

How to Avoid Costly Mistakes and Disputes Around Agency Staffing

Published 14 April 2016

The 1 April has passed, and the expectation is now that all agency procurement by NHS Trusts should be via approved framework agreements unless "exceptional patient safety grounds" apply. Using employment agencies can be costly, so we look at the simple steps Trusts can take to avoid getting caught out when contracting with agencies to minimise the scope for associated disputes.

There are now centrally imposed price caps and there will shortly be maximum wage rates agencies can charge Trusts. If agencies are able to continue to supply staff on this basis, the new pricing constraints are likely to reduce the phenomenal NHS agency staffing bill, which reached £3.3 billion last year, more than the cost of that year's 22 million A&E admissions combined.

The new agency rules are designed both to limit agency expenditure and to ensure that agency staff will be no better off than NHS colleagues, putting an end to unscrupulous agencies charging three times what NHS clinical staff might earn for a normal shift.

However, whilst all Trusts, whether bound by the new rules on agency procurement or otherwise, are under increasing pressure to eliminate agency spend altogether, this is simply not realistic in the short to medium term, and so agency staff will therefore continue to be a vital resource to plug workforce gaps all over the NHS.

The price of permanence

Issues often arise when good agency workers (clinical or otherwise) are "poached" by the organisations they are placed with, and so need to make the transition to being a permanent, directly employed staff member.

Where contracts continue to exist outside of the new frameworks, this can certainly be a costly exercise, as many Trusts have found to their detriment. Many NHS Trusts sign up to agencies' own terms & conditions, which can contain onerous charging provisions that leave Trusts exposed to significant and unexpected financial liabilities. Against the background of reduced NHS spend there are an increasing number of agencies not hesitating to litigate with Trusts over transfer fees, placement fees, cancellation fees and the like. For instance, we have seen agencies claim introductory fees relating to placing contractors in different roles to those for which their CVs have been sent; introductory fees when there is a significant question mark over whether the agency even introduced a member of staff; transfer fees arising from supplying temporary workers; and cancellation fees for aborted recruitment exercises.

The lack of robust contractual arrangements between Trust and agency will inevitably make these sorts of claims by agencies difficult for Trusts to defend. Being able to push back strongly will be determined by the wording of the contracts and a timely review could save Trusts many thousands of pounds.

1 April and beyond...

A sensible first step in regaining an element of control over relationships with agencies would be to audit the agencies you use, the contracts you have in place with each and whether those are "on or off" the NHS Improvement approved framework. You might find a whole host of contractual arrangements have been entered into over the years and that now is a good time to rationalise those arrangements.

A practical second step is working out who within your organisation is signing up to agreements with agencies. Again, typically, it is likely to be a wide variety of people, some of whom will not have authority to do so. It would be prudent to ring-fence a small group of individuals, making it clear to both the wider organisation and the agencies themselves, that it is this group alone who has authority to contract with them.

Finally, make sure you do not have contracts in place that are skewed in favour of the agencies when it comes to the fees that can be charged. Critically assess what your Trust is, or is not, prepared to sign up to and then ensure this is reflected in your contractual agreements.

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