MEETING LEGAL CHALLENGES FOR SOCIAL ENTERPRISES CREATED WITHIN PRIMARY HEALTH CARE

Abbie Rumbold

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BWB Bates Wells & Braithwaite
SOLICITORS

- Introduction to legal forms for social enterprise
- Types of legal form
- Pension regulations and their effect on choice of legal form

Definitions of Social Enterprise

- Guide to the Right to Request

"Social enterprises are businesses established to address a social or environmental need. They range from local and community based organisations to national, and even international, multi-million pound enterprises. They operate across an incredibly wide range of sectors from primary and community care to renewable energy, housing and retail."

Legal Forms

There is no “one size fits all” legal form for social enterprises

Why is legal form important?

- Risk
- Operational reasons
- Governance
- Finance
- NHS contracting routes
- NHS pensions
- Branding

Legal Forms for Social Enterprise

- Unincorporated Associations
- Partnerships and LLPs
- Industrial and Provident Societies (Community Benefit Societies and Co-operative Societies)
- Companies limited by shares and limited by guarantee
- Community Interest Companies

Partnerships and Limited Liability Partnerships

- Very common form for independent GP practices – approved under NHS Pension Regulations
- Two or more individuals or corporate bodies who carry on a lawful business with a view to profit
- Single tier structure
- LLP is a body corporate with limited liability – not approved
- Self employment status
- Save 12.5% Employees NICs
- LLP not eligible for NHS pension scheme

Industrial and Provident Societies - Types

- Community Benefit Societies
  - established for the benefit of the community
- Co-operative
  - "an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise"

Industrial and Provident Societies – General Features

- Financial Services Authority registered
- Incorporated
- Few registered and little law
- Two tier power structure
  - Members
  - Directors
- One member one vote
- Maximum £20,000 equity stake

Companies – Types

- Two sorts:
  - Companies limited by shares
  - Companies limited by guarantee
- Community Interest Companies

Companies – General Features

- Incorporated
- Two tier power structure
  - Members
  - Directors
- The difference between a share and a guarantee company
  - Dividends
  - Equity stake

Community Interest Companies

- Company limited by guarantee or by shares
- Asset lock
  - no transfers except at full value
  - cap on dividends
  - cap on performance related interest
- Cannot be a charity
- Directors may be paid

Company Structures

- Oligarchy
- Community Partnership
- Membership

Companies and NHS Pensions

- NHS pension scheme
  - Companies limited by shares with shares owned by the “right people”
- Special exception
  - Out of hours provider constituted as a company limited by guarantee
- Direction employer status
  - Not for profit company limited by guarantee or CIC limited by shares

Social Enterprise Lite

- LLP
- Charity Partner with 20% stake
- Avoids “hair shirt” of the CIC

  But not eligible for participation in NHS Pension

Can a social enterprise be a charity?

- Yes!
- A status not a form
- Established for exclusively charitable purposes
  - including the advancement of health
- Registration with the Charity Commission
- Tax reliefs
- Restriction on trading unless
  - Primary purpose trading: trade exercised in the course of the actual carrying out of a charitable purpose of the charity
  - Trading subsidiary
- Trustees cannot generally be paid

Pensions Regulations (1)

- The general rule
  - to obtain an NHS pension individuals must be employed by an organisation that has entered into or could enter into a GMS or PMS agreement i.e. partnership or company limited by shares with partners or shareholders in specific categories
- Therefore the full range of APMS providers are excluded
- Exceptions
  - out of hours provider which is a not for profit company limited by guarantee or other body corporate
  - direction employer status

Pension Regulations (2)
Direction Employer Status

- Charity
- CIC (limited by guarantee or shares)
  - provided the company is a “not for profit enterprise with any profit being reinvested in services or the wider community”
- IPS
- Differing benefits

Abbie Rumbold
Bates Wells & Braithwaite
2-6 Cannon Street
London EC4M 6YH
Tel: 020 7551 7777
Email: a.rumbold@bwbllp.com
www.bwbllp.com

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