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Healthcare newsletter

Spring 2021

Now, for tomorrow

Welcome to the Spring 2021 MHA Healthcare Newsletter.

It seems incredible that it is now 2 years since we were contemplating the formation of Primary Care Networks (PCN). Since then, PCNs have become established and have expanded their activities.

We are now seeing an increasing number of PCNs appoint their own dedicated PCN managers and develop more robust structures to mitigate the risks arising from both employment liabilities and Value Added Tax.

At the November 2020 BMA conference of LMCs a resolution was passed which called for a ballot to secure a mandate for the GPC before agreeing any changes or extension to the contract.

The Ballot asked "'Prior to any further negotiations, extension or changes for 2021/22, do you give GPC England a mandate for the PCN directed enhanced service?"

On 21 January 2021 the BMA published the results with 80% answering "yes" and 20% "No". Therefore, while concerns remain there appears to be a substantial commitment to the continued development of PCNs.

Going forward it will be interesting to see how the development of integrated care systems (ICS) will fit with the continued development of PCNs. Some of the proposed changes to ICSs are far reaching and would radically change the NHS in England.

MHA Healthcare team

Looking ahead at the GP contract financial arrangements from April 2021

A letter entitled Supporting General Practice in 2021/22 was published on 21 January 2021 jointly by NHSE and the BMA. The information in that letter is outlined below. It is expected that further details relating to aspects of the core contract payment arrangements will be made available in early March 2021.

Currently we know that:

- According to the previously agreed five year contract negotiation the global sum will be increased to enable practices to cover an intended 2.1% increase in pay and expenses and will be adjusted appropriately to reflect population growth.
- The cervical screening service, which is currently an additional service, is to be included as an essential service.
- The Additional Roles Reimbursement Scheme (ARRS) funding will increase from £430m to £746m with an expansion of the roles to include paramedics, advanced practitioners and mental health practitioners. However the original aim of including four additional services from April has been put on hold so that continuing prioritisation can be given to the pandemic issues.
- The Investment and Impact Fund funding will increase to £150m, of which at least £30m will be earmarked to incentivise improved patient access.
- Clinical pharmacists currently within the Clinical Pharmacist in General Practice scheme will be able to transfer to ARRS funding between 1 April 2021 and 20 September 2021
- Inner London and Outer London weighting will be applied to the ARRS funding and will be payable via the PCN DES rather than as additional ARRS reimbursements.
- Local community mental health services providers will provide each PCN with a WTE mental health practitioner funded 50% by each party with the PCN part paid from the increased ARRS funding.
- There will be very few changes to the Quality and Outcomes Framework (QOF). There will be £60m transferring to QOF from the Childhood Immunisations DES to fund the new Vaccinations and Immunisations domain covering 4 indicators. Mental health funding will be transferred into QOF amounting to £24m relating to the Serious Mental Illness physical health check indicators.
- Initiatives will continue to support GP recruitment and retention.
- It is intended that a newly funded obesity and weight management enhanced service will be set up later in the coming year.
- Additional funding was put in place for the final quarter of the 2020/21 year for capacity expansion at £30m per month and increased reimbursement for the Clinical Director role to be funded up to WTE. There is a recognition that such funding may need to continue into early 2021/22 so this will be kept under review.

Why are practices looking at transferring their GMS/PMS contract to a limited company?

On 12 November 2020 NHS England issued guidance for commissioners to follow when considering requests from partnerships holding a GMS or PMS contract to novate the contracts to a limited company. This guidance is set out in the form of a common assessment framework as Annex 1 to the Primary Medical Care Policy and Guidance Manual.

What has prompted the issuing of this guidance?

According to NHS England there has been an increase in the number of requests to novate GMS or PMS contracts or to sub-contract some services to limited companies. It is believed that this change is being driven by the development of PCNs and the scaling up of services. This can include several practices, each with a GMS or PMS contract, seeking to novate the contracts to the same jointly owned limited company or alternatively a cluster of practices each with a GMS or PMS contract who merge these contracts into a single geographically extensive and high value contract which is then novated to a limited company. Such "at scale" providers present a risk to the continuity of service should the company run into financial difficulty.

