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This Month

This month we include an update on the Statutory Holiday Entitlements and look at the reasons to consider an Enduring Power of Attorney before the new regime commences in October.

Statutory Holiday Entitlement – Update

There has been some concern that the changes to holiday entitlement will place an excessive burden on small businesses such as many medical and dental practices.

The aim of the regulations is to ensure that employees who must take bank holidays as part of their statutory holiday entitlement, receive extra entitlement. Those employees whose current entitlement excludes bank holidays will not receive more holiday entitlement although their statutory entitlement will include Bank Holidays.

Since the last edition, there has been a slight amendment to the upcoming changes to Statutory Holiday

entitlement. Following further consultation, the draft regulations, which have now been laid in Parliament, will delay the second phase of the increase from October 2008 until 1 April 2009.

As you may recall, under the regulations, statutory holiday entitlement will be increased from 4 working weeks to 4.8 working weeks in October 2007 and from 4.8 weeks to 5.6 weeks in the second phase and will include bank holidays.

For example, a full time employee who is entitled to 20 days holiday per year plus Bank Holidays will, from October 2008, be entitled to 28 days inclusive of Bank Holidays. A full time employee who is only entitled to 20 days holiday per year inclusive of Bank Holidays will be entitled to 28 days inclusive of Bank Holidays after October 2008.

Full details of the regulations are due out this month to allow sufficient time for employers to make the necessary arrangements.

We now recommend that you review your Contracts of Employment to ensure that the additional entitlement includes Bank Holidays and is not seen as a pure addition.

If you would like further information about Contracts of Employment or any Employment law issue, please contact Paul Werrell at pw@lockharts.co.uk.

Revision of PMS Agreements

Adopting the 'value for money' mantra, PCTs are increasingly seeking changes to PMS Agreements. Many particular reasons are being advanced but the two occurring most frequently are that the arrangements in PMS Agreements for superannuation contributions are unaffordable and that all that can be afforded are contributions that are the same as those available for GMS Contractors, and second, either in addition or alternatively, that the range of services provided by Contractors should be increased, albeit without additional payment.

Where changes of this nature are proposed, discussions, often led by the LMC on behalf of Contractors, are initiated but it seems always to be the case that not long after discussions start PCTs start to impose a tight timetable and to indicate that if matters cannot be agreed they will have no alternative but to give notice to terminate the PMS Agreements.

Unfortunately, the PMS Regulations are not as clear as they might be with regard to notice but in the absence of a specific notice period being set out in the PMS Agreement, it is probably the case that Agreements can be terminated on 6 months' notice.

In reality, however, 6 months' notice is akin to only 3 months' notice as at least 3 months' notice has to be given to PCTs if a PMS Contractor proposes to revert to GMS. Needless to say, the Contractor is placed in a very difficult position if negotiations which might lead to a revised PMS Agreement are ongoing as the last day for giving notice to revert to GMS approaches.

In this situation there is no textbook answer, but Lockharts are advising a substantial number of practices throughout the country on this sort of issue and further enquiries can be

made of Andrew Lockhart-Miramis at alm@lockharts.co.uk

Enduring Powers of Attorney – Deadline Approaching

With the last day for creating an Enduring Power of Attorney now less than 3 months away, Associate Solicitor Andrew Murdoch, Lockharts' Private Client Specialist, provides guidance on why you should act now.

Why clients (or their close family) should take out an EPA before 1 October 2007.

The existing Enduring Power Of Attorney document is concise, straightforward to explain and at 4 pages is relatively inexpensive to prepare. Further, should registration prove to be ultimately necessary with the Court of Protection, the fee required is £120.00. However, the regime in place after 1 October 2007 when only an LPA attorneyship will be available is far more onerous and expensive to prepare and to operate!

At present there is no requirement to actually register the attorneyship document, with the Court of Protection, unless **mental capacity (or the onset of mental incapacity)** of the donor is in question.

Furthermore, even though the attorney document has been executed by both donor and the attorney/s, it can be left in abeyance until such time as the donor regards him/herself as not being willing, or able, to look after personal financial matters. At that time the attorney document is then registered with those financial institutions where the donor has an interest: viz. banks, building societies, national savings, company registrars, life companies etc. As noted registration can take place, with the above institutions; there is no **formal requirement** to involve the

Court of Protection unless **mental incapacity** is under consideration.

As EPA document executed, prior to 1 October 2007, will remain valid under the post (LPA) regime: this presents a window of opportunity to execute now an **Enduring Power of Attorney**.

Lasting Power of Attorney (LPA)

Apart from a general Power of Attorney (under the 1971 Powers of Attorney Act) a LPA will be the **only** prescribed form of attorneyship authorised after 30 September 2007. The prescribed form (now available) runs to 26 pages!

