

Scottish Primary Care



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Extended Hours Access – Directed Enhanced Service

Elsbeth Curle, partner in corporate department
and Stephen Connolly, assistant in the employment unit of Miller Samuel Solicitors.

Legal Considerations

The policy debate behind the new Extended Hours Access Directed Enhanced Service (DES) for GP practices will undoubtedly be ongoing for some time, but for those practices opting to provide the service the focus will necessarily have shifted to more practical considerations relating to implementation.

The management issues surrounding the DES are clearly challenging. In addition to reviewing contractual arrangements and working practices for salaried GP's and staff, practices should check that the division of responsibility and remuneration packages for partners properly reflect any changes introduced and should use this as an opportunity to review their current partnership agreement more generally. Care should also be taken to address issues of safety, security and insurance.

Employment Matters

Out of hours cover is not permitted to result in a reduction to core hours so extended access will only be possible where there are sufficient numbers of staff within the practice prepared to work the required shifts. It will be up to each practice to make the relevant arrangements and such arrangements are likely to require a change to existing employment contracts.

If the contract does not already make provision for an employee to work extended hours then it may include a more general authorisation for the employer to make changes. There may, for example, be a provision which allows the practice to automatically impose any change to working hours which is reasonable and required within the course of all working. Alternatively, a more general flexibility clause may be included which allows changes to be made to any



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term of the contract. If there is no contractual right to make changes, then the practice will have three options: (1) obtain express agreement from each and every employee affected by the change to working hours; (2) unilaterally impose the change and use the employee's conduct in attending at work during the new hours to establish the fact that they have given their implied agreement to the changes; or (3) terminate the existing contract of employment and offer continued employment on new terms.

Good communication and engaging staff in the process of considering and planning the change is critical to success in obtaining express agreement. It is sensible to put details of any proposal the practice wishes to make in writing, including the range of options available (if any).

If, following discussions, agreement cannot be reached then the practice may have no option but to impose changes, relying on either option two or three above. This requires careful handling and may leave the practice exposed to

claims. The employees in question may have the right to raise claims for breach of contract or even constructive dismissal before the Employment Tribunal. Advice should be sought from the practice's legal adviser in such cases.

Partnership matters

Implementing the DES will require agreement between partners as to how responsibility for out of hours service provision will be shared and accounted for. Creative thinking will be required as pro rata payments may be regarded by some as insufficient remuneration for sessions taking place during those working hours perceived to be 'anti-social'.

Once agreement has been reached, the partnership agreement should be reviewed to ensure it has sufficient flexibility to allow for the changes, or is updated to reflect any new arrangements.

It is hoped that most practices will have a written partnership agreement. Any practice operating without one will be governed by the Partnership Act of 1890 and the age of that statute alone should be a clear enough indication that the

rules contained within it will not always be appropriate for businesses operating in 2008.

By way of example, under the Act most decisions are taken by simple majority and it may be desirable in certain situations for decisions to be taken unanimously. Perhaps of most concern is that without a written partnership agreement, the death or retirement of any one partner will automatically result in the dissolution of the partnership as a whole. As the GMS contract is held by the partnership rather than the individual practitioners within it, this could potentially have serious consequences.

Of equal importance with having a partnership agreement in the first place is keeping it up to date. If the agreement has not been updated since the current primary care contracting arrangements were introduced in 2004 it is probably time for a review now. This is certainly the case if there have been changes to circumstances, such as new partners, new surgery premises or changes to working hours/ remuneration as a result of the DES.

Incorporating such reviews within the management agenda will require a commitment of time and effort from all partners. Although this can be difficult to achieve in an already overloaded schedule, it should be prioritised as an investment of vital importance to the future of the business. A current partnership agreement reflecting in sufficient detail the requirements of the practice will assist in recruiting new partners, promote stability and partner retention and will save time and considerable expense in resolving disputes at a later date. Although much of the groundwork must be done at partner level it is always sensible to seek legal advice to ensure the drafting is sound and in line with legislative changes.

■ For more information on any of the issues raised please contact us by calling 0141 221 1919 or by visiting www.millersamuel.co.uk.