While this guidance doesn't resolve the potential procurement issues that can arise when a contract is moved from an individual or partnership to a limited company it does provide a process for commissioners to follow, suggests requirements that should be met and recommends variations that should be incorporated into the contract to mitigate the risks.

What restrictions could the commissioners require?

- The guidance includes the following:
- Prohibit changes in company control and ownership that could pose a threat to sustainability.
- Prohibit the company from entering into significant financial arrangement, for example high value loans.
- Place conditions on the company that must be met before dividends can be distributed.
- Commissioners could prescribe:
  - Any action that rests with the provider upon contract termination.
  - Minimum working capital requirements to provide confidence that the company will always be able to cover routine business running costs and its liabilities.
- To promote greater transparency there could be a requirement to report on matters including:
  - the annual company business plan.
  - Financial accounts
  - Management information
  - Staff pay
  - Dividend payments

So, what are some of the key issues that should be considered when thinking of incorporation?

Limited liability

GP partnerships have operated for many years. They have grown in size; however, this has been an evolution rather than a revolution. The result is that GP partners understand their practices and the risks involved and they are able to manage and mitigate those risks. With the development of PCNs this dynamic has changed and the risks of operating at scale and across different practices present new threats that partners are less keen to embrace and a corporate vehicle that limits the financial risks to the shareholders has an appeal.

Alternatively, some practices face the prospect of partners retiring without replacement and the possibility of a GP becoming the last man standing. As the number of partners reduces the risks are concentrated upon a reducing number of individuals and the possibility of limited liability may become more attractive. However, lenders, landlords and the CCG may require personal guarantees or other financial security from the directors to mitigate the risks to themselves arising from incorporation.

Taxation

There is a widely held belief that using a limited company will be tax efficient. However, frequently this is not the case and the tax burden from incorporation may be higher than for a partnership. Generally, the partners in a medical practice will wish to withdraw the maximum available profits. If a practice incorporates the company will pay corporation tax 19%. The GPs usually take a modest salary on which they will pay income tax and national insurance and the company will pay employers national insurance contributions. The remainder of the profits will be paid as a dividend and will typically be taxed on the GP at 32.5%. It is the combined liability to corporation tax and income tax that can result in higher tax liabilities.

Some practices have sought to include other family members with lower marginal rates of tax as shareholders, however this may jeopardize the company's ability to hold NHS contracts or access the NHS pension scheme.

Where the corporate tax structure may provide a benefit is if a practice has plans to scale up delivery successively over a number of years and plans to fund this expansion from retained earnings and would not be withdrawing all it's profits over a sustained period of time.

The NHS Pension Scheme

If the contract is to be novated to a limited company, it is essential that the company is structured so that it is eligible to access the NHS scheme. However, just as importantly the company needs to be setup so that whatever happens to the directors or shareholders the ownership and control of the company will always meet the requirements to have access to the scheme. This requires specialist advice from solicitors experienced in this work.

Another point to consider is the effect of incorporation on the pension of the GP shareholder. As mentioned above they will typically take the majority of their remuneration as dividends which are paid from the profits of the company after the payment of corporation tax. Therefore, typically the pensionable remuneration of GPs will be lower where a practice has incorporated.

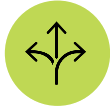
Surgery premises

If the practice premises are leased, then it will be necessary to negotiate the transfer of the lease to the limited company. Typically, the practice will need to cover the landlord's legal costs and the directors may well be required to provide personal guarantees, so the security of the landlord is not reduced. It will also be necessary to consider what will happen in respect of any service charge arrears, would these transfer to the company or remain a liability of the partners?

If the practice owns the freehold of its premises it is important that professional advice is taken to consider potential liabilities to Capital Gains Tax and Stamp Duty Land Tax that may arise on the transfer and how they may be mitigated. Consideration will also need to be given to current and future borrowing as a company may not be able to obtain the same loan to value ratio.