The LPA can be drafted to cover a donor's health and personal welfare (which crucially can include medical treatment decisions). A second "limb" of an LPA will deal with property and financial affairs.

An LPA dealing with property and affairs (sometimes referred to as a financial LPA) may be used before and after the donor loses capacity.

Personal Welfare LPA which relate to health care decisions can only be used once the donor has lost capacity.

To be valid both forms of LPA must be set out in the "prescribed form" and must be registered with the Office of the Public Guardian (OPG).

The statutory requirements of creating a valid LPA are exceedingly onerous and are outside the scope of these notes. The following serve merely to illustrate the "hurdles" which will be encountered!

First, under the Mental Capacity Act 2005 (MCA 2005) any LPA instrument must include the following:

- A statement by the donor (confirming informed consent).
- A statement by the donor indicating whether any party is to be notified on the registration of the LPA.
- A statement by the donee (confirming that he/she understand their duties and obligations as a donee).
- A certificate by a "prescribed person" (confirming no undue pressure or fraud involved in the decision to make a LPA and that the donor understands the scope and power of the LPA).
- The donee of the power is required to file a statement confirming that he has read (or has had read to him/her) the relevant information, or part of it, and that he understands the duties imposed on the donee of a LPA with particular reference to the MCA 2005 s.1 (the Principles) and s4 (Best Interests).

It will readily be appreciated that conformity with the above last two mandatory requirements will have significant costs implications where law professionals are involved: to explain the principles involved and the best interest concept will take time.

Second, the requirement for the certificate of capacity to be signed by the "**certificate provider**".

There are two categories:

- "**A**" an individual who has known the donor personally over the last two years.
- "**B**" certain Health Care professionals; registered social

worker; law and financial professionals.

The Certificate Provider will have to address, and be satisfied thereto, as to seven key points of reference!

Certain individuals are specifically **excluded** to be a Certificate Provider:

- Members of the donor's or attorney's family;
- Any attorney, appointed by the donor, of an existing EPA or another LPA; and
- Any business partner or paid employee of the donor or attorney.

Comment on the role of the Certificate Provider:

The Certificate Provider must have the appropriate knowledge and understanding to give a certificate; this will mean knowledge or experience of issues relating to mental capacity and the effect of making an LPA including basic issues and the core principles of the MCA 2005.

Registration process

For LPAs registration with the Public Guardian office is mandatory. There will be a "prescribed period" of five weeks (beginning with the date notice is given) during which objections can be raised with the Public Guardian.

The registration fee will be £150.00.

Summary

We can only emphasise to clients the benefits of taking out **NOW** the existing EPA format - even though individual donors may regard themselves as fit and able to look after their immediate financial affairs.

In our view, spouses, civil partners, elder parents (with adult children), (unmarried) brothers/sisters who are of age (18 years) should all consider urgently the merits of taking out an EPA over the following weeks.

It is impossible to estimate the exact legal costs of preparing EPAs and LPAs but we estimate respectively figures in the region of £200/£250 and £750/£1000 plus VAT and disbursements.

There are just 12 weeks remaining to take out an EPA attorneyship before the deadline of 30 September 2007.

For further information please contact Andrew Murdoch, Associate Solicitor email am@lockharts.co.uk, or Sandra Wiltshire, email saw@lockharts.co.uk.

PCT Claw-back

Whether there is any relationship between PCT reorganisation and the current level of PCT 'claw-back' activity which exists at present is unclear but certainly over the last 6 months or so we have been asked increasingly by our clients to assist them when PCTs have approached them for the claw-back of funds allegedly wrongly paid. In a large number of cases the proposed claw-back relates to property and premises funding, and in some cases relates back to periods as long ago as 2002/03.

In many cases, practitioners may be able to demonstrate that they received certain payments in good faith and they have, in whole or in part, spent the money in the belief that they were entitled to receive it. Where a practitioner has altered his position in response to such a payment, there may be a possible defence against the whole or the part of the claw-back claim although close consideration has to be

given to the contractual arrangements with the PCT.

Where claw-back issues arise, we should be very happy to help further and contact should be made with Michael Barrett at mb@lockharts.co.uk

Tendering

Since the reforms to the regulatory framework for primary care in 2004 we have received numerous approaches for advice and information on the tendering process. The introduction of APMS contracts, which have fewer restrictions on the provider organisation, mean that GPs are competing with commercial companies and voluntary organisations for the primary care contract.

Tenders can be invited by the PCT for any one of the following situations:

- The retirement of a sole practitioner
- The termination of a practice contract where the practice is failing
- The acrimonious dissolution of a practice
- Where extra capacity is required for a specific population
- Where specific services are required for particular conditions.

