HARWOOD ANDREWS

MEDICAL AND ALLIED HEALTH PRACTICES

Resources and Judgments

PROGRESSIVE
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HEALTH INDUSTRY PACK

There are many challenges in the complex and highly regulated medical and allied health industry. As federal and state revenue authorities and regulators focus on this industry and arrangements that have been in place for many years, practitioners are facing a landscape of shifting sand and unforeseen risks.

Our medical and allied health clients are medical, dental, physiotherapy and other allied health clinics wanting to maximise their returns while minimising audit and employment related risks.

This pack highlights some of the legal changes in tax, corporate law and workplace relations and how they can impact your practice.

Medical, dental and allied health professional structures have and continue to be designed to engage professional staff that are labelled and treated as independent business operators known as "independent contractors".

However, is this a proper way to structure your practice? What risks are involved in doing this?

In many cases, people who are labelled as independent contracts are actually employees. The legal test as to whether a person performing work for your business as either an employee or contractor is not based on what you call them, but on an overall consideration of all of the circumstances of a relationship.

This is becoming a significant issue due to an increasing tendency by the Courts to find an employment relationship and a more aggressive approach from regulators including State Revenue Offices, Work Safe, Fair Work Ombudsman and the Australian Taxation Office.

This is particularly problematic for practices that continue to seek the economic outcome of a contractor relationship with professional staff, but practically operate as if professional staff are employees.

Changing risk profiles

The risks and penalties for incorrectly characterising an employee as an independent contractor are increasing. In addition, individual workers are becoming more and more aware of their rights and entitlements and are more willing to pursue legal claims.

Ultimately our view is that in light of all these developments, engaging professional staff as independent contractors will become increasingly risky for the practice itself, particularly where an 'independent contractor' may:

- provide services to the practice;
- owes personal obligations to the practice;
- perform work that is integral to your practice;
- work exclusively at the practice;
- works fixed days or hours as directed by the practice;
- be advertised as a representative of your practice;
- be assigned patients by your practice;
- be provided with training by your practice; or
- be required to follow policies and procedures of your practice;

Implications

If you have not been meeting your obligations, your practice, and subject to the nature of the obligations involved, the directors, managers and others involved in running your practice, may be required to backpay unpaid entitlements, as well as be subject to financial and non-financial penalties for non-compliance.

In the most recent chapter of the battle between the Victorian State Revenue Office and The Optical Superstore Pty Ltd, the Commissioner of State Revenue has claimed victory, with the Court of Appeal finding on 12 September 2019 that transfers of funds made to optometrists by Optical Superstore were subject to payroll tax under Victorian law.

You may also be exposed to unanticipated and costly claims by your workers, such as unfair dismissal claims if you terminate the engagement of someone who was wrongly characterised as an independent contractor.

Our experienced team prides itself on providing practical advice to assist our clients in the most compassionate way possible.

RECENT CASE STUDY - THIRD TIME UNLUCKY: OPTICAL SUPERSTORES HELD LIABLE FOR PAYROLL TAX ON PATIENT FEES TRANSFERRED TO OPTOMETRISTS UNDER OCCUPANCY AGREEMENTS

In the most recent chapter of the battle between the Victorian State Revenue Office and The Optical Superstore Pty Ltd, the Commissioner of State Revenue has claimed victory, with the Court of Appeal finding on 12 September 2019 that transfers of funds made to optometrists by Optical Superstore were subject to payroll tax under Victorian law.

In this case, Optical Superstore entered into arrangements with optometrists working in its stores, either directly or via the optometrists' companies or trusts, under which it was agreed that the optometrists' entities would occupy consulting rooms at Optical Superstore's premises, and perform eye tests for members of the public at the stores.

Under the terms of agreements between the parties, bulk billed Medicare fees and other fees charged by the optometrists to patients were collected by Optical Superstore, held on trust by it, and then partly reimbursed to the optometrists' entities, after deduction by Optical Superstore of occupancy fees. The "reimbursement amounts" actually received by the optometrists' entities were calculated by reference to hourly rates.

The battle started in the Victorian Civil and Administrative Tribunal, where Optical Superstore initially succeeded in challenging the SRO's assessment of payroll tax against it. In February 2018, VCAT held that that monies transferred to entities related to optometrists working in the stores were not "wages" within the extended definitions of this term under the Payroll Tax Act and therefore not subject to payroll tax, even though the agreements between Optical Superstore and the optometrists' entities were "relevant contracts" and Optical Superstore was deemed to be the employer of the optometrists for payroll tax purposes.

