PCN Companies
A Short Legal Handbook
June 2021

Introduction

Mark Jarvis
Partner

This guide covers the relation between a company, its directors and shareholders in general terms, but also comments on matters specific to Primary Care Network Companies (**PCN Companies**).

For the purpose of this guide, a PCN company is one that has been set up to support a PCN. It is assumed a PCN company will be wholly owned by the member practices of the relevant PCN.

This guide also briefly touches on the main duties of directors under *The Companies Act 2006* (**the Act**). Please note, this is not an exhaustive guide and provides a general overview only. If directors have any doubts as to their duties, or how to act in a particular situation, legal advice should be sought.

Prior to forming a PCN company, please ensure that you take **specific legal and tax advice relevant to your particular circumstances and the aims and operation of your PCN.**

This guide does not consider duties owed by directors under laws and regulations outside of the Act (such as insolvency and health and safety legislation). Furthermore, this guide does not discuss matters unique to community interest companies (CICs).

Contents

Key Concepts

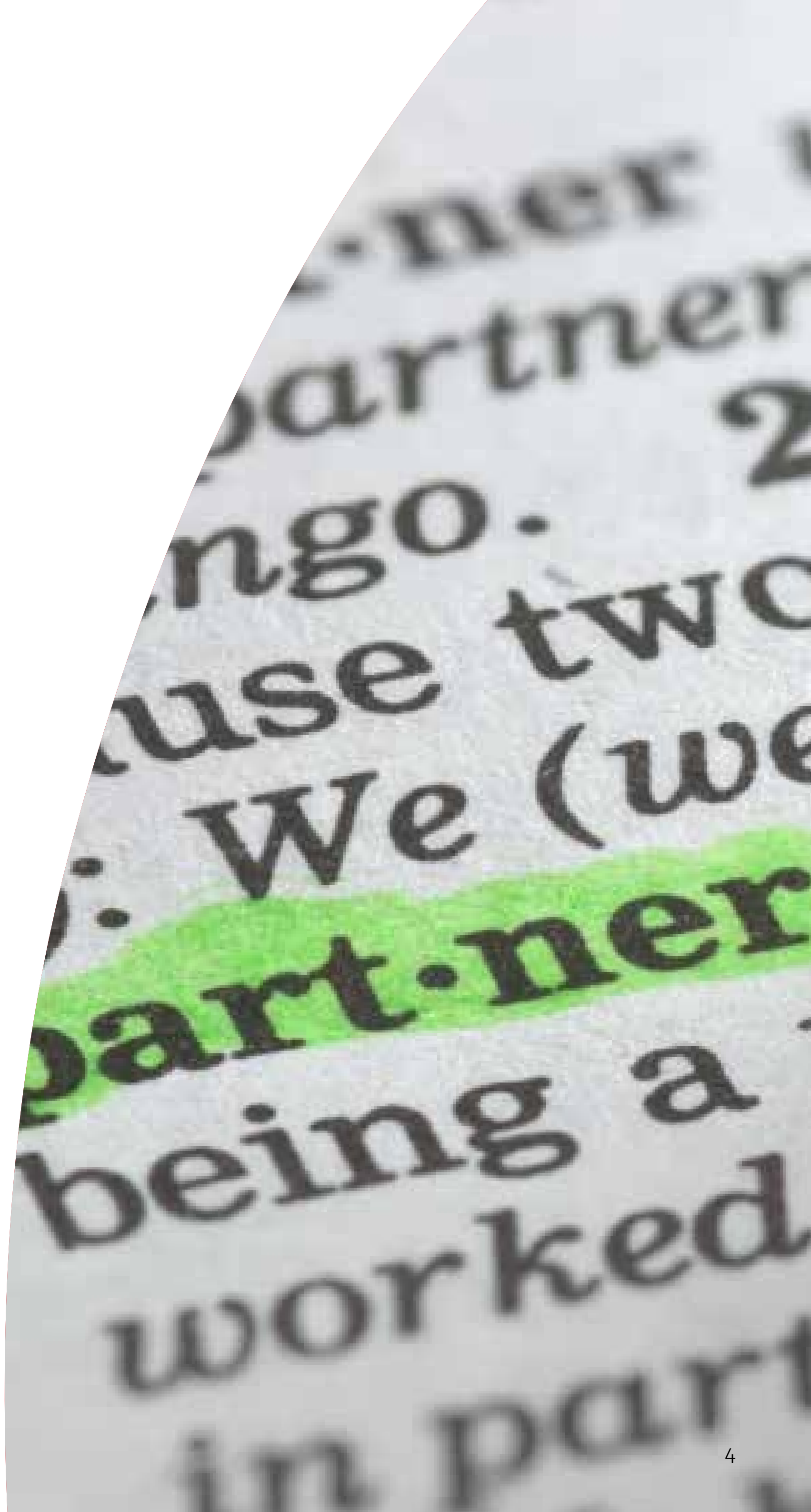
A **company is a separate legal entity distinct from its shareholders and directors**. This has important consequences for its shareholders as they have 'limited liability' for the debts of the company. Provided that they have paid the company in full for their shares, they have no further liability to contribute to the assets of the company should it experience difficulties paying its creditors. (If shareholders have provided loans to a PCN company, there is risk that the PCN company may not be able to pay these back if it runs into financial difficulties, ie it cannot pay its debts.)

