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By email

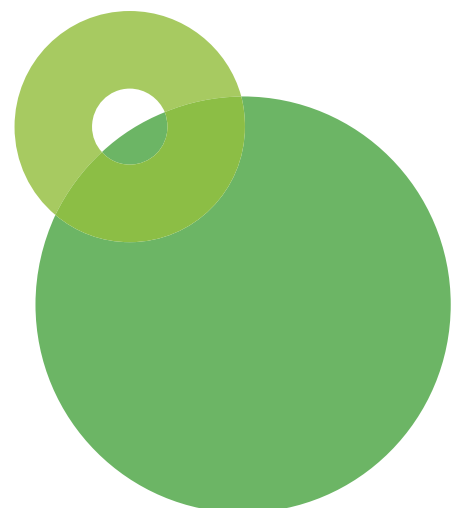
NHS Partners Network's Response to the Employment Status Consultation

Introduction

1. The NHS Partners Network (NHSPN) is the representative body for independent sector healthcare providers. Our members deliver a very diverse range of services to NHS and private patients including acute care, primary care, community care, clinical home healthcare, diagnostics and dentistry.
2. The Network was established in 2005 as a body to represent independent sector providers of NHS clinical services, and was incorporated into the broader NHS Confederation in June 2007. In 2018 the Network expanded its remit to cover all services delivered by our members including NHS and privately-funded care.
3. NHSPN data shows that approximately 23,000 clinicians are engaged in the independent healthcare sector.

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4. Like the government, NHSPN supports the Taylor Review's conclusion that there is a compelling case for greater clarity in employment status, particularly in relation to the realities of the modern labour market. NHSPN agrees that these issues are complex, and it is right to give them the careful consideration they need to ensure that any changes achieve the government's policy objective and do not lead to unintended consequences.
5. The consultation sets out a series of proposals designed to offer workers extra protections. There is a focus on potentially vulnerable workers in the so-called 'gig economy' where highly flexible working arrangements can result in unfair working conditions. While we support new measures to protect vulnerable workers it is important that existing arrangements that work well for both individuals and organisations are not inadvertently affected.



6. In the independent sector, highly skilled medical consultants often operate outside of traditional employment contracts under what are known as ‘practising privileges’ arrangements. This means that they are not directly employed by independent sector hospitals and clinics and, as such, do not have guaranteed working hours or other benefits typically associated with employment contracts. However, this reflects not the vulnerability of consultants but their seniority and expertise. Practising privileges enable consultants to see and treat patients in many different healthcare settings – enabling people, wherever they live, to have the benefit of access to highly skilled medical care. It is very important that these arrangements are not inadvertently threatened through efforts to protect workers more generally from exploitative arrangements.
7. NHS consultants that work in private practice make individual choices about how they engage with and are paid for private practice and have a high level of control over their work. Managing their private practice requires working flexibility which the current law enables.
8. The granting of practising privileges is a well-established process within independent healthcare whereby a medical practitioner is granted permission to work in an independent hospital or clinic, in independent private practice, or within the provision of community services. This requires strict checks in advance of granting practising privileges and always involves close monitoring of the consultant’s work within a hospital or clinic.
9. NHSPN promotes to its members the *Association of Independent Healthcare Organisations (AIHO) Key Principles on Practising Privileges* to ensure that best practice in this area is fully embedded across the membership. It should be noted that a small minority of independent hospitals and clinics do not engage consultants through practising privileges – some do directly employ consultants.
10. It is not intended that practising privileges should have the same interpretation as an employee contract under employment law (including for example with respect to payments for annual leave, sickness absence and maternity/ paternity leave). However, those with practising privileges are covered by relevant areas of compliance with regulations and guidance within healthcare as set out by the appropriate system regulator(s), for example in terms of patient safety, consent, record keeping, hand hygiene etc.
11. Should changes in law unintentionally impact individuals like consultants, this could reduce the number of highly qualified consultants practising in the independent sector and delivering services to both NHS and private patients.
12. In response to the proposed ‘more precise test’ for employment status set out in 6.6 of the consultation, NHPSN makes the following observations:
 - Length of time: This test would automatically result in employment status if an individual spends more than a specified period ‘working’ for a specific engager. This could clearly have an unintended adverse impact on practising privileges, the nature of which often involves working in certain locations for potentially lengthy periods of time.
 - Percentage of individual income: This test would imply employment status if an individual receives more than a specified percentage of their income from one engager. Again, as above, this test could quite easily have an unintended adverse impact on practising

privileges if an individual spends more than a specified period of their time working for an engager.

- Location of work: This test would indicate an employment relationship if work is required to be carried out in a certain location, for example the location of the business. This could clearly and easily have an adverse impact on practising privileges as these individuals will generally need to carry out their work in specified locations such as hospitals or clinics.

13. Not specifically referenced in the consultation, but of relevance here is the impact that reviewing employment status could have on the Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (TUPE). This is important as the definition of 'employee' for the purposes of TUPE is wider than that used in the Employment Rights Act and is more akin to the definition of a worker. This is relevant to the health sector and practising privileges, as TUPE is a frequent occurrence due to the way NHS contracts are tendered.
14. These consultation proposals could also have unintended adverse consequences on the future treatment of 'bank' staff within the health sector. The following example from an NHSPN member Alliance Medical, a significant provider of medical imaging services to the NHS and private sector captures this neatly.
15. Alliance Medical engage with around 60 'bank' radiographers who are effectively on zero hours contracts. Most of these staff hold full-time or part-time radiographer roles with other organisations. They either use their bank work with Alliance Medical to supplement their income levels or they have taken a definitive decision to pursue a flexible 'bank' career. This might be because it fits in with their lifestyles or because their short-term earnings potential is greater. Alliance Medical would wish to employ them all on permanent contracts, however, this is not something that the radiographers wish to happen.
16. The above illustrates how any legislative proposals must allow for the subtleties and nuances of particular labour markets and not act as a one size fits all solution as the position in the healthcare sector is often very different to other sectors.
17. NHSPN would urge the government to carefully consider the impact of any new proposals on consultants and other clinical professionals in the healthcare sector. While protecting the most vulnerable workers, it is important that flexible arrangements can continue where they work well for individuals, organisations and, in this case, patients. This includes ensuring that any new proposals are introduced over an appropriate period in order to ensure that sectors can make the right arrangements for effective implementation.
18. For more information about this response, please contact disa.young@nhsconfed.org.uk