

FINANCE

**Pat sheehan**

Horwath Bastow Charleton
Horwath House
The Red Church
Henry Street
Limerick

061 310 311

Taxation of Locum Pharmacists

The tax treatment of locums has, in recent times become a very topical issue. Some Revenue districts have issued letters to pharmacies advising them to operate PAYE/PRSI on locum payments. This has created much uncertainty in the industry for those engaging the services of locums, as well as for the locums themselves. Those engaging locums should, as a matter of urgency, review the nature of the relationship (i.e. is the locum in reality an employee or a self-employed contractor) and apply the appropriate tax treatment in order to avoid substantial tax exposures going forward.



In view of the position being applied by the Revenue, employers would also be advised to review previous payments to locums to consider what action (if any) may need to be taken in respect of such payments.

Employee v Self-Employed

A locum may be either a self-employed contractor or an employee. Self-employed individuals are required to register for income tax and file income tax returns with Revenue under the self assessment system.

By contrast, employees are subject to tax under the PAYE system. PAYE/PRSI must be deducted from their remuneration by their employer and paid over to Revenue. It is the employer's obligation to operate PAYE/PRSI on an employee's remuneration and failure to do so can give rise to a substantial exposure to tax, interest and penalties for the employer.

The key issue therefore in applying the correct tax treatment is for the employer to determine whether an individual who

is engaged as a locum is to be properly regarded as an employee or is self-employed. This issue has been the subject of numerous court cases over the years, which have set out a number of criteria to be considered in determining the status of the relationship. Also, the Code of Practice for Determining Employment of Self-Employment Status of Individuals sets out the guidelines which should be considered. The guidelines can be located at <http://www.revenue.ie/en/personal/payee-employee.html>. It is important to note that these are guidelines only and it is not necessary that all criteria be met in each case.

Factors which determine the employment status include:

Employed

- Under control of another person
- Employer sets hours
- Supplies labour only
- Not exposed to personal financial risk or opportunity to profit
- Receives a fixed hourly/weekly/monthly wage
- Extra pay or time off for overtime
- Entitled to sick pay
- Receives expense payments to cover subsistence and/or travel expenses
- Cannot subcontract the work
- Does not supply equipment/materials
- Employer provides insurance cover

Self-Employed

- Has control over what, when and how
- Sets own hours
- Provides own materials
- Provides own equipment and machinery
- Exposed to financial risk
- Costs and agrees a price for the job
- No entitlement to overtime, holidays etc
- Can subcontract work
- Has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks
- Provides own insurance
- Owns his or her own business
- Can work for others also

In addition, it is important to note that statements in contracts such as 'you are deemed to be an independent contractor' have little or no contractual validity and are of minimal value in concluding the status of the individual engaged.

Appeal Case

The principal reason why tax treatment of locums has become a very topical issue in recent times is due to a recent case that came before the Appeal Commissioner. In 2009, the Appeal Commissioner held in favour of the Revenue that MIDOC, a GP co-operative based in the Midlands must deduct PAYE/PRSI from locum doctors providing out-of-hours' services, despite the fact that they were engaged as self-employed contractors. The case is currently under appeal to the Courts, however the decision has had a significant impact on the taxation of locums across the medicine, health care and pharmacy sectors.

Revenue Approach

In December 2009, the Revenue Commissioners issued a Tax Briefing which set out their position as regards the status of individuals described as 'locums in the fields of medicine, healthcare and pharmacy'. Essentially, Revenue stated that it is irrelevant how the individual is described (i.e. as a locum or otherwise). Instead, they will examine cases having regard to the Code of Practice outlined above and having regard to relevant case law. Revenue does not propose a 'one cap fits all' approach. However, they have stated that, when considering the guidelines, the job as a whole must be examined, including working conditions and the reality of the relationship. In addition, they have stated the overriding consideration to be whether the individual does so 'as a person in business on their own account'.

The Tax Briefing further states that individuals who work only a few hours per week could, depending on the facts, be regarded, for example, as a part-time employee or a self-employed individual. The fact that the individual may not have continual work does not make the individual a self-employed contractor. The guidelines set out in the Code of Practice should be considered in such cases.

Importantly, Revenue clearly stated in the Tax Briefing that, in their experience, locum pharmacists are engaged as employees and the employer should operate PAYE/PRSI on any remuneration paid. This statement

clearly indicates Revenue's general stance on locum pharmacists. Nevertheless, each engagement should be considered in light of the guidelines set out in the Code of Practice. If the employer believes that a self-employed contract arrangement exists, it is strongly recommended that appropriate tax advice is requested before any payments are made to the locum. As referred to above, it is the employer who is liable to account for any PAYE/PRSI that should have been deducted and, therefore a successful Revenue challenge to a particular tax treatment could be very costly for the employer.

Conclusion

In conclusion, the tax treatment of locums is an issue the Revenue is paying close attention to. In considering whether a locum is a self-employed contractor or an employee, due consideration should be given to the guidelines set out in the Code of Practice. Appropriate tax advice should be requested in cases of doubt, particularly given Revenue's statement that in its experience locum pharmacists are engaged as employees. If a locum is to be treated as an employee then the employer must consider the practicalities of such in terms of deducting PAYE/PRSI from payments made and also the potential additional cost, i.e. employers' PRSI (at rates of up to 10.75% of gross salary). Also if locums are to be properly treated as employees then employers will have to have due regard to their entitlements under employment law.

Pat Sheehan is a Tax Partner in Horwath Bastow Charleton in Limerick and an Associate of the Irish Taxation Institute. Pat has fifteen years experience in tax consulting and specialises in the tax planning of property transactions, tax based property incentives, VAT, capital taxes and the buying or selling of businesses including tax due diligence. His experience covers a range of sectors including healthcare, hospitality, manufacturing, distribution, family-owned business, technology and professional service firms. If you would like to discuss any of the tax issues outlined above with Pat please contact him at psheehan@hbcl.ie or 061 310311. www.hbcl.ie