The European Union procurement rules, on which the tendering process is founded, mean that any bid should follow the strict guidelines set out in the rules and this could lead to bidding practices feeling at a disadvantage.

The Proposal

By compiling a business-like proposal a local GP can greatly enhance their bid and build on the strong position that their local knowledge can provide.

The tips below provide guidance on compiling a successful bid

SWOT Analysis

A careful analysis will identify whether you will be able to do the work that you are bidding for and how you will overcome any obstacles. Be realistic; if the negatives outweigh the positives, you might not be ready to bid for that contract. Keep careful records of your discussions.

Bid Management Team.

Strong leadership for your bid will ease the process considerably. The team should consist of at least one experienced GP and a practice manager who have the time to devote to the whole process.

Detailed Business Plan

Perhaps the single most important part of the process and probably the most challenging. A good plan should be specific and cover:

- Analysis of the local healthcare environment
- Finance
- Staffing, equipment and management
- Information on marketing the service.

The plan will identify any further weaknesses and further consideration should be given to the viability of the proposal at this stage.

The Tendering Timetable

Always stick to the deadlines. Build in leeway to your personal timetables to allow for any unexpected events or problems.

Tailor your Proposal

Your proposal should address the selection criteria and answer all of the questions. Avoid including irrelevant

information and anything that hasn't been specifically asked for.

Unique Selling Points

How will you stand out from the other bidders? Include all aspects that make your application unique. Local knowledge, experience and achievements will all serve to enhance your application.

Quality Assurance Matters

Provide evidence that you are aware of the significance of PCT performance standards and procedures and that you have successfully met them.

Further Information

If the PCT asks for further information, provide this within the original timetable unless otherwise agreed. Treat it as part of your original submissions and not supplementary information.

Be Patient

The process is lengthy and can take months for a decision to be reached.

A Successful Bid

A successful bid is not the end of the process. The detailed terms of the contract need to be negotiated. You should be happy with everything that you are taking on, this includes the benefits but also the duties, risks and liabilities.

The specialist Tendering team at Lockharts, lead by Andrew Lockhart-Mirams can provide legal advice on:

Contract Terms

- Will you be able to comply with all of the contract terms?
- Do the financial elements add up?
- Is there a break clause in the contract?

Conducting Due Diligence Enquiries

- When taking over an existing practice you will need detailed information regarding the assets, staff and premises which you are acquiring

Property Issues

- Investigation of title
- Terms of the lease or sale contract

Staff Issues

- Compliance with Transfer of Undertakings (Protection of Employment) Regulations (TUPE)
- Existing terms of employment including NHS Pension Scheme Eligibility
- Recruitment and employment of new staff

Equipment and Supplies

- The value of existing practice assets.

For further information or advice on any of the matters covered above please contact Alison Oliver at ao@lockharts.co.uk.

Practice Websites

Providing up to date information about your practice, surgery hours and the clinics on offer can represent a big challenge. The choice available is daunting and it is difficult to decide which option to go with. We are pleased to recommend www.GPSurgery.net for your practice website.

Rosalind Dewar has built up a strong reputation within the healthcare sector and has extensive experience of marketing and communications.

Rosalind recently attended the Small Practices Association Event near Regent's Park and offers a range of options to suit practices of all sizes.

If you contact GPSurgery.net, please quote "Reference 47". We do not have any financial arrangement with GPSurgery but understand that a reference number assists their own strategies.

The Firm

We are pleased to announce that Mark Jarvis has completed his training with Lockharts Solicitors and is now enrolled as a Solicitor. Mark will be working as part of Lockharts' NHS Team Department with a particular focus on the firm's services for dental practitioners. At present Mark is working on the changes that will occur in 2006 when the 3 year guaranteed contract value comes to an end.

We also welcome Solicitor Michael Barrett to Lockharts. Michael brings a wealth of Corporate, Commercial and Intellectual Property experience in the Health Care Sector to Lockharts' NHS Regulatory Team. Michael will be leading the firm's work on NHS Superannuation and a number of proposed 'test cases'.

Thank you to all who came to our stand at three recent events; the LMC Conference, The NHS Confederation Conference at London's ExCeL and the Small Practice Association London Event in Regent's Park. It was a pleasure to meet so many people.

Lockharts hope that you have a pleasant summer (despite the weather), our specialist staff will be on hand throughout the holiday period to ensure the continuity of the service you receive.

Next Issue

Unless there are any matters arising which are of immediate importance, the next issue of the Lockharts Solicitors Legal Update is due in September. In the meantime, if you have any comments please email rag@lockharts.co.uk.

Back Numbers

If you are a GP or Practice Manager and have previous issues 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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