Change of control clause? Don’t panic!

Thomas Coates discusses what to do if your NHS contract has a ‘change of control’ clause

I’m often contacted by NHS dentists who have queries about the terms of their NHS contract. Very often the contract was signed a number of years ago and only now that the contract holder wants to sell their practice or incorporate do they have cause to examine the terms of the contract.

One of the most common examples we see is where a practice owner has previously incorporated their NHS contract into a limited company with the consent of the NHS. Whilst the approach taken by the NHS Area Teams to incorporation requests is nowadays uniformly uncooperative, this was not always the case and back in the days of the PCTs, there were many examples of certain PCTs being happy to permit incorporation without opposition. Those days sadly are now behind us.

If you did manage to incorporate your practice or if for any other reason you trade through a limited company, you will at that time have been issued with an NHS contract in the name of your limited company. Was that proposed new contract ever reviewed by a solicitor at the time you entered into it? If not then you may find that your NHS contract had a clause inserted called a “change of control” clause. The effect of a change of control clause is to restrict your ability to transfer the shares in your company to a third party on a sale.

These clauses were often slipped into the contracts without being brought to the attention of the contract holder and unless specialist advice was sought at the time, they can be a nasty surprise once discovered. They are normally discovered at the point when a contract holder is looking to sell the shares in their company and the solicitors have examined the NHS contract and found the clause.

If you do find yourself with an NHS contract that contains a change of control clause? Don’t panic!

The LCF Dental Team understands dentists; understands dental practices; understands the regulations.

“We talk your language. We are great listeners and really understand your situation.” says LCF Law partner, Thomas Coates.

The team advises dentists and dental practice owners throughout England and Wales on specialist legal issues including:

- Practice Sales and Purchases
- Dental Employment and HR Services
- CQC
- GDC and Regulatory Issues
- NHS Disputes

Contact Thomas Coates or Sarah Buxton today to find out how they can help you and to request a no obligation telephone consultation or practice visit.
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The main thing to remember is that the NHS Area Teams are under a duty to act reasonably in granting consent to a change of control. Sometimes this duty is explicitly stated in the contract with the words “such consent not to be unreasonably withheld”. Where those words are not present, in our opinion there is a strong argument that the duty is implicit anyway.

This view is reinforced by the recently issued (April 2014) NHS guidance document “Policy for Incorporation of Primary Dental Contracts” which gives area teams the exact wording for a change of control clause to be inserted to an NHS contract on an incorporation and states that consent to change of control should not be “unreasonably withheld, delayed or conditioned”.

On behalf of our clients, we have successfully obtained consent to change of control from a number of NHS Area Teams and in our experience, provided the proposed buyer of the shares is a registered dentist of good standing without previous disciplinary or conduct issues, capable of maintaining the existing standard of service provided at the practice, it would be unreasonable for the Area Team to withhold consent.

One further point to remember is that there is no express right in any of the regulations or guidance for an Area Team to impose alterations to the contract value when asked to provide consent to change of control under the NHS contract.

Whilst these are strong arguments we’ve used before to successfully procure consent to change of control, they are not always immediately accepted without the need for negotiation with Area Teams causing delays to a proposed practice sale.

Our advice is that if you have an NHS contract in the name of a limited company and you intend to sell your practice at some point in the future, have it reviewed by a firm of solicitors who are used to successfully dealing with these issues and obtaining consent. That way any change of control clause can be considered from the very outset.

In addition, instruct your Solicitor to open the dialogue with the Area Team as soon as you have found a buyer so that the issue does not cause delays further down the line.

About the author

Thomas Coates is a Partner and Head of the Dental Team at LCF Law. Thomas has years of experience in acting exclusively for dentists and dental practice owners throughout England and Wales particularly in respect of practice sales and purchases, practice business structures, incorporation and general commercial advice. Within the Dental Team he can also call on Solicitor led expertise in Dental Employment and HR, CQC issues, GDC regulatory matters, NHS disputes and Property. Call Thomas on 0113 2440876 or email tcoates@lcf.co.uk for a no cost/obligation consultation.