



**AMA**

**GUIDELINES ON SERVICE  
CONTRACTS BETWEEN DOCTORS  
AND MEDICAL PRACTICE  
PRINCIPALS**

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# **GUIDELINES ON SERVICE CONTRACTS BETWEEN DOCTORS AND MEDICAL PRACTICE PRINCIPALS**

## **INTRODUCTION**

Many doctors are engaged on individual contracts in private medical practice, including part-time and locum arrangements. There are benefits for both the parties to employment or independent contracts in having their respective rights and obligations clearly understood and well documented. This enhances the working relationship and helps to prevent unnecessary disputes.

The complexity of the law and issues involved in employment and contracts are such that neither negotiating party may have adequate information to strike a reasonable deal that meets their obligations and protects their interests. This may be particularly so for young doctors, who may feel that they are negotiating from a disadvantageous position, leading at times to gaps between their expectations and reality. Many of the problems that arise could be avoided if parties to medical service contracts were aware of the key issues in drawing up contracts.

### ***Issues***

Some of the issues likely to arise in relation to medical service contracts include:

- whether a person is an employee or an independent contractor;
- amount and basis of payment eg. fixed salary/fee or percentage of billings or combination;
- access to non-fee for service income such as the immunisation service incentive payment;
- share and mix of patient load;
- obligations and payment for on-call and after hours service;
- arrangements for holidays and other time off;
- any agreed conditions for becoming a partner in the practice.

These guidelines seek to address issues for AMA members as employers and employees and as principals and contractors. The guidelines are designed around the principles of fairness, equity and good practice in contract relationships.

These guidelines do not go to detailed clauses, rates of remuneration or model contracts. That information may be accessed through your state or territory AMA office.

## **CONTRACT BASICS**

A contract is a legally binding agreement between two or more parties. Usually one party undertakes to supply defined goods/services, under certain conditions, to the other party, who undertakes to make certain payments/considerations in return.

A contract is generally assumed under law to be between competent parties of equal standing. Unless it can be proven that one party has been disadvantaged in the

signing of the contract, for example through duress, misrepresentation or withholding of key facts, a court will generally uphold the strict terms of a contract. Except where federal or state legislation imposes specific conditions, rights or obligations - such as the federal *Workplace Relations Act* and *Superannuation Guarantee (Administration) Act* - a contract stands alone. Any implied or understood contract terms which do not appear in the contract itself may be difficult to enforce. Therefore it is important for both parties to:

- use plain language to spell out requirements and obligations;
- include all significant items likely to arise during the term of the contract;
- enable variations or additions to be made by agreement;
- define how and when the contract can be terminated by either party;
- have a mechanism for addressing disputes and resolving them fairly;
- clarify what happens when the contract comes to the end of its term;
- seek professional advice where there is doubt.

### ***Checklist for Contracting Process***

There is a significant difference between an employee and an independent contractor, especially in the Australian context - this is addressed in the next section. Regardless of the type of contract, the following principles of good contracting apply:

1. Make sure the other party has the wherewithal to deliver on their side of the contract:
  - check the qualifications and experience of candidates if you are engaging someone, investigate financial standing and reputation of the business if you are a candidate.
2. Treat the contracting process as a dynamic process, with all terms of an original offer, not just the price or remuneration, subject to negotiation:
  - the contract may have been drafted by the other party's advisers to protect their interests, not yours, so read it carefully and make sure you understand the terms;
  - sometimes a standard contract form may be used, so add or change terms to make sure the contract covers your particular situation;
  - the best negotiating tool is information, so find out what you can about the supply of quality candidates, remuneration and conditions in comparable jobs, issues that your colleagues in similar situations may have had trouble with.
3. Insist on enough time to consider the contract and reach an informed decision:
  - pressure tactics are not helpful to either party.
4. Get an explanation for anything you do not understand in the contract:
  - if the words in the contract do not match the explanation, change the wording of the contract.
5. Avoid any provision which enables the other party to change - without your consent - the rules, policies and procedures you are required to follow.

6. Make all documents referred to in the contract a part of the contract:
  - as attachments or at least as a detailed reference to a readily accessible document.
7. Fill in all the blanks.
8. Evaluate whether the contract will further your professional or business goals, both short-term and long-term.