New to Partnership

The GMS contract currently includes the "New to Partnership" payment to those who have not previously been partners. This payment is not available to GPs operating via a limited company.



Flexibility

The traditional partnership model is extremely flexible, and partners take it for granted as to how easy it is for them to change sessions and profit shares, to personally take certain income streams or to bear certain costs personally and for partners to come and go. This flexibility doesn't exist within the corporate structure and changes will require greater planning and attention to detail with significantly higher costs.

Regulation and privacy

Traditional partnerships are subject to very few regulations and are not required to publish their accounts. By comparison limited companies are required to prepare accounts in a proscribed format and to file the accounts and other documents at Companies House where they will be available for public scrutiny. As a result, the compliance costs will typically be higher for a limited company than a partnership.

NHS Contract requirements

NHS Contracting regulations impose restrictions on the ownership and control of entities holding certain NHS contracts. Typically, GP partnerships have no difficulty complying with these requirements. However, it is possible for a limited company to inadvertently breach these rules and as with access to the NHS pension scheme it is essential that advice is taken to ensure that this doesn't become a problem. This would need to include the situation where a shareholder leaves or dies in service as it is essential that the ownership of the shares resides with those eligible to hold them for the purposes of the contract.

Other matters

Following incorporation, the practice staff will need to be transferred to the company (TUPE), all other contracts, including insurance will need to be transferred and the company will need to apply for CQC registration.

Conclusion

I believe that many practices will consider incorporation but conclude that overall it doesn't offer enough advantages over the traditional partnership model. The exception to this will be where the requirement for limited liability overrides the costs and complications arising from the limited company model. This will be particularly relevant where practices are delivering services at scale.

Good news on the way for practices caught by Final Pay Control Charges

In a new government consultation NHS Pension Scheme: proposed changes to Scheme Regulations there appears to be some very good news concerning the issue of Final Pay Controls. These regulations do not apply to GP practitioners, whether partners or salaried, but to other practice staff and non-GP partners.

Current regulations

Under the current regulations those members in the 1995 section of the Pension scheme have their benefits calculated based on the highest pensionable pay figure in each of the final 3 years before retirement. The government found that there was a reasonable number of members who received a larger than expected pay rise in those final 3 years and thus were in receipt of a larger than anticipated pension. As there was no way to pay for this higher pension through increased contributions – as the member had retired – the cost fell on the whole scheme. Therefore anti avoidance measures were introduced to mitigate this apparent abuse of the system which means that pensionable pay increases in the last 3 years before retirement cannot exceed an “allowable amount”. This allowable amount is currently set at 4.5% + inflation (CPI). Any increase above this limit is then subject to a final pay control charge and is levied on the employer.

Detailed calculations need to be performed to calculate this charge but NHS Pensions will do this and send a bill to the employer concerned. It is thus important that practices are aware of these regulations and take reasonable steps to review the pay of anyone coming up to retirement to ensure they are not subject to these charges. The only exemptions from this charge are where the pay increase is due to an increase in the national minimum wage or under the terms of the Agenda for Change framework.

Issues with the current regulations

There have been many unfortunate cases where practices have been hit by these charges without warning and in particular non-GP partners who have had an increase in pensionable pay as a result of increased practice profits not really within their control.

Practices were also concerned that they were being charged when legitimate promotions in those final years was also caught by the regulations. In some cases these charges can easily reach tens of thousands of pounds. The governments own figures show that over the 5 years up to 2019-20 there were 1,621 cases actually taken with an average charge of around £35,000.

Proposals for change

Under the consultation the government have proposed to introduce 2 main changes to the regulations these being:

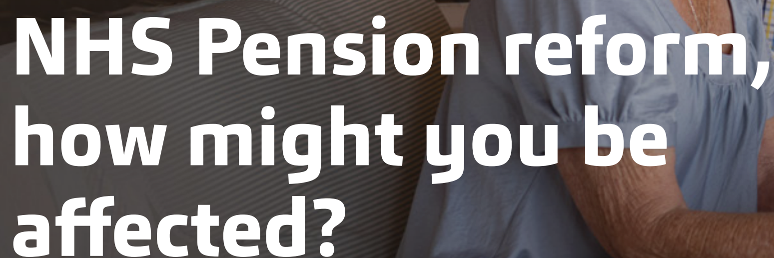
- An increase to the allowable amount from 4.5% to 7% + CPI
- An increase in the number of exemptions that will apply.

