@lockharts.co.uk.

Age discrimination

It is now 6 months since the age discrimination legislation amendments came into force; have you made any changes to your work practices and procedures? Under the legislation it is unlawful to discriminate, harass or victimise an employee or potential employee based on their age.

Direct Discrimination

Direct Discrimination can take the form of a set retirement age, or a policy not to employ anyone who is over, or under a certain age. As the most obvious form of discrimination, it is perhaps the easiest to guard against; by drawing up a clear guide on the firm's recruitment, employment and promotion policies it will be possible to guard against direct discrimination.

Indirect Discrimination

Indirect discrimination is, potentially more difficult to avoid; a firm may have a policy or set of criteria that apply to all of the employees regardless of their age, however, it is more difficult for people in a particular age bracket to meet the criteria. A common concern regarding the legislation is whether length of service related benefits are permitted. Many employers make provisions for employees to gain extra days of holiday after working for a certain number of years. These provisions are the same for all employees and are applied irrespective of the age of the employee; the concern is that a younger employee is less likely to have the benefit of the extra day's holiday, especially if they are new to the job.

Exemptions

Using the example of enhanced holiday based on service length, an employer will see this as a valuable way of encouraging staff loyalty and rewarding the staff who do stay with the firm; this may be someone who started a job at the age of 16 or 30 and has continued with the same firm. The enhancement of benefits based on the length of service is not considered to be indirect discrimination if the following criteria are met:

- The length of service required to accrue the benefit is 5 years or less; or
- If longer than 5 years service is required, the benefit reflects an increase in experience or rewards loyalty and, the measure meets a business need of the firm.

In order to show that the measure meets a business need, the employer must be able to rely on evidence to show that this is the case.

For further information on Age Discrimination in the work place please contact Paul Werrell at pw@lockharts.co.uk.

Lecture Series

The lecture season continues and Andrew Lockhart-Miramis has spoken at two Pulse Seminars and GlaxoSmithKline lecture on Providing in Practice Based Commissioning. Later this week Andrew will be the only English based speaker at the Wiesbaden Working party for Doctors and Healthcare Lawyers. At the start of May he will be leading a study stream for the 'Doctor: Future proof your practice' conference at the Royal Society of Medicine.

If you would like further information about arranging a lecture please contact Richard Gilligan at rag@lockharts.co.uk.

The Firm

Lockharts welcomes new staff member Brian Sweeney, who has joined the Partnership team as an assistant solicitor and brings with him a wealth of experience from both the public and private sectors.

Richard Gilligan, from our Client Services Development team, took part in the London Marathon finishing the course in 5hrs 10 minute and 7 seconds and raising over £700 for Kidney Research UK.

Feedback and Further Information

If you have any feedback or comments on this issue of the 'Lockharts Legal Update' please contact Richard Gilligan at rag@lockharts.co.uk.

Further information about Lockharts Solicitors, the staff and services that are offered can be found at www.lockharts.co.uk.

Back Numbers

If you are a GP or Practice Manager and have missed issue 1 or issue 2 please contact Richard Gilligan at rag@lockharts.co.uk quoting 'Back Numbers'.

Disclaimer

The content of this newsletter is only intended as information and should not be considered to be legal advice. Lockharts cannot be held liable for any loss caused by any act or omission as a result of the information in this newsletter.

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