

Payment withheld

PCT deductions may not be lawful, says **Alexander Hall**.

For those National Health Service dentists who underperformed by more than four per cent in the year to March 31, the months of August to October normally herald the arrival of the dreaded claw-back invoice. Dentists who underperformed by four per cent or less are often just managing to catch up by performing the carry over and getting on cumulative target for the current year. If behind target, some dentists will already be worried about a possible mid-year review in October.

However, many who normally expect to have to pay a claw-back invoice in the autumn may be taken by surprise this year.

PCTs have been withholding payment under contracts and making deductions from monthly payments.

Rather than wait for the ratification of final figures to raise a claw-back invoice, PCTs under pressure to hunt for funds and savings have been withholding payment under contracts and making deductions from monthly payments instead.

Such deductions can have a serious impact on the cash-flow of a practice, especially if unplanned.

What right has a PCT to withhold payments otherwise owed to a provider?

The frameworks for PDS and GDS contracts are similar. In relation to

GDS contracts, PCTs often quote paragraph 11.7(b) and (c) of the *General Dental Services Statement of Financial Entitlements (SFE)*, a document issued by the former health secretary.

However, it would also appear that PCTs could rely on the standard GDS clause 239 which states that the obligation of PCTs to make payments under the contract promptly to the contractor.

But does the SFE give the PCT the over-arching right of set-off?

The issue is further complicated by the fact that the standard GDS contract contains provisions in relation to two specific circumstances in which the PCT does have the right to make deductions – after following and completing the mid-year review process (clauses 96 and 97) and as a ‘contract sanction’ in place of termination of the contract in circumstances where the right to terminate is available (clauses 341 and 342).

So which is correct? Can the PCT make deductions because the SFE says so? Or are such deductions restricted to certain circumstances?

There certainly appear to be contradictions between the wording of the SFE and the GDS contracts.



● PCTs are hunting for savings regardless of the impact on practices.

To understand the relationship between these provisions it is worth exploring their provenance, as the source of the provisions shed light on which may take precedence in the event of conflict. Remember, primary legislation (Acts of Parliament) always take precedence, then subordinate or secondary legislation such as regulations and directions apply.

Section 103 of the National Health Service Act 2006 (‘Act’) states that the health secretary ‘may’ make directions in relation to payments under a GDS contract. In doing so he must consult persons who are representative of those to whom payments are made before making such directions. Directions have been made – the SFE.

Section 104 of the Act states that a GDS contract ‘must’ contain



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Such provisions as may be prescribed in regulations. Regulations prescribing the mandatory terms required in GDS contracts were enacted – the National Health Service (General Dental Services Contracts) Regulations 2005.

Mandatory terms required by the 2005 Regulations include those clauses mentioned above in relation to the right to withhold monies following a mid-year review process and as a contract sanction in place of termination of the contract.

Furthermore, the 2005 Regulations state that the obligation of the PCT to make payment promptly is also a mandatory term – however, it is subject to any right of set-off the PCT may have as a result of the SFE.

What was the point of prescribing in secondary legislation (in the 2005 Regulations) certain circumstances when deductions could be lawfully made if the right of set-off existing in the SFE applied in any event?

It is arguable that in the specific circumstances mentioned in the 2005 Regulations (in relation to the mid-year review and contract sanctions) deductions may only be made following compliance with the processes and conditions described therein relating to the mid-year review process and contract sanctions options.

The matter may be subject to judicial scrutiny as the practice of withholding payments becomes more common.

It is also arguable that the 2005 Regulations, as secondary legislation required by the Act and subject to parliamentary scrutiny, should take precedence over the SFE if it contradicts the 2005 Regulations. This is because the SFE was not required by the Act and is subject to consultation rather than parliamentary scrutiny.

It is worth noting that whilst, when signing a GDS contract, a provider has only constructive or partial notice of the SFE as a result of the above mentioned clause 239 and because by the standard clause 261 the provider agrees to 'comply with all relevant legislation and have regard to all relevant guidance issued by the ... Secretary of State', the provider has actual notice of and explicitly agrees to the PCT's right to make deductions following a mid-year review and as a contract sanction.

This matter may be subject to judicial scrutiny as the practice of withholding payments and deductions from monthly payments becomes more common.

Having a basic knowledge of the relevant provisions of the GDS contract, the SFE and the source, history and reasons for such provisions assist in assessing whether such deductions are lawful in the circumstances. ■

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