These additional exemptions will hope to cover areas where employers can demonstrate that a pay increase above the allowable amount is justified. These will include promotions that are awarded on the basis of fair and open competition as well as profit share percentages for non-GP providers. It was noted that the large proportion of charges to date arose from this particular issue of non-GP partners profits rising and so the exemption will be great news for those practices with non-GP partners as long as any increase in pensionable pay in those final 3 years was not as a result of a change in profit share or, if the share does increase, it is due to a reduction in the number of partners at the practice.

It is thus hoped that by increasing these exemptions only those employers who increase staff pay unjustifiably will be caught and charged. It is intended that these proposals take effect from 1 April 2021.

Corrections for previous charges that would now be excluded

If practices have been issued with a charge on or after 1 April 2018 they can seek to have the charge reassessed against the new allowable amount and exemptions. The proposal is that employers should apply for a redetermination within 6 months of these amendments coming into force and any reduction in the charges calculated will be reimbursed to the practice.
We therefore encourage practices to review the position and to seek specialist medical help from your local MHA healthcare accountants to assist with any reviews and claims for reimbursement.



NHS Pension reform, how might you be affected?

Last week the Government published its guidance on the public service pension scheme consultation which ran during 2020 and closed in October 2020, the McCloud Consultation.

The purpose of the consultation was to gather stakeholder views on how pension schemes affected by the recent rulings on the judicial and firefighter's pension scheme appeals court ruling would move forward.

The position will now be that members of pension schemes affected will be given a choice on retirement as to which scheme they wish to have their pension under between 1st April 2015 and 31 March 2022. This would be either the legacy scheme (95/08) or reformed scheme (2015). From 1st April 2022 all members will be moved to the reformed scheme.

For any members where a choice was made between 1st April 2015 and 31 March 2022, either through opting out, retirement, ill health or for beneficiaries as a result of a member's death, their case will be reviewed to determine which option is the most appropriate and offers the higher lump sum and annual pension. The latter two will be a priority, and there is no set timeframe suggested for when the position of members who opted out of the scheme can or will be reviewed.

Presently there is insufficient legislation in place to deal with these changes and a deadline for implementation has been set for 1st October 2023, with initial legislative changes planned for mid 2021 so any movement forward cannot start until this is implemented.

These uncertainties, at least in the short term will cause ongoing complications over the effects on a member's personal tax position, whether they have paid Annual Allowance Charges, if Scheme Pays Elections have been or need to be submitted, life time allowance charges will all be affected depending on the scheme chosen when they retire.

Where a member is currently in the 2015 scheme if their pensionable earnings are over £125,000 then they will likely have growth over the £40,000 annual allowance, and so be subject to a tax charge. However the same level income allocated to the 1995/08 scheme would not see such a high level of growth and so the member may not suffer a charge for the year.

There is now considerable uncertainty as to whether a member has a tax charge, or if they should be submitting a SPE, what charge should be included, this is as a result of the member now having no certainty in which scheme they will be for that year. To add to this there is currently no mechanism in place to amend the information submitted for events four years after submission so where changes to assumptions are made there is no process to update records if there is a need to go back further.

We expect clarification when legislation starts to be passed, and although choice is a good thing, the underlying problems are still the same. Annual allowance charges for defined benefit schemes (NHS Pension) do not work, they cause a "double taxation" situation for members of the schemes where they are taxed each year, and also on retirement under life time allowance.

Although changes were made to address this to some extent in the last budget it still means that the higher paid members within the NHS, Consultants, GP's, have a minefield to navigate to ensure they don't fall foul of tax legislation. It is more important than ever to ensure pension information held is correct, the AA position is known and how the changes impact your plans for the future.

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