

This technical query paper was submitted to Revenue via the TALC Direct/Capital Taxes Sub-committee. The matter was discussed at the September 2022 and December 2022 TALC Direct/Capital Taxes Sub-committee meetings and the discussions are reflected in the Minutes.



Submission to Revenue regarding the status of employed GPs with GMS contracts

3 August 2022

1. Introduction

At a meeting of the TALC Direct/Capital Taxes Subcommittee on 23 June 2022, Revenue requested that in considering the status of GPs with GMS contracts in their own name, that consideration be given to the Tax and Duty Manual *Individuals described as 'locums' engaged in the fields of medicine, health care and pharmacy* (TDM Part 05-01-20).

TDM Part 05-01-20 notes that Revenue's approach to examining the employment status of locums will have regard to the Code of Practice for Determining Employment or Self-employment Status of Individuals and relevant case law on the subject of contract of service (employed) and contract for service (self-employed).

As set out in the Institute's submission to Revenue dated 31 May 2022, subsequent to a review carried out by Revenue in 2010, many GP practices restructured their businesses to ensure that locum GPs were engaged as employees. Consequently, the current position for many practices is that the entire GMS and private income of a GP practice is subject to tax under Schedule D in the hands of the partnership/sole trader irrespective of whether the income is generated by a partner as a self-employed GP or by a GP employed by the practice.

2. Typical clauses in the employment contract

We understand from practitioners that as part of their contract of employment with the GP practice, it is common practice for employed GPs to agree with their employer that they will enter into a GMS contract and assign the income generated under the GMS contract to the practice. As set out in our submission of 31 May, feedback we have received from our members indicates that the following are typical clauses that would appear in the employment contract:

- The employed GP is paid an annual salary based on [X] clinical sessions.
- The employed GP is entitled to [X%] of practice / partnership superannuation entitlements.
- The employed GP agrees that any GMS income attached to their GMS panel forms part of practice/partnership income.

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- The employed GP agrees that any PSWT allocation relating to GMS income is allocated to the practice / partnership.
- The employed GP agrees that any GMS benefits relating to annual leave, study leave and practice support subsidies form part of the practice/ partnership income and the employed GP's leave entitlements are captured in the main body of the employment contract.
- The employed GP is indemnified against expenses, liabilities and losses of the practice/ partnership.
- On exiting the practice, the employed GP agrees to use all best endeavours to ensure the smooth transfer of patients, including their GMS list, to a partner or another nominated GP in the practice/ partnership.
- On exiting the practice, the employed GP agrees not to work within a 10km radius of the practice within 2 years of exiting (ad-hoc locum work and out-of-hours exempt).

3. The importance of considering the 'job as a whole'

TDM Part 05-01-20 notes that the Code of Practice for Determining Employment or Self-employment Status of Individuals does not espouse a "one cap fits all" approach. It stresses that it is important that the "job as a whole" is looked at, and to ensure that workers are correctly classified in a way that matches the reality of the relationship.

In considering an employed GP's "job as a whole", regard must be had to their role as it relates to the provisions of services to both private and GMS patients. It is not possible to isolate the functions which are carried out in respect of GMS patients only in circumstances where the employed GP's role, in accordance with the terms of their contract of employment, consists of providing services to both GMS and private patients.

GPs do not generally split their time so that they see GMS patients during one session and private patients during another session. To do so would be impracticable from the perspective of the GP practice and would most likely lead to delays for patients in receiving a GP appointment. An employed GP may see several GMS patients and private patients during any one session. Indeed, it is likely that during a session, an employed GP would have consultations not only with GMS patients which are on their GMS list, but they would also see patients on the GMS lists of the partners in the practice. Similarly, it would be common for the other GPs in the practice to have consultations with patients that are on the employed GP's GMS list.

It is important to note that the GMS contract held by an employed GP typically arises directly as a result of them entering into the contract of employment with the GP practice, whereby it is agreed they will apply for a GMS contract for a number of mutually beneficial reasons; to avail of increased practice support subsidies, to avail of increased annual, sick and other leave entitlements, to avail of superannuation entitlements and to provide stability in the practice. It is also significant that on exiting

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the practice, the employed GP would usually be obliged under their contract of employment to use their best endeavours to ensure the smooth transfer of patients, including their GMS list, to a partner or another nominated GP in the practice/partnership.

Taking the above factors into consideration, we believe that it is clear that when considering whether an employed GP with GMS income is an employee of the GP practice, one must consider the entirety of their role which they have contracted to fulfil in accordance with their contract of employment with the GP practice.

4. Factors indicating the existence of an employment

The Code of Practice for Determining Employment or Self-employment Status of Individuals sets out factors which normally indicate that an individual is an employee. We have analysed these factors below based our understanding of the typical clauses contained in the employment contract of employed GPs (as set out in paragraph 2 of this submission):

- There is a clear mutuality of obligation in the relationship: the employed GP receives a fixed annual salary based on a set number of clinical sessions. Patient appointments are typically managed by the practice receptionist/secretary. The employed GP provides services to patients who have been allotted appointments during their clinical sessions. The patients can include both private patients and GMS patients.
- While the employed GP controls and has responsibility for the medical advice provided to patients, the employer has control over when and where the employed GP provides their services to patients.
- The employed GP is typically entitled to a fixed number of annual leave days and sick days. The employed GP annual/sick leave entitlements may vary from practice to practice and would usually be captured in their employment contract. Typically, the practice/partnership would cover or arrange locum cover for annual / sick leave of an employed GP. It would be usual that any GMS sickness benefit attached to the employed GPs GMS list would go to the practice/partnership towards locum cover.
- The employed GP cannot subcontract their work to another GP.
- The employed GP does not provide materials or equipment for the job other than some small tools of the trade which GPs would typically possess (for example, stethoscope, otoscope etc.).
- The employed GP does not bear any financial risk for the GP practice. They are indemnified against expenses, liabilities and losses of the practice/partnership.
- As they receive a fixed salary, the employed GP does not have any opportunity to profit from the sound management of the business.
- PAYE is operated on the employed GP's salary which is a fixed amount specified in the contract of employment. Under their contract the Employed

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GP agree that any GMS income attached to their GMS panel forms part of practice/partnership income.

In our view, it is clear from these factors that the role of employed GPs is correctly categorised as employees. The clear commercial reality of the relationship between the employed GP and the GP practice is that of employee and employer.

The need for certainty regarding employment status

On a more general note, feedback from our members suggests that it can be quite difficult in certain circumstances to have certainty regarding the status of workers. In our view, consideration should be given to the introduction of a tool similar to the HMRC's Check Employment Status for Tax (CEST) tool. The CEST tool gives the taxpayer the HMRC's view of a worker's employment status, based on the information provided in response to a series of questions covering issues such as;

- the contract between the parties;
- the worker's responsibilities;
- who decides what work needs to be done;
- who decides when, where and how the work is done;
- how the worker will be paid; and
- if the engagement includes any corporate benefits or reimbursement for expenses.

HMRC will stand by all determinations given by the tool, as long as the information provided remains accurate.

While the questions included in the CEST tool would require modification in an Irish context, we firmly believe that the introduction of such a tool by Revenue could provide the certainty needed by both workers and businesses regarding the employment status of workers.