

# Pharmacy Law - The Autumn Update

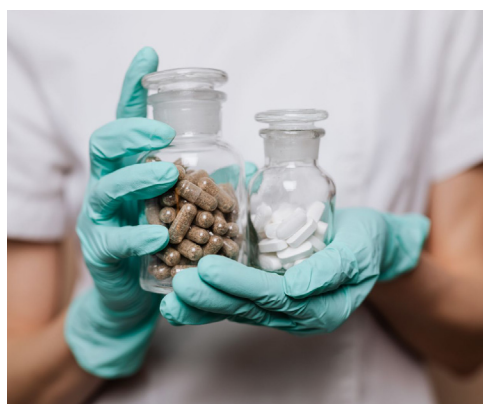
## Gordons Partnership

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The autumn legal update arrives on the back of news of another new health secretary, Therese Coffey, and funding arrangements which have been the subject of much comment. Ignoring the political turmoil, there have been sensible changes to regulations and some interesting cases...

### Tweaks to Terms of Service and other changes

The Terms of Service are being amended along with other tweaks to the 2013 NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations. The changes are in force from 1 October 2022. Although the changes are small they are important... They are as follows:



**Terms of Service** - There is a change to the notice period for changes in supplemental hours. Contractors are permitted to decrease supplementary hours with five weeks' notice to NHS England. No notice is now required for an increase in supplementary hours.

**Terms of Service** - There is now a requirement to undertake a workforce survey in an approved manner, but contractors no longer have to complete a patient satisfaction survey. NHSE have instead said that they will look at national patient engagement with pharmacy services.

**Market entry** - Updates of fitness to practise information about superintendents are to be provided for new applications up until they are included on a pharmaceutical list, or the application can no longer proceed.

**Market entry** - The required 45-day notice period is reduced to 30 days for the notification of consolidation (the merger provisions) of community pharmacies on to one site.

Some regulatory tidying up also took place with the removal of the requirement on NHS England to keep lists of pharmacies that provide EPS and a provision regarding zero reimbursement in some cases for coronavirus vaccines and antivirals.

### GPhC rules allow telephone and video link hearings

From 6 October 2022, GPhC fitness to practise rules allow hearings to take place remotely rather than in person in some circumstances. This was happening in any event as a pandemic arrangement, but, subject to the discretion of the chair, it will now be a permanent option.

### Changes for the future

Further changes in the way clinical services are delivered, for example, the increased use of pharmacy technicians, which were heralded in the funding arrangements, in some cases will require a change to legislation. DHSC have said that there will be public consultations on legislative changes in relation to the skill mix in pharmacies and, if approved by the Commission on Human Medicines, on allowing Pharmacy Technicians to make use of Patient Group Directions.

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### Interim Orders

No one wants to be in receipt of an application for an Interim Order but in my recent article in the Chemist and Druggist I wrote about the test to be applied and recent cases.

Here are some key pointers on how to handle such situations...

#### ***What should you do if you are at risk of receiving an Interim Order?***

- The email address used for service will be the one you have given to the GPhC for registration. The Notice of Interim Order will be served at short notice – normally around seven days. Make sure your contact details are up to date with the GPhC to prevent communications going astray. All is not lost though- I have successfully argued that reasonable notice runs from when the notice was effectively delivered and opened.
- Seek advice as soon as possible. Contact indemnity providers (or solicitors) as there will be much to prepare in very little time.
- Think about the effect of an Order on you personally and your business, and the positive elements of your work and personal history so that the committee can be told about them.
- Accept that this is not the day on which the alleged facts will be tested. The Interim Order hearing does not make findings of fact- that exercise will take place at the full hearing of the Fitness to Practise committee, if there is one.
- Be prepared that a decision may be made on the day of the hearing which may mean that you cannot work as a pharmacist on the next day.

### WhatsApp groups and discriminatory messages

Many pharmacies use WhatsApp groups or other phone-based discussion facilities for staff to communicate so pharmacists may be interested in a recent appeal by the Professional Standards Authority (PSA). The appeal was against the decision of the tribunal hearing a Fitness to Practise matter relating to a group of doctors.

The nine doctors involved were members of a WhatsApp group and, over three years, exchanged numerous messages that were offensive, racist, discriminatory, and disrespectful towards women, disabled people and people who are LGBTQ. As well as written messages, one doctor shared a category A pornographic image and others shared extreme pornographic images.

