

REPORT

Independent contractor agreements

Are your contractual arrangements in order?

6 July 2017

.....

Nihal D'Cruz outlines what you should consider before signing on the dotted line.

.....

Being a sole principal in your own medical practice is becoming less common.

Instead we are seeing a variety of different forms of medical practice, including many practitioners who are either engaged as employed doctors or as independent contractors by corporate bodies. These bodies may be partnerships of other doctors, companies operated by larger corporate bodies who run many practices, or corporate bodies formed to operate one or a few practices.

An independent contractor enters into a written or oral agreement to provide goods or services to another entity that is not their employer. Their payment depends on fulfilling their contractual conditions.

Unlike employment arrangements, independent contractors are generally not afforded the various legislative entitlements which employees can receive, such as maximum weekly hours, paid parental leave, annual leave, personal leave, long service leave, public holiday and redundancy pay, workers' compensation cover and superannuation payments.



Nihal D'Cruz is an Underwriting and Risk Education Manager at MIGA.

Generally speaking, some bodies will only offer independent contractor roles instead of employment, particularly given the flexibility they can offer. Similarly, this flexibility of arrangement can be attractive to a medical practitioner. It may be that a practitioner can negotiate an agreement involving a higher rate of pay in lieu of leave entitlements, or the ability to work for different organisations at once.

In the context of medical practice, it is important to remember:

- Independent contractors do not have the benefit of vicarious liability by an employer, i.e. an employer being legally responsible for damages claims against a practitioner arising out of the context of their employment (as is the case, for example, for most junior doctors working in a public hospital)
- Consequently, it is necessary that you have appropriate medical indemnity insurance to cover your practice as an independent contractor – most commonly, independent contractors are expected to arrange their own insurance and provide proof of it to the body they contract with.

DISPUTES

In recent times we have seen an increase in disputes around the terms of independent contractor agreements, including disputes which have arisen in the absence of a formal agreement.

You might be faced with a scenario where a contractor leaves your practice without providing any notice, 'sets up' in direct competition and solicits your patients. Conversely, you may be a practitioner who worked as an independent contractor, left a practice and is now faced with a restraint of trade clause.



It is important to satisfy yourself that you understand the impact of each term and seek advice on any areas of concern.

Another situation we see is contractors who feel they have been rostered to work excessive hours in a day and night practice. Alternatively, you may be the practice principal or owner faced with a claim of bullying and harassment by a contracted practitioner based on your expectations of their work.

Who owns and controls clinical records can be another area of dispute. Some agreements will have particular provisions which govern this, often placing ownership and control of the records in the hands of the corporate body operating a practice. This has implications for practitioners who receive requests for records from patients, and when practitioners leave a practice and certain patients wish to continue seeing them elsewhere.

These are just some of the examples you might face.

Disputes such as these can have significant financial and personal consequences regardless of your role in the contractual relationship. With a robust agreement and some careful thought given to your own situation and potential issues you may face (which may warrant independent legal advice), many of the pitfalls which can arise in the absence of a clearlyworded contract can be avoided.

IS THE CONTRACT RIGHT FOR YOU?

While independent contractor arrangements are treated as distinct from employment contracts, the requirements are sometimes analogous. For instance,

they can both stipulate hours of work and how they will be worked across the week, or conditions concerning taking of leave.

Before entering into a contract of any type, it is important to review its terms. Once entered into, the terms will normally be binding and direct the relationship between the parties to the contract.

It is important to satisfy yourself that you understand the impact of each term and seek advice on any areas of concern. It is important to liaise with the person you are contracting with, or their representative, to ensure there is clarity. This will help safeguard against unforeseen problems which may arise in the future. Some of the key contractual terms which may need to be clearly expressed in the contract include:

- Services delivered by each party
- Notice periods
- Ownership of medical records
- Professional indemnity arrangements
- Restrictions on practice post termination (restraint of trade)
- Leave entitlements
- Practice services you can expect (i.e. equipment, rooms, practice staff)
- Basis of remuneration.

RESTRICTIONS ON PRACTICE POST TERMINATION

These are also known as 'restraint of trade' or 'non-compete' clauses.

After a contract is terminated, either by reaching the end date or in accordance with its terms, regard should be given to any term in the contract which imposes ongoing restrictions on where the contractor can practise medicine.

This type of clause can create issues from the contractor's perspective depending on the radius in which the contractor is prevented from practising and the period of time in which they are required to honour the 'non-compete' clause.

Before entering into a contract it is important to understand the effect of any 'restraint of trade' clause and assess from a practical perspective the impact should the agreement come to an end. A breach of this clause can result in significant financial and emotional cost, and also expensive and time consuming litigation.

OTHER CONSIDERATIONS

Make sure before you enter into a contract you have done your homework on the other party. You will want to be sure that there is going to be enough work to keep you busy and meet your financial needs.

Another issue some of our clients have raised is the tension between the commercial needs of the practice in terms of billings and patient 'turnover', and a practitioner's view on and capacity to provide for quality health care. If you are engaged as an independent contractor, medico-legal liability for your own care will normally rest with you as the doctor. This includes not just civil claims, but also reflects how:

- A regulator such as AHPRA and the Medical Board of Australia, a health complaints body, will assess complaints against you
- Medicare and the Professional Services Review may deal with billing issues in your practice.

SUMMARY

There are many considerations to be taken into account when entering into a contractual arrangement. If you are unsure about the terms of an agreement or whether certain conduct may be in breach of an agreement, you should seek independent advice. MIGA offers superior cover complemented by expert medico-legal support, available 24/7 in emergencies. If you are not insured with us, give us a call to see if MIGA can offer you more value and better protection. At MIGA, we are always here for you. ☺

If you are not insured with us, give us a call on 1800 777 156 to see if MIGA can offer you more value and better protection. Further details about the cover we offer practices and healthcare companies is available at www.miga.com.au/healthcare

Insurance policies available through MIGA are issued by Medical Insurance Australia Pty Ltd. MIGA has not taken into account your personal objectives or situation. Before you make any decisions about our policies, please read our Product Disclosure Statement and Policy Wording and consider your own needs. Call MIGA for a copy on 1800 777 156 or visit our website at www.miga.com.au. The information contained in this document is of a general nature only and does not purport to take into account, or be relevant to your personal circumstances. This information is not intended to be nor should it be relied upon as a legal or any other type of professional advice.