Another key concept is the **separation of management and ownership**, further elaborated on below. In short, the directors are responsible for the management of the company and are separate from the shareholders, who own the company. Whilst there may in some cases be an overlap of directors and shareholders, they do have two separate roles and **these roles must be treated as separate.**

This is a very different model and structure to that of a traditional partnership, which will be more familiar to GPs. In a traditional partnership there is usually no separation of these roles and the managers and owners of the business will be the same persons.

Many **Network Agreements** provide for a tiered governance system and whilst it is possible to attempt to replicate these within the management of a PCN company, it is not possible to completely alter the roles of directors and shareholders. It is important to bear this in mind.

A **PCN is a collection of GP practices working collaboratively** on terms outlined in a Network Agreement and is essentially **a contractual joint venture**. A PCN company is a separate entity to the PCN and is likely to become a member of its relevant PCN. Existing Network Agreements should be reviewed and updated to reflect the involvement of PCN companies.



Governing Documents

A company's constitution is set out in its Articles of Association (**Articles**).

This document sets out the **rules and procedures** governing the running of the company.

Examples of **what is contained in the Articles** include:

- procedures for calling and holding meetings of directors and shareholders
- voting rights of shareholders
- restrictions on and procedures for transfer of shares

Ownership

A **company is owned by its shareholders**. A company issues shares in return for an investment in the capital of the company. The shares will generally confer certain rights and expectations on shareholders, such as:

- the right to vote at general meetings of the company
- an expectation of sharing in the profits made by the company (in the form of dividends) on the winding up of the company
- a share in any surplus assets after all debts of the company have been paid (including the return of the original share capital invested)

Whilst the day-to-day running of the company is a matter for directors, the Act provides that **certain important decisions must be taken by shareholders**. These are taken by the passing of **resolutions.**

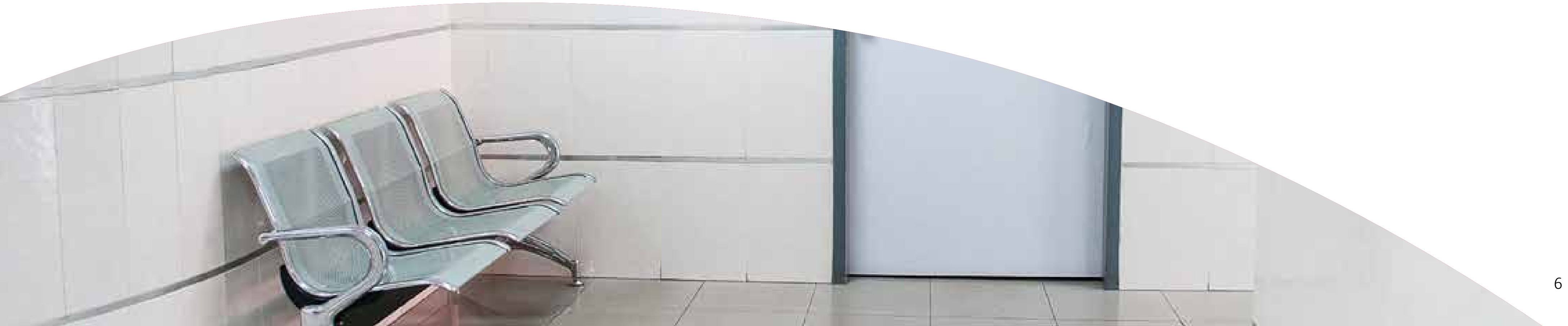
Resolutions are either **Ordinary** (which require majority approval), or **Special** (which require 75% approval). Please note this is a simplification of the technical position.

