

Locum/GP Independent Contract

Explanatory notes

EXPLANATORY NOTES

The contract is intended to create the relationship of independent contractor, as distinct from employer/employee. Normally, an independent contractor will have greater discretion than an employee in determining how the services to be performed can best be carried out. This Independent Contract will be unsuitable if the locum/GP is to be engaged as an employee. The NZMA also has a locum employment agreement available for use by its members if the locum is to be an employee. More information on the two relationships can be found on the NZMA resource titled “Independent Contractor or Employee”. Please contact your solicitor if you are uncertain as to which agreement is most appropriate in your circumstances.

If the independent contractor is GST registered, then he/she will need to provide tax invoices. Because the locum under this contract is not intended to be an employee, no PAYE will be deducted from payments, nor will the industrial legislation (such as the Employment Relations Act 2000 (ERA), the Holidays Act 2003, the Parental Leave and Employment Protection Act 1987 etc), be applicable. To ensure that a genuine independent contractor relationship is established, however, the practice *must* comply not only with the letter of the contract but also with the spirit of the arrangement: the locum will need to be entrusted with a greater level of discretion, and freedom from workplace restrictions and controls, than would be customary with employees. This is a crucial consideration. Practices cannot expect to be relieved from the constraints of employment legislation if to all practical intents and purposes the locum is still treated as if he/she were a staff member.

Furthermore, the ERA has introduced a new right to Contractors. They can seek to be reclassified as an employee. Care therefore needs to be taken when entering into these contracts. The Court and the Authority have the power to decide that someone engaged as a Contractor is instead an employee. A Contractor may ask the Authority to decide the matter or alternatively a Union, labour inspector, or one or more of your Contractors can ask the Court for an order declaring that the Contractor named in the application are in reality employees. If someone applies on behalf of the Contractor it must be with the Contractor’s written consent. In determining “the real nature of the relationship” the Court or Authority will consider all relevant matters including the intention of the parties. If you are the person who engaged the Contractor, the ERA says you must be given the opportunity to be heard. Any statement describing the nature of the parties relationship, e.g. locum/GP, will not of itself be taken as determining the matter.

Interpretation – Locum/GP Contract – Independent Contractor

On Call Requirements

In completing the on call requirements section, reference should be made to any arrangements that are to apply while the locum/GP is on call, even though he/she is not working at the surgery.

Examples are the on call hours, how he/she is to be contacted, and whether he/she is to have access to the practice's car.

Method of Payment

Either clause 7 or clause 7A should be deleted, depending on the nature of the payment arrangements between the practice and the locum/GP. If the arrangements in clause 7 (as distinct from 7A) are retained, then care needs to be taken to avoid any ambiguity when specifying the rate or rates of fees to be listed in subclause (a) of the clause. For example, if the locum /GP is to be paid on a sessional basis, it will be inappropriate for a weekly rate to also be specified.

If the arrangements in clause 7A are to apply, then the practice will need to decide whether a guaranteed minimum payment is to be made. If so, the appropriate minimum payment should be inserted in para (1) of clause 7A(a). If not, then that paragraph should be deleted. It will then simply be the percentage rate in para (2) of clause 7A(a) that will apply.

Clause 7 and 8A are example clauses, alternative arrangements can be agreed on.

Locum/GP's Responsibilities

The list of responsibilities can be changed, added to, or reduced, to suit individual circumstances.

Restraint of Trade

This clause is designed to prevent unfair competition after the expiry of the contract. It reflects the fact that the locum/GP will have access to information about the patients of the practice, and that it would usually be unfair for the locum/GP to be able to turn that information to his/her personal gain by luring patients away from the practice in the event that he/she establishes a rival practice or joins another local practice.

Sometimes instead of a restraint of trade clause like that in the sample contract, the restraint will be based on a geographical limitation. For instance, it might be expressed to prevent the locum/GP from setting up a practice within a particular town, or within a defined radius from the employing practice. Such clauses are not always enforceable. Much depends on how reasonable they are in the particular circumstances. Because the circumstances of medical practices differ, any practice which prefers to opt for such a clause would be best advised to consult its own solicitor with a view to getting a "tailor made" clause for its contracts.

Vulnerable Children Act 2014 (Clause 16)

This clause allows employers to conduct a safety check, under the Vulnerable Children Act 2014, for Locums/GPs who will have contact with children. Refer the NZMA advisory on the Vulnerable Children Act 2014.

General

The clauses in the sample contract are not immutable. They can, and should, be changed to meet the particular needs of the practice. For example, the clauses which provide for monthly payments can easily be changed to refer to fortnightly payments, if that better suits the parties. However, it will be risky to make any changes which could lead to the document being construed as an employment contract; for example if a clause providing for "annual leave" were to be added, then that would go a considerable distance towards establishing employment.

Application to non-locum medical practitioners

Locums are generally regarded as temporary engagements. Whilst this contract may be suitable for use for non-locum medical practitioners, care must be taken in determining whether the medical practitioner is an independent contractor or an employee. An indefinite engagement of a medical practitioner can indicate an employer/employee arrangement.

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Need more help?

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