Above all, get any agreement or variation in writing. This is not an issue of trust, but one of common sense and sound business practice. As time passes, principals can change and so can the financial standing of a business and the environment in which it operates. If each party had a different understanding of a matter at the outset - which is always a possibility in oral agreements - then even a perfect recollection is not much use in confirming agreed arrangements and resolving disputes.

### **EMPLOYEE OR CONTRACTOR?**

Employees have a contract of employment or “of service” with their employer, while the supply of services to another party in any other way is a contract “for services”. The terms “employee” and “independent contractor” are used in these guidelines to distinguish between the two. This is not just fiddling with words. Remuneration, conditions and legal obligations differ markedly between employees and independent contractors, so it is important to clarify what the arrangement is.

Unfortunately, there is no common law definition of “employee” which holds good in every case. Courts will examine the terms of the total relationship between A and B when determining whether A is an employee or an independent contractor. The main thing the courts look at is the economic contribution each makes to the work being done:

- at one end of the scale, if A contributes only his/her labour, it is likely to be an employment contract;
- at the other end of the scale, if A and B are each contributing capital or other resources, each has a say in what work is done and how it is done and A is paid according to results achieved, then A is likely to be an independent contractor.

A particular arrangement can be anywhere on this scale, so it is sometimes difficult to determine whether a person is an employee or an independent contractor.

### ***Employees***

An employee has obligations under common law to serve the legitimate business interests and goals of the employer. This means there are limitations on employees - especially full time employees - engaging in similar work for another party whose interests may be seen to be in conflict or competition with the employer's.

Typically, employees use the employer's premises, equipment and other resources (apart from personal “tools of trade”) to get the work done. Employees may well

have independence in the application of their professional skills and judgement, but are otherwise subject to the employer's policies and directions on where, when and how the work is to be done. Employers carry vicarious liability for the actions of their employees (unless the employee has acted well outside the bounds of professional standards or employer policies), so an employee may choose not to take out professional indemnity insurance. The AMA recommends, however, that all doctors obtain professional indemnity insurance appropriate to the nature of medical practice they undertake.

Employees are usually paid a salary (though they may be paid on commission or billings) and the employer is obliged to deduct PAYE tax instalments and pay superannuation at a minimum prescribed percentage of salary into an approved fund for the employee. Employees are usually entitled to paid annual leave, sick leave and public holidays unless they are casual employees, in which case they receive a loading to compensate for the absence of those benefits. State and territory legislation also provides for employees to have access to long service leave after defined periods of employment. Employees are covered for work-caused injury or illness by the employer's workers' compensation insurance, which is compulsory under state and territory legislation. Whether or not they are covered by an award or enterprise agreement, employees have certain other entitlements prescribed by federal and state industrial legislation.

In many cases, especially where a person works full time for the one practice, they will clearly have the status of an employee. In other cases, where a person provides services to a number of practices on negotiated rates and conditions, the situation is not so clear. The person may be the part-time or casual employee of several employing practices or he/she may be an independent contractor.

### ***Independent Contractors***

Any contract with persons who use an incorporated company as the formal contracting party is clearly an independent contract. Only a natural person can be an employee. But independent contractors do not have to operate through incorporated companies. The essential feature of an independent contractor is that they are effectively running their own business, providing defined services to other parties on agreed terms and rates, which take account of the fact that they have business overheads and are not entitled to employee benefits such as paid leave.

Typically, independent contractors supply, or are capable of supplying, their own equipment and resources for getting the work done, even if a particular contract may allow or require them to undertake the work using the principal's premises, equipment or resources. They carry their own professional indemnity and public liability insurance and, because they are only paid for work done and have no entitlement to paid leave, are likely to have their own income protection insurance. For the same reasons, their charges will be considerably higher than an employee's base salary for comparable work.

A principal does not generally have to deduct tax instalments from payments to independent contractors, but simply pays the agreed contract rate for work done. With the work to be done and the results to be achieved spelt out in the contract, an independent contractor is (theoretically at least) free to determine how the work gets done and has the right to delegate part or all of the work to another qualified person or contractor.

A word of caution for independent contractors; the Australian Taxation Office may deem you to be an employee if they form the opinion that an independent contract is only a mechanism to avoid tax on employee earnings. The Australian Taxation Office is more likely to form this opinion if you work continuously, or exclusively, for one practice and contribute only your labour. Obtain legal advice on the contract arrangement as well as on the detailed terms of the contract if you are uncertain.