Examples of **decisions reserved to the shareholders** include:

- amending the Articles of Association of the company
- changing the name of the company
- allowing shares to be issued to new shareholders (save where directors have been given authority to do this previously)

The shareholders of the PCN company (ie the partners or nominee in PCN member practices) may also enter into a **shareholders' agreement**. This governs the relationship between the shareholders and the PCN company.

The Articles of the PCN company and the shareholders' agreement will outline how decisions are to be made by shareholders. These should be referred to as part of the decision making process. **Decisions must also be made in line with the overriding terms of the Act.**



Management

Directors are agents of the company to whom power is delegated to **manage the company's business on a day-to-day basis**. In the absence of allocation of power to shareholders, the directors have the authority to exercise all of the powers of the company. Directors normally make decisions by means of simple majority at board meetings. However, the company documentation can be amended to provide alternative thresholds.

Shareholders would usually not be involved in the day-to-day management of the company (in their capacity as shareholders).

Directors owe their company **seven duties**, which are outlined in the Act. By way of summary, these include the following duties:

- to act within their power
- to promote the success of the company
- to exercise independent judgement
- to exercise reasonable care, skill and diligence
- to avoid conflicts of interest
- not to accept benefits from third parties
- to declare interests in proposed transactions or arrangements

In general, a director's duties to the company will start when they became a director and cease when they resign. However, the Act provides that certain duties, such as the duty to avoid conflicts of interest and not to accept benefits from third parties, continue to apply even after a person ceases to be a director.

Please note the above is **only a brief summary**, and further explanation of these duties in detail would require an entire separate guide. If in doubt, **specific legal advice should be taken in relation to any particular situation.**

A PCN company may also want to consider who will form the board and whether external or non-GP directors are appointed in order to bring new or varied skill sets to the board.

Assets & Liabilities - Profits & Losses

Since a company is a **separate legal entity**, it is able to possess its own assets and is responsible for any liabilities and losses of its business. The profits of the business also belong to the company itself.

The directors may or may not decide to distribute some or all of these profits to shareholders in the form of dividends.

The exact mechanism for the distribution of dividends will be covered in the Articles and shareholders agreement.

Adding Members to a PCN Company

If a practice were to join an existing PCN, it would do so by **becoming a party to the Network Agreement**. However, a member will 'join' a PCN company by being issued/allotted shares in the company. By owning shares in the PCN company, the new member owns a part of the company and so is entitled to a **share in dividends** and would have the **right to vote on shareholder matters** (save where other bespoke arrangements are agreed).

The PCN company's Articles and shareholders' agreement will outline the process for allotting shares. If there is a shareholders' agreement, the new member would need to enter into a Deed of Adherence, which would mean that they are bound to the terms of the shareholders' agreement, as if they were an original party to the document.

The above is a **simplified summary** of the process and it is more complex that represented above. Depending on the structure of your PCN company, a new practice may also have the right to appoint a director to the board.

Removing Members from the PCN Company

A **Network Agreement** will outline when and how a member can be expelled from a PCN.