A second round victory also went to Optical Superstore in the Supreme Court, where Croft J agreed that as the funds received by Optical Superstore from patients were always held on trust for, and beneficially owned by, the optometrists' entities, transfers of those funds to the optometrists' entities were not "payments" for the purposes of the Payroll Tax Act.

In the most recent third round decision, this finding was overturned, with the Court of Appeal unanimously finding that a "payment" is made when monies beneficially owned by a beneficiary are provided to the beneficiary by a trustee.

As the funds transferred to the optometrists' entities were held to be payments made for or in relation to the performance of work by the optometrists in providing services to Optical Superstore and patients under "relevant contracts", the amounts transferred were taken to be "wages" under the Payroll Tax Act, with the effect that Optical Superstore was liable for payroll tax.

With the most recent finding in this case comes an increased warning for operators of medical and allied health practices, many of whom who have structured their affairs in a similar way to Optical Superstore, or through the engagement of practitioners as "independent contractors" in the belief that monies received by medical and allied health practitioners under these types of arrangements would not attract payroll tax.

Increased scrutiny by regulators in this space is one of many reasons for medical and allied health practices to pause, review and seek expert advice about past and future structuring arrangements, to make sure that arrangements being used for the engagement and payment of practitioners are compliant with laws as they are being applied today.

WHOSE EQUIPMENT & EXPENSES

When considering whether an allied health worker is an employee or a contractor, one factor to consider is in respect of the provision of tools, equipment and other assets required to undertake the work.

An employee generally performs work using tools and equipment supplied by, and at the cost of, their employer at their employer's place of business. Alternatively, an employee may provide most or all of the necessary equipment and then be reimbursed by the employer.

This latter arrangement will often also apply with respect to additional expenses incurred by the employee (where authorised), and reimbursement of a worker falls within the typical realm of an employer/employee relationship. Contrastingly, a true independent contractor will generally provide their own tools and equipment and not be reimbursed or provided an allowance for expenses incurred in providing the work or services.

While the supply or maintenance of tools and equipment is one factors which might help to show that an individual is in fact an independent contractor, this can be difficult to arrange in a medical or allied health context. This is due to the practical (and financial) limitations of requiring practitioners provide their own equipment which is necessary to their role and is often costly, sizeable, and required to be mounted as a fixture (think radiologists, for example).

Sometimes, arrangement might instead be made for practitioners to pay the practice for use of the practice's equipment and consumables. But is this appropriate for your situation? While this might be fine if the practitioner is properly characterised as an independent contractor (and could help you to show this is the case), requiring an employee to pay you for use of your equipment is likely unlawful, and exposes you to risk of fines.

It is important that your methods of engaging practitioners, and practical arrangements and contracts with them, appropriately balance and deal with a whole range of issues, including who provides and pays for necessary items such as consumables, stationary and medical equipment. We can assist in reviewing your practices methods of engagement and contracts and assessing your risk exposure.

FEE COLLECTION & REMUNERATION

The payment of fees and remuneration structure in place between the parties can lend significant weight to the assessment of whether someone you treat as a contractor is, in fact, a contractor (or rather an employee). An employee is generally paid for their time (i.e. set hours worked), amounting to an annual salary or wages. True contractors are typically paid to deliver a particular result, and are more commonly paid a fixed fee for units of work completed or services delivered, and are often paid pursuant to an invoicing system.

Commission arrangements, which have commonly been adopted by medical practices in the past as a basis for payment to "contractors" are now more commonly being considered by Courts to be a neutral factor in deciding whether a worker is really an employee or a contractor, as both employees and contractors might be paid a portion of the income derived by a business from their individual efforts.

Sometimes, a structure might instead be adopted where:

- the practitioner rents a room for a fixed price and/or acquires services from the practice;
- the practitioner pays the practice (for example, in return for administrative support);
- the practitioner bears the cost of equipment and consumables; and
- the practitioner sets their own prices and fees.

There is no "one size fits all" approach, but if your practice is paying "contractors" for their time or personal labour, it is worthwhile undertaking a risk assessment, to check your exposure to risk that they may be instead be found to be employees.

In the event that a purported contractor is found to be an employee by a court or other relevant body, significant adverse consequences, including tax consequences (discussed in "What are your tax obligations, and are you meeting them?") and financial penalties may arise.

SUPERANNUATION FOR CONTRACTORS

Determining whether an individual is an employee or contractor can leave you scratching your head. There is unfortunately little clarification in the context of superannuation entitlements and determining whether payments to a contractor are covered by the superannuation guarantee (SGC) regime further blurs the line between contractor and employee.

