

## **BULLETIN 8**

### **MERGERS AND TAKEOVERS**

#### **INTRODUCTION**

A significant number of GP practices are merging or taking over failing practices in their locality. This is for a number of reasons, but mainly because of sustainability, forward planning, preserving core contracts, acquiring more staff and to enable them to have a more prominent position where commissioning is concerned by increasing their patient list size.

This works particularly well for single hander practitioners who are finding it difficult to sustain their practices and deliver under federation sub-contracting arrangements and, also, enables them to more easily take 24 hour retirement, or indeed to retire permanently without potentially having to bear redundancy costs of staff.

#### **DIFFERENT TYPES OF MERGER**

##### **1. Full Merger**

A full merger is where two or more practices having the same core contract merge partnerships and merge contracts. So, for example, 2 GMS practices would merge their contracts and come together as one partnership. Essentially, NHSE/CCG would have to be informed, contracts merged and varied to reflect the names of all partners and patient list size increases and all patients access one practice.

In all mergers, NHSE need to be aware of the proposal and in many cases ask that the practices produce a business case to reflect how the parties plan to merge and where they intend to operate from. Once approved, the parties then embark on the process below until the merger date when they complete the process formally.

##### **2. Part Merger**

This is still a merger, but because the parties hold different contracts (GMS and PMS), these cannot be merged. However the merger is really about the business partnership merging rather than the contracts and the parties apply for both contracts to be varied enabling all partners to figure on both contracts and form one partnership. The same issues apply as below and the parties can continue to service both contracts and cater for all patients. The IT systems may have to remain separate to cater for both types of contract, unless the PMS

contract reverts to GMS if considered financially neutral to do so, in which case it can merge into one contract, or in some cases remain separate and operate as two GMS contracts. There have been cases where practitioners for personal/business reasons choose not to merge contracts even though they are entitled to do so. This could be because the per capita payment differs slightly on each contract and merging the two contracts may entail a loss of income.

### **3. Takeover**

There is in law (where GPs are concerned), no such thing as a “takeover”. Because we are dealing with public contracts, commissioners are not entitled to simply allow one practice to take over another and pass the contract on to another contractor without going through a full public procurement process in accordance with EU procurement rules. To describe it as such is technically wrong or to refer to a contract as being terminated is also misleading.

In reality, one practice wishes to acquire the interests and contract of another practice and the latter practice partners either wish to retire/leave or wish to convert to becoming salaried GPs. Essentially this can be effected by way of a merger process, but, with a slight difference in that it is acknowledged and provided for in the documentation that certain partners will leave the partnership shortly thereafter. “Takeovers” can therefore occur, but not without going through a merger process first, then a stage where partners wishing to exit remain as “technical partners” until they are able to safely exit their partnership after giving the appropriate notice under the relevant regulations. This avoids the necessity of commissioners going through a procurement process and also mitigates any potential for challenge by other providers.

## **PROCESS**

### **Due Diligence**

Any business including a GP practice wishing to merge or takeover another should undertake a due diligence process. LMC Law provides a full due diligence checklist for those practices wishing to merge. Due diligence enables a practice to identify any issues, liabilities, problems of the other practice including but not limited to staff pay and terms, finances and potential claims. It gives both parties the opportunity to assess what they are taking on and to make appropriate changes to the agreements or request that some matters are dealt with before the merger takes place. It assists in ensuring that certain matters are specifically covered in any merger agreement.

### **Proposal to NHSE/CCG**

NHSE usually require a business case to be submitted by merging practices and they will need to know how the merger will be structured in terms of delivery to patients, premises and IT systems. They usually send out a checklist for practices to address and answer and

more often than not are supportive of the whole process. They will need to have an intended merger date communicated to them so that they may work towards producing appropriate documentation such as variation notices by that date and so that they know the practices will be merged and are to be treated as one partnership and one contractor on that date.

### **CQC Registration**

CQC must be informed as to the changes and a fresh application made for new registration setting out the new partners/contracts. This should be done in good time as the process takes some time to complete.

### **Merger document**

It is important to sign this and therefore important to agree the terms as soon as possible. The merger agreement does not create the merger – **it merely sets out the terms of the merger and protects the parties before, during and after the merger has occurred.** It is really important that this document is signed as soon as the parties are clear that they are working towards merging. This is a very robust document and caters for a number of issues such as preserving the status quo of the business during merging, protecting parties against liabilities not picked up in due diligence, setting out the obligations of parties to ensure the merger progresses and, providing a get out clause should parties change their minds.

### **Consultation with staff**

Please be aware that staff will have to be formally consulted and if a party has more than 10 employees the process is slightly more complicated in terms of how the employer consults so it is important to take advice. A merger or takeover means that the staff will have a new employer. Therefore there will be a TUPE transfer (Transfer of Undertakings [Protection of Employment] legislation will apply). Although terms and conditions of service are usually maintained, there will be instances where staff changes may have to be made and therefore advice should be taken as to how and when changes can be safely made to mitigate any risks of claims. Common questions arise around what to do if partners wish to remove staff, unify terms and conditions, make redundancies etc. Practices are strongly advised to take professional advice before making any changes or consulting with staff.

### **The new partnership**

The new partnership will need a new partnership agreement or any robust old one will need to be updated to reflect the new partnership and entity.

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