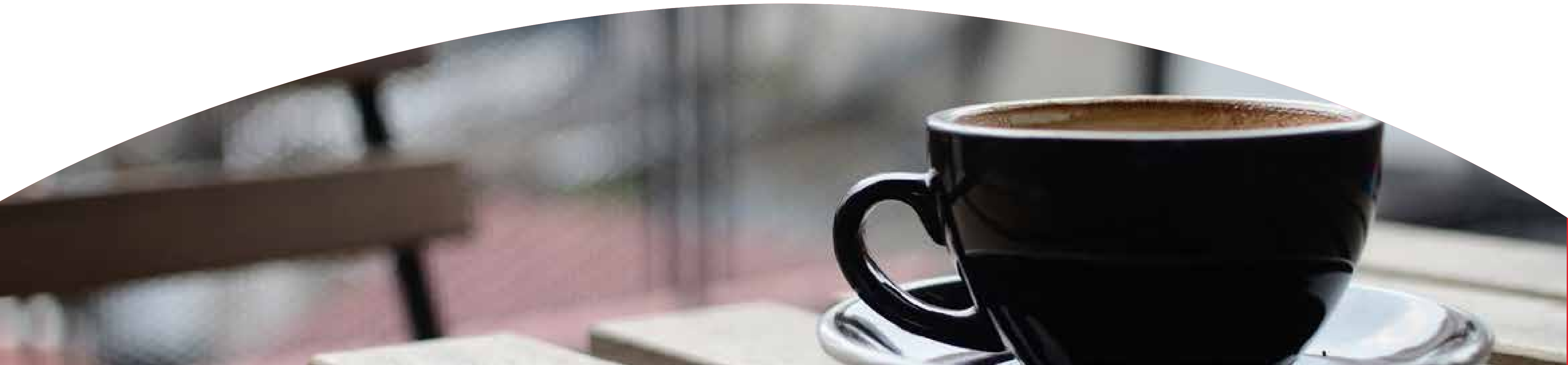
A member would usually be expelled/lose their interest in a PCN company by having their shares bought back or redeemed.

The **Articles and shareholders' agreement will outline how a member can be expelled** from the PCN company and in what circumstances.

The Care Quality Commission (CQC)

If a PCN company is carrying on a ‘**regulated activity**’, it may need to be **registered with the CQC** as a provider. This will depend on the function and role of the PCN company with respect to the PCN.

If in doubt about whether you need to register your PCN company with the CQC, ensure you seek appropriate guidance.



Provision of Staff and Services

Provision of Staff

In cases where the PCN company is employing staff on behalf of a PCN, it is important to **make sure employment contracts for those staff are drafted to permit this**, and that clear contracts exist between the PCN and the PCN company in relation to this arrangement (particularly in relation to the limitation of liability between the parties). **Specific tax advice should also be taken.**

Provision of Services

PCN companies may also be formed to **provide services to PCNs**, for example back office support or admin support. Down the line, we may see PCN companies holding clinical contracts on behalf of PCNs. In either case, **service contracts or subcontracts** should be entered into between relevant parties outlining how these services are to be provided. Again, specific tax advice should be taken.