The SGC is administered under the Superannuation Guarantee (Administration) Act 1992 (SGAA). In addition to including all individuals who the common law characterises as an employee, through an assessment of all of the factors involved in the relationship, the definition of an "employee" in the SGAA is extended to include a person who works under a contract that is wholly or principally for their labour (contract for labour). This gives rise to the following questions: are my contractors, in fact, contractors? Or are they employees? Even if they are contractors, am I required to pay Superannuation?

When are contractors owed Superannuation?

The Tax Office Superannuation Guarantee Ruling SGR 2005/1 consider three factors to determine whether a person who engages a contractor must pay the SGC:

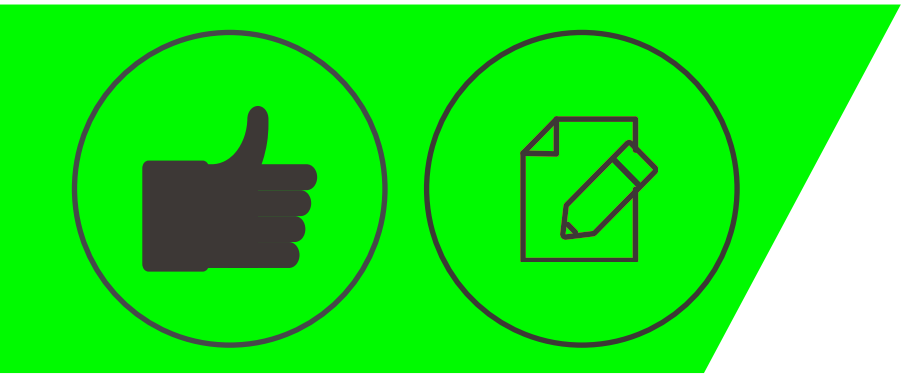
- is the individual remunerated for his or her personal labour and skills;
- is the individual required to perform the work personally, or do they have the ability to delegate; and
- is the individual paid to produce a result (or merely for their time or efforts)?

Depending on the answers to these questions, superannuation obligations may arise even where a person is otherwise a genuine independent contractor.

The allied health industry is at particular risk of this occurrence because of the nature of the work or services provided by health professionals. The SGC must be paid at least 4 times per year (in accordance with the quarterly due dates) if a minimum level of superannuation contributions, currently 9.5% of an employee's ordinary time earnings, are not made on behalf of all of your "employees". This means, your practice may be at significant risk of being held liable for backdated superannuation entitlements, even where, for example, a doctor, clinician or other professional was expressly hired under the label "contractor".

For example, in the recent case of Moffet v Dental Corporation Pty Ltd [2019] FCA 344, the Federal Court found that even though a dental practitioner was, in the particular circumstances, properly characterised at common law as an independent contractor, he was nevertheless an "employee" for the purpose of the SGAA.

CONTRACTOR ENTITLEMENT TO GOODWILL



Goodwill is the essence of any business, and can often be a business' most valuable (albeit intangible) asset. The value of goodwill lies in brand identity or recognition, customer networks, positive customer and employee relations, and broadly speaking, reputation.

But, how do you determine who, or what, will be entitled to the benefit of the goodwill in circumstances where it will substantially be established by individuals you want to engage as contractors? What difference does it make who owns the goodwill?

Who owns the goodwill in a practice?

While the work of an employee creates goodwill for the employer's business that can be protected by including reasonable post-employment restraints and other terms in employment contracts, true independent contractors should typically be entitled to the goodwill they generate, for their own business.

While it is still possible, in appropriate cases and by appropriate contractual terms, to reserve for yourself the benefit of goodwill generated by independent contractors, there is some inherent contradiction where a medical practice wants to engage practitioners as "independent contractors", as well as wanting to keep the benefit of the goodwill generated by those practitioners.

This issue particularly arises where practitioners or other allied health professionals are engaged as purported contractors, and will bring their own body of clients to the practice, or gain new clients while at the practice, who may be willing to follow the practitioner to another practice.

The impact of restraints

Leaving practitioners free to compete and take away "their" clients when they leave can help to exclude the existence of an employment relationship, but if the goodwill of the practice is fragmented between the practice and the practitioners, this has the potential to, for example, heavily reduce the value of the practice in the event of a sale.

If your intention is that the goodwill generated by a practitioner will be owned by the practice, and you want to restrain the practitioner from using that goodwill after the practitioner leaves, then you should be aware that this is one factor that will make it more probable that the practitioner will be considered to be an employee, and not a true independent contractor.

