

Good Practice Guide Appendices Appendix 17

Cluster Hosting Arrangements

There are a number of different contractual arrangements that could potentially be used for the employment of cluster staff, including:

- The Health Board acting as the employer
- One practice acting as 'host' employer for the cluster, with cross charging arrangements
- One practice holding an honorary contract with the Health Board on behalf of the cluster
- The Social Enterprise as the employer, involving the transfer of staff to the new organisation
- Other organisation employing cluster staff, e.g. WAST, Local Authority, Third Sector
- Co-option of staff with specialist expertise to the cluster team

These different options for contractual and employment models carry different implications in terms of contracts, indemnity, reporting arrangements, etc. Secure employment and access to NHS pensions are clearly important in the recruitment and the long-term retention of cluster staff.

It is therefore essential to have clear, strong processes and contractual arrangements underpinned by legal advice when making decisions about the employment of cluster staff. Arrangements made without due care, for the sake of expediency and/or avoiding excessive bureaucracy, can result in costly legal challenges. There needs to be consideration of the relative risks and potential conflicts of interest of different employment models, with clarity and transparency on the roles of each party.

Test of Employment

The definition of an employer is a person who is contractually bound to a worker – the employee – to give that worker money as a salary or wages, in exchange for on-going work and for which the employer directs the work and exercises fundamental control over the work. In deciding whether a particular worker is an employee, there are several items to consider: issues of control, the contractual rights of the worker and several other factors, as listed below.

Test of Employment

Control:

- Who controls what work is done

- Who controls where the work is done
- What control is exercised over how the work is done
- Who controls when the work is done
- Who controls who does the work, particularly with respect to the right to delegate, send a replacement or hire staff to help.

Contract of Employment Rights:

- Protection against unfair dismissal
- Statutory redundancy payment
- Maternity and paternity leave and pay
- Parental leave
- The right to request flexible working
- Rights under TUPE
- Rights to preferred payments in the event of an employer's insolvency
- Access to pension scheme
- Annual leave entitlement

Other factors:

- Length of the relationship
- Method of payment agreed by the parties
- Who provides the equipment needed to get the job done
- Whether the worker works mainly for one person or for a number of different people
- Whether the worker is 'part and parcel' of the organisation
- Tax treatment may also be an indication, but not a conclusive one
- Mutuality of Obligation

In relation to 'control', the higher the degree of control, the more likely it is that an employment relationship exists. This is important because employers will be liable for the majority of employment rights for those working for them as employees. This is an important consideration in relation to cluster staff employed by Health Boards who have much of their work controlled and supervised within the cluster environment.

The second consideration is the contractual arrangements - people are classed as employees if they work under a contract of employment and their employment rights include those listed in Box 18 above. Other factors to consider include various factors listed, including length of the worker's relationship with the employer, method of payments, etc.

Mutuality of obligation is the next key factor to examine, i.e. the obligation of the employer to provide work and of the worker to do it. Where mutuality is present, there is likely to be an employment relationship. This is influenced by various factors:

- How many engagements the worker performs
- Whether they are performed mainly for one person or for a number of different people
- Commitment as evidenced by sick pay, holiday arrangements, etc.
- Commitment as evidenced by guarantee of work and guarantee of service.

Framework for Lead Employment Model

It is important for cluster teams to understand the employment and governance responsibilities, and the potential risks, for the body 'hosting' a service on behalf of a cluster and therefore the need to have robust arrangements in place for managing their cluster staff.

Issues to be considered include the implications of vicarious liability, the need by professional staff to have personal indemnity and the line management arrangements for cluster staff. A framework to support the operational model is helpful in ensuring these issues are fully addressed, with clarity and transparency by employer and employee.

Cardiff and Vale University Health Board Protocol

The protocol has proved useful in addressing the complexities of cluster staff employment (see Appendix x), setting out the operational arrangements for managing cluster staff employed by the UHB. It aims to provide a mechanism for maintaining professional alignment with the relevant professional departments, with appropriate line management arrangements in place.

NWSSP Lead Employment Model for GP Specialty Training Registrars (GPTRs)

In 2015, NWSSP was established as the Lead Employer for all GPTRs in training in Wales. A framework was developed to support the Lead Employment Model, with supporting protocols, SLAs and contracts.

In partnership with the BMA, NWSSP drew up an overarching employment 'contract' to provide the technical employment architecture for the employment relationship. SLAs set out the detailed schedules of roles and accountabilities for both Lead and Host employers:

- As Lead employer, NWSSP is ultimately responsible for all employment related issues

- Health Boards, Trusts and GP training practices are the Host Employers who provide all training rotations for GPSTRs
- A separate SLA with Wales Deanery addresses all training related responsibilities and how these are discharged in relation to the Lead and Host relationships

The doctors remain 'employees' of the NHS for the duration of their employment whilst in training and therefore are covered for indemnity purposes by the provisions of the Welsh Risk Pool (WRP). A personal 'top up' indemnity, secured at a significantly discounted rate, is required for Good Samaritans Acts etc. while they are in GP practice.

The governance arrangements for the model are complex and not without risk to the Lead employer, in particular when the employment relationship breaks down. The SLAs make reference to 'acts or omissions' by the Lead or Host which would be used to determine where the ultimate fault would lie in such circumstances.

Cluster Lead Employment Model

Clusters urgently need a good, workable model for the employment of their staff, underpinned by sound legal and contractual arrangements that apply wherever staff work. There is potential for a similar model to that described in 10.2.2 to operate for cluster staff from other disciplines, with SLAs underpinning their contractual arrangements. There are various ways that this could operate:

- The relevant geographical Health Board for the cluster could act as the Lead and the cluster would in that instance be the Host Employer
- One cluster could be the Lead for a number of clusters which would be the Hosts, but this arrangement would not provide NHS WRP cover
- One body in Wales could act as the Lead for all cluster staff with a number of clusters acting as Hosts. (There is potential for NWSSP to be the Lead in such circumstances, if deemed acceptable by NWSSP, clusters and Health Boards).

NWSSP Legal Services are available to offer advice and guidance on cluster employment issues.