Premises

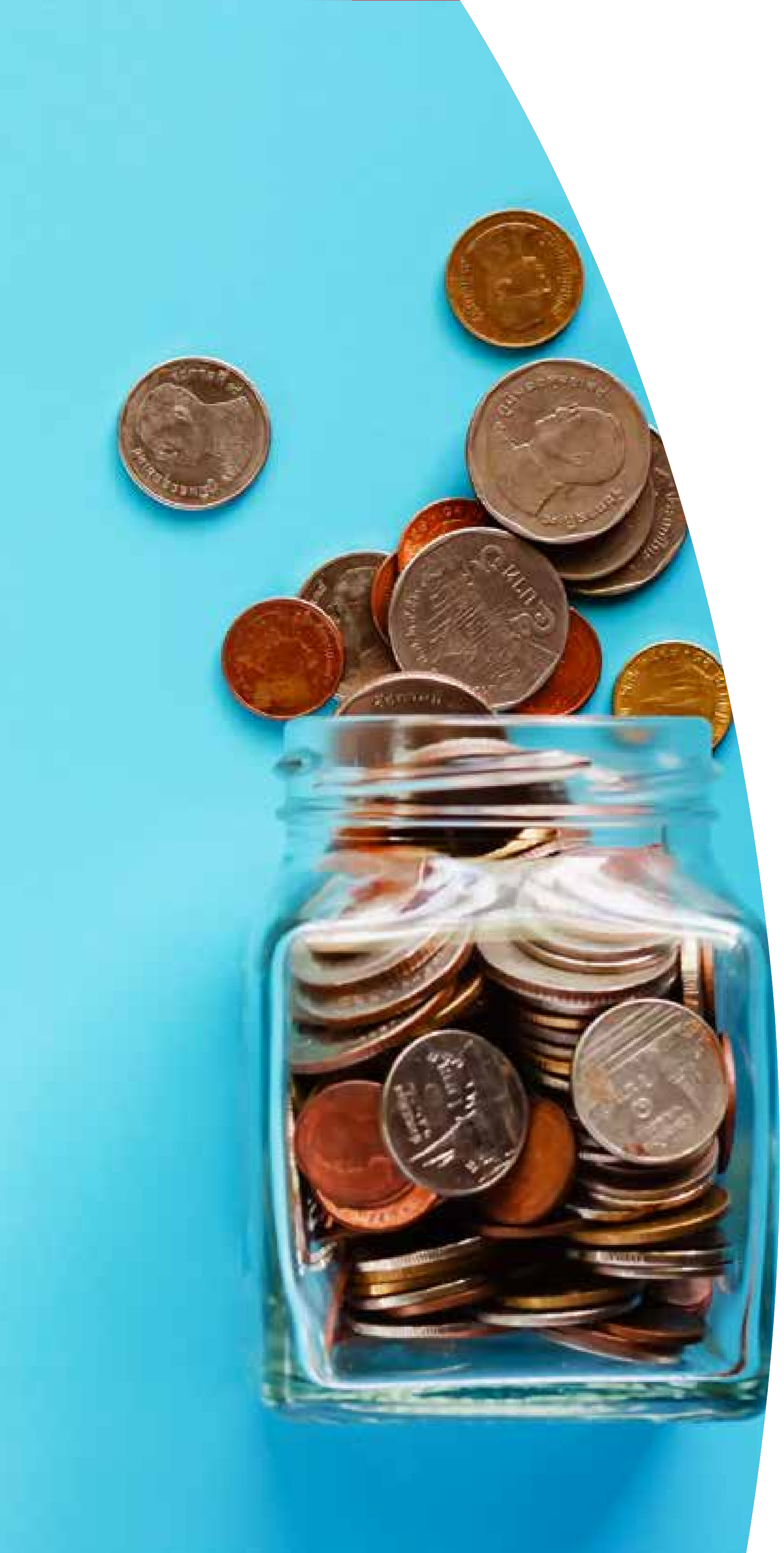
If the PCN company is looking to occupy premises, it must have a **legal right to do so** (bearing in mind a company has its own legal personality).

Both the PCN company and the practice providing space within their premises should seek legal advice as to whether a lease or licence to occupy is appropriate to document the arrangements.

The lease or licence to occupy should be in place prior to the PCN taking occupation.

The practices offering space in their premises should also consider:

- what financial impact (if any) the PCN's occupation will have on Notional Rent/Rent Reimbursement
- if the proposed occupation is even permitted under the terms of the practice's lease if they are in rented premises
- if the written consent to the occupation arrangements should be obtained from any bank who has security over the premises or any other third party such as a landlord



NHS Pension

In order to offer the NHS Pension to employed staff, **an organisation must become an Employing Authority (EA) and be issued an EA code.** In order to do this, the organisations must meet a number of various eligibility requirements. This is a very complex area of law and the below only provides a high level summary of the situation. **Financial and legal advice should always be obtained prior to offering the scheme.**

There are several ways in which a business can offer the NHS pension to staff it directly employs:

- **The PCN Company is a 'GMS/PMS provider'** It holds a GMS contract or PMS agreement. Please note that in order to hold such a contract the company must meet certain eligibly requirements. This is not likely to be an option for PCN companies at this time.