In weighing up whether a practitioner should be engaged by your practice as an employee or an independent contractor, and how best to protect your business assets, goodwill is only one of the many issues which needs to be considered.

CONTROLLING THE CONTRACTOR

The measure of control exercised by one party over the other is an important factor in determining the nature of the relationship between a purported contractor and principal, or employee and employer.

An employer usually has the right to control how, when and where an employee performs their role, and that role is delineated by, and completed at the request of, the employer. A true independent contractor generally works on their own initiative to deliver a result, and maintains a considerable discretion and flexibility in terms of how, when and where the work is carried out.

If your practice exercises a significant level of control over a purported contractor, or reserves the right to do so, then arguably the purported contractor is not a contractor at all, and is in fact functioning as an employee.

The type of control exercised by a medical practice which could suggest an employer/ employee relationship may include:

- preventing the individual from working at another clinic or elsewhere;
- preventing the individual from commercially competing with the practice;
- requiring the individual to work under supervision, report to management, or comply with your directions;
- requiring the individual to attend training and follow your techniques, methods or procedures;
- deciding which patients, the individual must see, or which tasks the individual must complete; or
- something as simple as requiring the individual to work set hours, at a set place of work.

For example, in the case of Fair Work Ombudsman v Metro Northern Enterprises Pty Ltd

Upon the termination of a relationship between the practice and practitioner, who will retain the patient records? Where will they be stored? Is the practitioner permitted to access the records, or make a copy? The answer to these questions depends on whether the practitioner is, or was, an employee or contractor, and the agreements under which the individual in question was engaged. Even more confusingly, answers to these questions might also influence whether or not the practitioner was really your employee all along.

As a general rule, an employee of a practice does not own patient (or business) records, and an independent contractor will own their patients' medical records, which will form part of the business undertaken by the contractor.

OWNERSHIP OF MEDICAL RECORDS

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Notwithstanding this, we are seeing Australian case law suggesting that even where a practitioner is contractually engaged by a practice to provide a service and patients are primarily attracted by the practice's advertising, the practitioner acquires no property in the medical records of those patients. Unfortunately, the outcome is always highly circumstantial, and in certain circumstances there are legal and regulatory requirements for certain parties to hold and own patient records.

The prudent approach is to expressly provide for property rights and clearly set out the circumstances in which the practitioner may access medical records (particularly in respect of post-employment/contract access, to the extent legally permissible).

Overall, there are significant commercial benefits to owning patient records, and the choice of which party does so must be balanced with other factors – the courts have clearly identified this issue as being a key determinative factor in whether a "contractor" is indeed carrying on an independent business, or in fact, a mischaracterised employee with the associated risks.

Contracts engaging either contractors or employees should be appropriately written to mitigate the risk of disputes arising over who owns what.

YOUR TAX OBLIGATIONS

The tax obligations on a practice in relation to an employment relationship are often perceived as being significantly more costly (and restrictive) compared to simply engaging a practitioner as an independent contractor. However tread carefully when making this decision, as getting your characterisation of a worker wrong can be even more costly and you may find yourself on the wrong side of the law.

Whether an individual is considered by law to be an employee or a contractor has significant tax implications. If the individual is an employee, you are clearly (amongst other things) required to:

- withhold tax (PAYG withholding) and report the amount withheld to the ATO;
- pay superannuation; and
- include that employee in payroll tax calculations; and
- report and pay fringe benefits tax (if applicable).

These obligations do not typically apply to a true independent contractor relationship, however recent approaches of State and Federal Taxation authorities has been to seek to extend the reach of liability for employers to find that many individuals engaged as contractors may in fact trigger a liability under one or all of the items above.

Where a practice has incorrectly categorised an employee as a contractor, it is potentially left with a significant taxation obligation, and this will apply for the entire period of engagement of the worker, not just from when an employment relationship is alleged.

ARE YOU COVERED FOR WORKERS COMPENSATION?

Workers in the allied health industry, such as nurses, doctors and other professionals may find themselves exposed to many different risks and hazards on a day-to-day basis, including lifting and moving patients and equipment; work-related stress; slips, trips and falls; exposure to infectious diseases and occupational violence.