The tribunal, the MPTS, decided to take no action but the PSA appealed. By consent the High Court substituted a warning that will be in place on the medical register for two years. It is of note that there was no finding by the panel that the messages exchanged by this group of doctors discriminated against their patients and the doctors demonstrated considerable insight and remorse which would have been relevant to the sanction imposed.



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### Challenge to improvement notices

We have recently been instructed to appeal against the imposition of an improvement notice by the GPhC. The route for an appeal is, unusually for GPhC appeals, by way of complaint to the Magistrates Court. Although Magistrates Courts, an ancient institution dating back to 1285, are more usually associated with criminal matters, they retain some jurisdiction to deal with civil matters.

If considering an appeal, do not expect a speedy turn around. Although use of email has been embraced, we have found the response time ranges from two and half to six weeks. Usefully though it is possible for the Court to suspend the notice until it hears and determines the substantive appeal.

We are happy to discuss the options with you if you have premises issues.

### The GPhC Pre-Registration Exam



Problems with the June 2022 pre-registration exam were widely reported in the pharmacy press. The situation was so poor that Gisela Abbam, Chair of the GPhC issued a statement apologising, “We would like to sincerely apologise again to the candidates who experienced significant problems during their registration assessment sitting.”

We have been pleased to be able to assist a number of students who had troubling tales of exam issues and delighted when our intervention is successful. Due to the issues with the June 2022 exam experienced by many

candidates the GPhC have taken the decision to allow provisional registration to candidates who experienced a delay of 30 minutes or more or who successfully appeal their result on a procedural irregularity. Such candidates will still have to retake and pass the exam and their practice will be limited in the meantime.

It is important for candidates to be aware that, given the limited number of exam attempts available to them, there are rights to appeal. This is the case every year, not just because of the hopefully one-off problems experienced in June 2022. We suggest students should consider their fitness to sit exams prior to sitting and be aware that time limits are strict and familiarise themselves with the assessment regulations or seek advice without delay following any issues with an exam.

It does not appear that the GPhC’s provisional registration will address all issues that candidates have had as there will be a cohort, especially those running into the 8 year limit to be registered, who may need to further challenge the GPhC arrangements.

*(Update from Matthew Barlow)*

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### Break Clauses - Keeping your options open

Businesses are able to take up occupation of new space once more after the COVID-19 crisis, but tenants are likely to be cautious in agreeing the terms of a new lease. One option to consider is introducing a break clause into a new lease, exercisable part-way through a lease term. However, a landlord will impose various conditions on the exercise of a tenant's break to preserve their rights as far as possible.



#### ***What factors should a tenant consider?***

- 1)** The landlord may try to impose a rent penalty, a sum of money to be paid to the landlord if the tenant exercises the break. This is not usual in the current market and is generally not necessary.
- 2)** The tenant may be obliged to return the property to the landlord "with vacant possession". This is a technical term which means a landlord may not accept the termination of the lease if a few items of furniture are left behind.
- 3)** A condition that all sums owed to the landlord must be paid prior to exercise of the break should be avoided. If certain sums have not yet been finalised by the landlord, such as a service charge contribution, then a landlord may prevent a tenant terminating the lease by refusing to provide details of the sum required. Instead, it is best if a tenant is obliged to pay only the annual rent because the figures are already set out in the lease. Alternatively, the tenant may wish to amend the clause to restrict the payments to those that the landlord has demanded in writing not less than seven days before the break date. This will ensure that the tenant is aware of all sums being claimed and has sufficient time to pay and to satisfy the condition.
- 4)** A tenant should avoid accepting a condition to comply with all the tenant's covenants in the lease. Even a limitation to material compliance only (ignoring minor breaches) could help a landlord prevent a tenant exercising a break clause, alleging any one of several dozen obligations which may have been breached.

*(Update from Kathryn Johns)*



If you would like advice on any of the regulatory issues raised, please contact the author Susan Hunneyball by calling **01483 366064** or sending an email to [susan@gordonsols.co.uk](mailto:susan@gordonsols.co.uk).

To speak to our specialist Commercial Property solicitors call us on **01483 451 900** and ask for Hamish Ferguson, Adrian Jones or Kathryn Johns. Alternatively email - details on our website.

**This update should not be taken as advice on any particular circumstance and legal advice should be sought for a specific matter.**

**27 September 2022**