- **The 'Classic APMS Route'** The company holds an APMS contract and it is constituted so as to be eligible to enter into a GMS contract or PMS agreement for the provision of primary medical services. Unless and until commissioning strategies change, this route is less feasible to a PCN company at this time.

- **The 'Independent Provider Route' (IP Route)** Under this route, the company must hold a qualifying NHS contract and not already qualify for an existing NHS Pension Scheme. This route therefore would allow a company that is not constituted to have access via the 'Classic APMS Route', to become an employing authority. As above, it is not likely at this stage that a PCN company would qualify through this route. This route also requires that employees must be wholly or mainly working on the qualifying contract itself, and so this can be limiting.

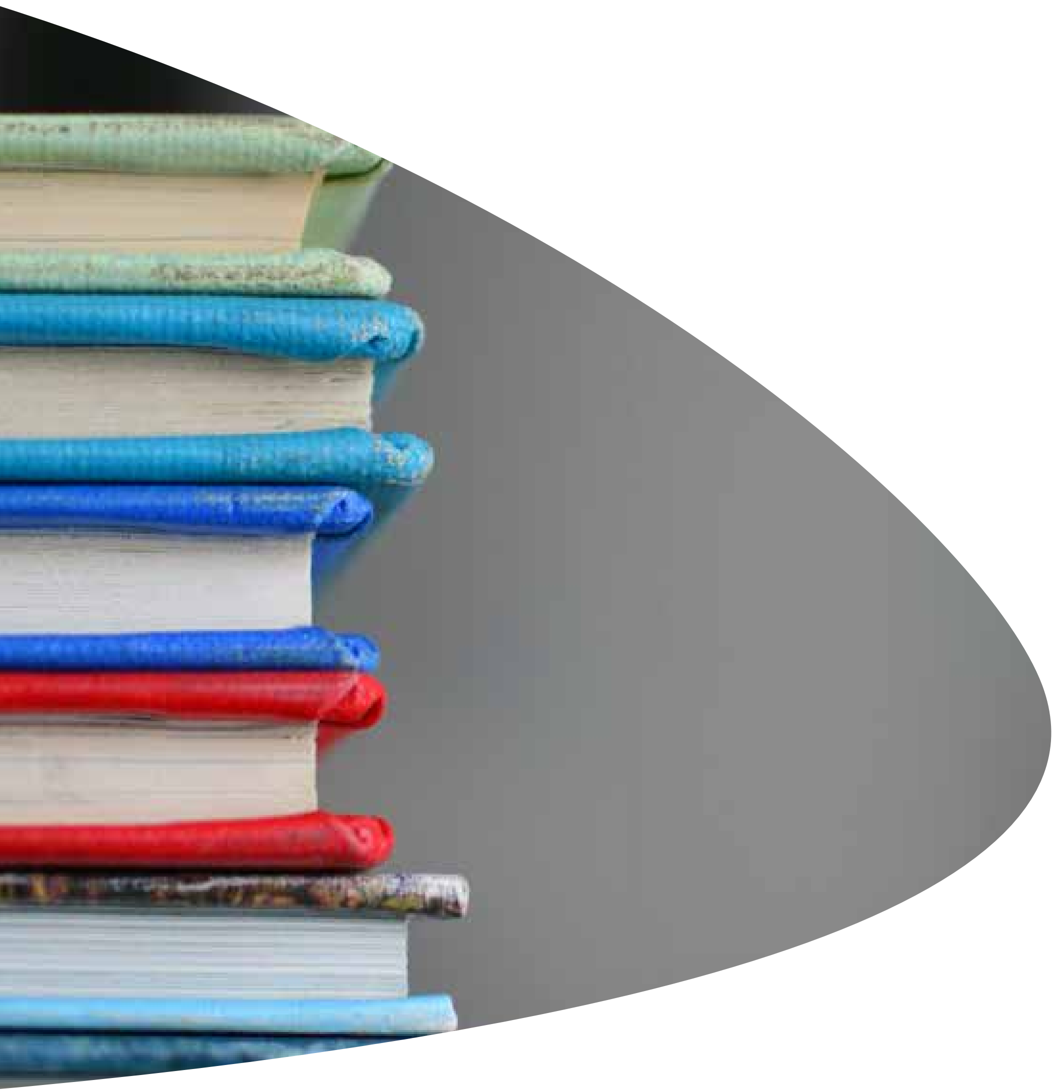
- The NHS Pension Regulations offers an alternative route for NHS pension success via making an application to the Secretary of State for 'Determination' employing authority status. The NHS BSA have confirmed in their October 2019 guidance that a PCN company can offer NHS pension scheme access to employees provided they are involved in directly assisting in the performance of GMS/PMS/APMS/PCN/ARRS.