## TERMS AND CONDITIONS OF CONTRACTS

Whatever the arrangement – employment or independent contract – the detailed terms need to be negotiated and agreed *before* the person starts work.

In Australia there is a complex system of awards and certified agreements covering the employment of many people in all types of occupations and categories, including doctors in the public sector, but there are no awards covering employment of doctors in private medical practice. This means that individual contracts are used. Since, apart from a few items covered by legislation, terms and conditions of employment for doctors are not spelt out elsewhere, the individual contract should be comprehensive in covering the rights and obligations of both parties. The advantage is that such contracts can include matters which are not covered in awards or are difficult to address under the common law.

While an oral arrangement to provide services in return for an agreed consideration is still a contract, it is obviously difficult to interpret or enforce in the event of disagreement. Whether an employee or an independent contractor, it is recommended that a comprehensive written contract be drawn up and signed by the parties. Most disputes over doctor/doctor contracts are unlikely to have anything to do with medical competence. They are more likely to be caused by the expectations of one party not being met by the other party on issues such as working conditions, on-call responsibilities; patient load, pay increases and opportunity to buy into the practice. A good contract will avoid most of these problems and underpin a productive business relationship.

In addition to specifying the work to be done, the remuneration for it and the terms and conditions to apply, any contract should include provision to:

- review remuneration at regular intervals in multi-year contracts;
- vary the contract by written agreement between the parties;
- settle disputes by reference to an independent mediator or arbitrator who is empowered to settle the matter.

### ***Employment Contracts***

*Employment contracts* should include the following items:

- (a) parties to the contract;
- (b) specification of the work to be done (usually as an attachment);
- (c) duration of the contract (if not indefinite) and what happens when it comes to the end of its term;
- (d) rights and notice periods for termination of employment;
- (e) remuneration (not just salary, but bonuses, fringe benefits and packaging options such as vehicles, superannuation, share of practice incentive payments as well as loadings in lieu of paid leave);
- (f) basis for adjusting remuneration (regular review dates and what will be taken into account in deciding any increase);
- (g) specific employment conditions such as:

- ordinary hours of work;
  - payment for excess hours and on-call;
  - annual leave and leave loading;
  - public holidays;
  - sick leave/family leave;
  - other forms of leave;
  - additional remuneration in lieu of paid leave;
  - expenses incurred on business;
  - location of employment (and payment of costs if required to move);
- (h) compliance with specific policies of the employer (to be attached or referenced);
- (i) provision for variation of the contract by written agreement between the parties;
- (j) procedure for discussing and settling disputes, including reference to an agreed mediator who, in the absence of agreement, is empowered to settle the matter.

Other provisions which may be appropriate in particular employment contracts are:

- (a) opportunity and terms of buying into the practice;
- (b) professional development, including attendance at seminars and conferences;
- (c) professional indemnity;
- (d) ownership of intellectual property;
- (e) disclosure of confidential or other information the employer regards as valuable;
- (f) terms of access to patient records after cessation with the practice;
- (g) restrictive covenants.

#### Specification of work to be done

A general issue which has been found to cause problems in doctor/doctor employment relationships is the workload in terms of patient numbers and types, after hours work and on-call obligations. It is not uncommon for new (usually young) doctors in a practice to be burdened with workload and after hours obligations well above what they expected. For the benefit of both parties, make sure that the work obligations are explained clearly at interview. If workload is unpredictable or erratic, think about including an averaging provision in the contract or additional remuneration for periods of high load.

#### Buying into the practice

If the prospect of becoming a partner in the practice is offered, then indicate to the new doctor the time when a decision will be made and the likely dollar cost of becoming a partner. Problems have arisen where young doctors have gained the impression that they will be able to buy into the practice at nominal cost, only to find that there are substantial costs which they have not planned for.

If a buy-in is only a vague idea or possibility, then make that clear. If a commitment is made to consider or allow a buy-in at a certain time, then include a clause in the contract to that effect. Ideally, add an attachment which spells out the percentage of the practice the doctor will be able to buy, what that part ownership of the practice

entails in terms of business assets and liabilities, what the cost of purchase will be and how the payment can be made.

#### Access to patient records

Access to patient records after a doctor leaves the practice can become an issue where:

- the doctor is subsequently sued, or
- a patient wants to transfer to the same doctor in another practice.

