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Fixed Share Partnerships: An Alternative to the BMA Model Terms?

A fixed share partnership has been proposed in the medical press as a legal alternative to a practice having to offer a salaried GP the BMA Model Contract terms. Is it really a simple alternative, or are there other important considerations involved in the decision?

Definition

In tax law there are only two vehicles by which a GP can provide his or her services to a practice: as an Employee or as a Self-Employed person. Employees are taxed under Schedule E (PAYE), and their employer is responsible for accounting for income tax and employer and employee national insurance. A self employed person is taxed under Schedule D, and is responsible for his/her own tax and national insurance.

Partnership is a variation of self-employment whereby two or more persons 'carry on a business in common with a view of profit'. By default, the mechanics of a Partnership are governed by the 1890 Partnership Act which, perhaps understandably, has very little to say about the way modern business is conducted. Given the limitations of statute, any good Solicitor will certainly recommend that a separate Partnership Deed is drawn up to govern the way the Partners want their business to function.

All further descriptions such as 'Equity Partnership', 'Fixed Share Partnership', 'Fixed-Term Partnership' and so on are simply ways of describing different terms within the Deed and do not alter the fact that the signatory parties are in Partnership with each other. Be aware that these are not legal defined names and there are no standard definitions of the terms.

Confusingly, an employee can also have the title 'Partner' without actually being a Partner in the legal sense. Such employees are sometimes called 'salaried partners' but I will ignore these for the purposes of this article.

An employee or a Partner?

The rights and responsibilities of an employee and a Partner are very different.

An employee benefits from a raft of employment legislation designed to protect them from exploitation or discrimination in recognition that the 'balance of power' in the relationship has historically been with the employer. This legislation is constantly evolving, and is highly complex. To name but a few there are laws relating to discrimination on the grounds of sex, race, religion and sexual orientation; regulations regarding maximum working times; laws on unfair and/or constructive dismissal; laws on minimum salary and leave and so on. All employees are protected by this legislation, even before you consider the additional rules designed to protect employees within the health service.

The BMA model contract provides terms which further improve the position of 'salaried GPs' such as improved maternity and paternity and a higher minimum salary. However it is important to consider this in the context of the wider protection available to employees.

As a Partner most, though not necessarily all, of the employee related legislation is not relevant. This is the case whether the Partnership is fixed share or equity. Partnership law was designed to provide a legal framework for the owners of a business not for the employees, and there is a presumption in law that a Partner is the joint business owner. This is a fundamental difference which is reflected in all the rights and responsibilities that accrue to Partners and employees. Unless expressly stated otherwise in a Partnership agreement, all Partners share all the business profits and losses equally. All Partners have the ability to make commitments on behalf of the business, and they have *joint and several liability*. This means that if anything happens which causes the business to suffer a loss, all the partners have unlimited personal liability to settle the claim. There have been many examples of Partners losing their house and their life savings as a result of liabilities incurred by a different Partner.

Fixed Share Partnerships

Although there is no legal definition of a Fixed Share Partnership, it is commonly recognised as a Doctor entitled to a fixed, guaranteed share of the partnership profits and sometimes a small amount of equity and/or a bonus determined by the practice's financial performance each year. E.g. £X per annum is paid to the fixed share partner before the other partners divide the balance of the profits in their percentage shares. Depending on the terms of the partnership agreement, he/she may not be required to contribute to partnership losses although it is difficult to exclude this possibility completely due to the nature of joint and several liability. Fixed-share partners may also have more limited voting rights than equity partners and some fixed share roles have no voting rights at all. Typically a fixed share partner would not own a share of the surgery premises.

A fixed share partnership can thus be used to provide a payment superficially equivalent to a salary. The Partnership Agreement can be drawn up to include certain terms similar to an employment contract, and to exclude some of the default terms in a Partnership Agreement. There are however a significant number of issues including but not limited to:

- All Partners are able to incur unlimited liabilities on behalf of each other. This can be restricted but not eliminated.
- GP partners are responsible for managing the provision of services under their contract with the PCT/LHB. All partners are effectively signatories to this contract, whereas employees are not.
- If the Partnership Deed becomes invalid, as it can for a number of reasons, the business relationship becomes a 'Partnership at will'. This has a very significant impact on your business relationship as Partners and potentially on the Practice contract with the PCT/LHB. This is a situation you will want to avoid.
- If you use a Fixed Share Partnership simply to avoid some of the employment terms and regulations, are you going to be able to attract the best GPs to the surgery?
- If a Partnership Deed is too heavily skewed in favour of one party, there is a possibility that the arrangement could be deemed an illegal sale of goodwill, and/or HMR&C could deem the relationship to be as an employee

Conclusion and Recommendations

It will never be possible to create a situation whereby a Fixed Share Partnership is equivalent to an employment contract without the BMA model terms. This would be like

trying to modify a car to create a truck; both are designed for a fundamentally different purpose.

We strongly recommend that both parties start with a view on the nature of the business relationship they desire. Given the changing nature of Primary Care, by no means all GPs want the responsibilities associated with being a business owner and would prefer the protection afforded as an employee. Conversely, many Partners wish to share the burden of business ownership. Typically the total reward package as an employee would be lower than as a Partner, commensurate with the reduced risks and responsibilities.

The many variations on the basic employee and self-employed models reflect the complexity of society and of different businesses. Seeking early professional advice from a Solicitor familiar with GP practices and the associated regulations would be a wise step.

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