Depending on the route taken, individuals will be able to pension their earnings or income through either the 'practitioner' or the 'officer' route. **Do get in touch if you would like more information.**

Tax

Ensure that **specific tax advice is taken from a specialist medical accountant, regarding the structure of a PCN company,** and in particular in relation to:

- the payment of dividends to shareholders
- directors remuneration
- the payment of fees or expense to the PCN company in relation to the provision of staff or services
- the transfer of monies between a PCN company, a PCN and its members (particularly in relation to managing nominee accounts)
- VAT cost sharing group exemptions



Statutory Books

Companies have an **obligation to maintain up to date statutory books**, which includes any register, index, accounting records, agreement, memorandum, minutes or other document required by the Act to be kept by a company and any register of its debenture holders

The key statutory books are the:

- register of members
- register of directors and secretaries
- register of interests in voting shares
- register of debenture holders
- register of charges - please note that charges created on or after 6 April 2013 are not required to be kept on the company's records, however, the requirement to keep a register of charges still applies in respect of charges created before 6 April 2013

The company secretary and directors are **equally responsible** for maintaining these records which must be kept at the registered office and made available for inspection by those entitled to view them.

Further Resources

The Running of a Company

You must ensure that your PCN company is run in accordance with its articles, and where decisions are made by shareholders, in accordance with any shareholders' agreements that are in place. **Ultimately all decisions made must be in accordance with the Act.**