Obviously this is a sensitive issue because there are connotations of patient poaching. Equally, it is reasonable for a doctor to have access to patient records for medical defence purposes and where a patient chooses to transfer to the doctor in another practice. There is value in having a clause on this subject in the employment contract, guaranteeing the former and, in the latter case, agreeing to pass on a copy of patient records when the patient authorises it in writing to the practice.

#### Restrictive covenants

The common law allows an employer to protect a legitimate proprietary interest. An employer can do so by restricting an employee's future employment opportunities provided the restriction is reasonable. That is, the covenant must protect some legitimate interest of the employer but the restriction must be no greater than is strictly necessary to protect that interest. However, a restrictive covenant cannot be used solely to discourage competition.

Any restrictions on the use of patient information or the establishment of a competing practice need to be carefully negotiated. Both parties to the arrangement should obtain legal advice concerning any restrictive covenants in employment contracts.

#### Legislation applicable to employees

Note that a range of federal and state/territory legislation applies to employers and employees in the following matters:

- unlawful discrimination in employment (on the grounds of race, ethnic origin, gender, marital status, pregnancy, age and other proscribed reasons);
- sexual harassment in the workplace;
- superannuation (requiring employers to pay a minimum percentage of an employee's salary into an approved fund or an equivalent amount to the Taxation Office);
- deduction and remittance of PAYE tax instalments, issue of group certificates, completion and lodgement of employee rebate declarations, Fringe Benefits Tax returns, etc;
- workers compensation (each state/territory has a compulsory insurance scheme);
- long service leave (most states/territories legislate for all employees);

- unlawful termination (for a proscribed reason);
- parental leave;
- annual leave (most states/territories have legislation).

### ***Independent Contractors***

*Independent contractors* need to include some clauses similar to employment contracts, but also take account of the fact that the contractor is running a business and is not eligible for employee benefits such as paid leave. Essential clauses include:

- (a) parties to the contract;
- (b) specification of the work to be done (usually as an attachment) including standards and time for completion;
- (c) facilities, equipment and resources to be supplied by the respective parties;
- (d) duration of the contract;
- (e) rights and notice periods for termination of the contract by either side;
- (f) contract fee:
  - this needs to reflect the fact that the contractor only gets paid for work done and is not generally entitled to a number of employee benefits such as paid public holidays, annual leave, sick leave, superannuation, employer cover for workers compensation and professional indemnity;
  - see further notes below on setting of contract fees;
- (g) other expenses (such as travel or vehicle use) incurred in providing the services but not covered in the contract fee;
- (h) public liability and professional indemnity insurance (the principal may want to demand evidence that insurance cover is held up to a defined level);
- (i) review dates and mechanism for increasing the fee in longer term contracts;
- (j) provision for variation of the contract by written agreement between the parties;
- (j) procedure for discussing and settling disputes, including reference to an agreed mediator who, in the absence of agreement, is empowered to settle the matter.

Depending on the particular situation, an independent contract may also include clauses on:

- (a) ownership of intellectual property;
- (b) disclosure of confidential or other information the principal regards as valuable;
- (c) compliance with specific policies of the employer (to be attached or referenced);
- (d) access to patient records after the contract ends;
- (e) restrictive covenants (see notes under *Employment contracts*).

### **Remuneration**

The remuneration for providing medical services as an independent contractor is a matter for negotiation in each case. This remuneration could take many forms, such as a percentage of billings or an hourly rate. However, compared to the salary paid to an employee for doing comparable work, it is reasonable for remuneration for independent contractors to be higher due to the following:

- non-payment for public holidays;
- no paid annual leave;
- no paid sick/family leave;
- need to obtain personal disability insurance for serious illness or injury;
- lack of employer superannuation contributions;
- need to obtain professional indemnity and public liability insurance;
- business infrastructure and equipment costs;
- marketing costs in gaining contracts.

The applicability of these components will vary from one contract to another, but they suggest that remuneration for independent contracts should be higher than equivalent salary rates. Note, as a further point of comparison that casual employees, who are entitled to employee benefits except paid leave, typically receive a 15 - 20% loading on the base hourly rate.

### **OTHER RESOURCES**

These guidelines are designed to serve the interests of both parties to medical service contracts. In an environment free of state or federal award regulation it is desirable for individual doctors to seek independent legal or accounting advice on their contracts.

Please contact your AMA Branch for further advice on employment and contract issues.