As an employer, or person in control of a workplace, the operator of a medical practice in Victoria must generally comply with a series of duties and responsibilities relating to health and safety which differ slightly in respect of employees and contractors, including:

- taking reasonable care (including through the implementation of appropriate policies and procedure) to minimise risks to health and safety to employees in the workplace;
- ensuring individuals other than employees are not exposed to risks to their health and safety by the operation of the practice's business undertaking;
- providing employees with the necessary information, instruction, training and supervision to undertake their roles safely; and
- complying with reporting obligations, such as reporting notifiable incidents to WorkSafe

Contractors and employee each have slightly different workplace rights and responsibilities in relation to occupational health and safety, but at the end of the day, what happens if an employee or contractor falls ill, or is injured at work?

Workers' compensation insurance is compulsory for all employers in Victoria who pay, or expect to pay, more than a threshold level of rateable remuneration each financial year. Insurance is mandatory, so that employees (and your practice) are protected against financial hardship as a result of workplace injuries and illnesses and so that employees can access return-to-work programs.

Independent contractors that employ their own staff may be required to have their own worker's compensation insurance policies, and the remuneration paid to a true independent contractor is typically not taken into account in calculating your "rateable remuneration" and associated insurance premiums.

However, individuals who are treated as independent contractors cannot take out workers compensation insurance to cover themselves, and it is not enough just to label someone an "independent contractor" to avoid having to account for them in your insurance cover, or to avoid liability to compensate them in the event they become ill, or are injured at work.

All individuals who the common law considers to be your employees, as well as some independent contractors (and sometimes, their employees) who are deemed to be your workers for the purpose of Victorian workers' compensation laws, will be entitled to seek compensation from you regardless of fault, if they are injured or fall ill in the course of working for your business. The remuneration paid to all employees, as well as those contractors, must by law be taken into account in calculating and paying your worker's compensation insurance premiums. Every time you engage a worker, especially an individual, you should be considering whether or not you need to treat them as an employee, including for workers' compensation purposes.

If you fail to register for workers' compensation insurance, or underestimate the remuneration your premiums must be based on, and one of your workers suffers an injury or illness at work, WorkSafe might still pay them compensation, but the costs of that compensation can be recovered from you, and you may also find yourself facing significant fines for failing to comply with your insurance obligations.

THE MEDICAL AND ALLIED HEALTH STRUCTURE RISK ASSESSMENT TOOL

Use the below as a tool to assess what you actually do, against what the Courts have said may contribute to the distinction between an employee and a contractor.

	COLUMN 1		COLUMN 2	
Goodwill and restraints				
Do or can Practitioners operate in other Clinics?	No		Yes	
Under whose name or brand is advertising for services?	The Clinic's		Practitioner's	
Are Practitioners subject to a restraint while engaged with the Clinic or if they choose to leave?	Yes		No	
Is the Practitioner advertised or presented as a representative of the Clinic?	Yes		No	
Delegation and control				
Can the Practitioner subcontract the Services he/she provides at the Clinic or employ others to perform them?	No		Yes	
Is the Practitioner assigned work by the Clinic that the Practitioner must accept?	Yes		No	
Is the Practitioner subject to supervision or control by the Clinic or its representatives?	Yes		No	
Who sets the hours of work for Practitioners?	The Clinic		The Practitioner	
Is the Practitioner trained in, and subject to, the policies and procedures of the Clinic?	Yes		No	
Patient records				
Who has rights to patient records (eg to remove)?	The Clinic		The Practitioner	
Fees and remuneration				
Who sets the price of a consultation?	The Clinic		The Practitioner	
Who charges the fees to patients?	The Clinic		The Practitioner	
Who initially receives the fees paid by patient's?	The Clinic		The Practitioner	
Equipment and expenses				
Who provides or bears the costs of equipment and consumables?	The Clinic		The Practitioner	
Risk and insurance				
Who bears the risk of advice and services and takes out insurance?	The Clinic		The Practitioner	

All column 1? Your arrangements have the characteristics of an employment relationship. If your Practitioners are engaged as contractors, you should conduct a review of your risk profile and remuneration arrangements.

All column 2? Your arrangements have the characteristics of an independent contractor relationship or an independent business.

A mix of both columns? Your arrangements have the characteristics of both employment and independent contractor relationships. If your Practitioners are engaged as contractors, you should conduct a review of your risk profile and you may have to amend the terms of the contractor agreement, change your practices and/or review your remuneration structure.

Harwood Andrews is a progressive legal firm providing positive solutions for our clients.

HARWOOD ANDREWS

PROGRESSIVE INNOVATIVE COLLABORATIVE

With offices in Geelong, Melbourne and Albury we are dedicated to building lasting relationships and providing innovative, expert services to our business, private and statutory clients.

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