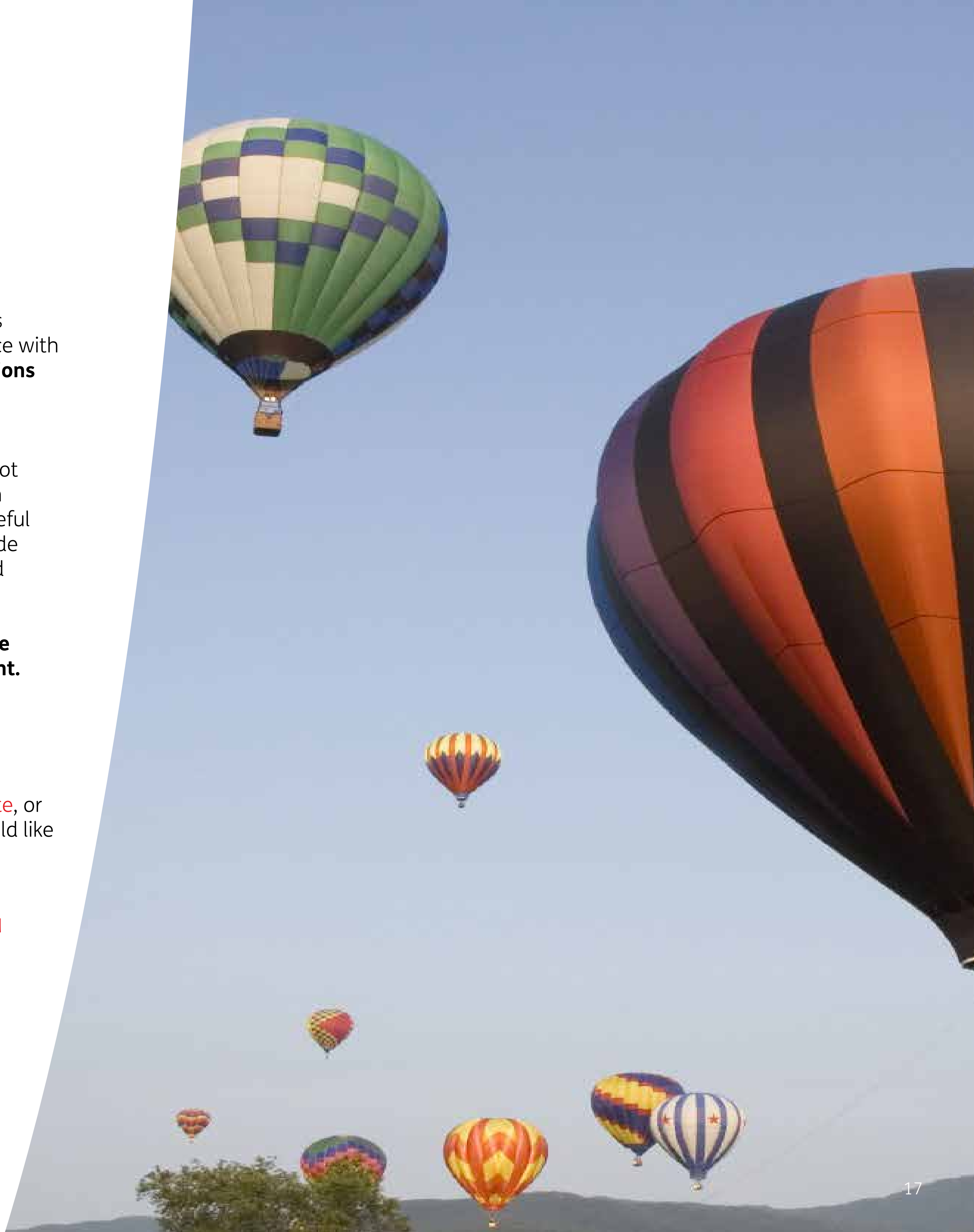
The Companies House website contains a number of useful guidance documents relating to the running of a limited company. These are not specific to PCN companies, however they cover a number of common company matters, including filing requirements, and this can be a useful resource for helping run a company. The website will be able to provide basic advice in relation to most company matters, however we would suggest seeking formal professional advice if in doubt.

Do bear in mind that **the above should be read with reference to the terms of a company's specific articles and shareholders' agreement.**

VWV Company Secretarial Services

VWV provides a company secretarial service. Please visit our website, or get in touch if you would like more information on this service or would like to know how we can assist you.

For specialist legal advice on PCN companies, or if you have further questions, please contact Mark Jarvis on 07469 850 489 or Adam Siwak on 07387 025 975.



About the Authors

Mark Jarvis
Partner - VWV

07469 850 489
mjarvis@vwv.co.uk

Mark is a specialist commercial and healthcare lawyer, based in VWV's London office. Mark advises on a range of commercial, corporate, procurement and general contracting areas for both NHS and private sector clients. He has a particular specialism in primary care contracting and commissioning.

With Primary Care Networks (PCNs) being high on the agenda for many GP practices, Mark can help you consider your options, from supporting you with the initial set-up and structure through to models and drafting up your agreements.

Mark is also part of our Coronavirus Response team and provides specialist support to NHS and private sector clients on the challenges posed by coronavirus.

Adam Siwak
Solicitor - VWV

07387 025 975
asiwak@vwv.co.uk

Adam is a solicitor in the Corporate team at VWV's London office.

Adam advises clients across a wide range of matters within the healthcare sector, including mergers and acquisitions both within the NHS and private sector, with a special emphasis on the acquisition and sale of dental practices.

Adam also advises on commercial and regulatory matters including registration with the Care Quality Commission, contracting with NHS England and 24 hour retirement.

Adam has a keen attention to detail and the ability to work under pressure to tight deadlines, whilst offering pragmatic solutions to problems.

Get in Touch Today

Mark Jarvis - Partner

07469 850489

mjarvis@vwv.co.uk

Adam Siwak - Solicitor

07387 025975

asiwak@vwv.co.uk

@VWVHealthcare

vwv.co.uk | London, Watford, Bristol & Birmingham