



QUERIES CONCERNING ASSIGNMENT AND NOVATION

When would an assignment or novation be required?

When a GPN wishes to transition contracts or leases to a Medicare Local, it may need to novate the contract or assign the lease. Novation and assignment are different mechanisms to transfer contracts (and they apply in different circumstances), as explained below.

Most commercial contracts can be transferred in this way, although the consent of a party (or one or more third parties) may be required. However, certain contracts such as employment contracts cannot simply be assigned or novated: please refer to [HR Advice](#) for more information.

What is the difference between an assignment and novation?

Ordinary contracts require a novation to transfer both rights and obligations. Special contracts such as leases and IP licences only require an assignment (although these can be novated as well). The key difference between assignment and novation is that an assignment allows for the transfer of contractual *rights* from the 'transferring party' (e.g. the GPN) to the 'receiving party' (e.g. the Medicare Local). The assignment cannot transfer the burden of any of the transferring party's *obligations* under that contract. However, for the special contracts such as leases and IP licences both rights and obligations can be assigned.

The key consequence of an assignment of an ordinary contract is that the other party to the contract (e.g. a service provider or other third party) - referred to here as the 'third party' - could still take action against the transferring party for a default under the contract that occurs *after* the assignment takes place. The assignment documents (e.g. a deed of assignment) would usually give the transferring party rights against the receiving party for any such claim that is brought against the transferring party, but this does not extinguish the transferring party's potential liability under the assigned contract after the time of assignment.

If the transferring party wishes to transfer both its rights *and* its obligations under the contract, so that it is released from any obligations to perform and the other party assumes those obligations, a novation is required unless the contract is a special contract such as those mentioned above.

Novation is the process whereby the receiving party is substituted for the transferring party. This process requires all three parties - namely, the transferring party, the receiving party, and the third party (e.g. funding partner) - to consent to the novation by entering into a deed of novation. As a consequence:

- the original contract (or alternatively, part of it) between the transferring party and the third party is terminated; and
- a new contract between the receiving party and the third party is formed.

In this context, the novation process would involve removing the GPN from an existing agreement with a third party and substituting the GPN with the Medicare Local. Following novation, a new contract would exist between the Medicare Local and the third party.

What type of document is used, and which parties need to be involved in the process?

An assignment is usually achieved by means of a 'deed of assignment'. Typically, the only parties to the deed would be the transferring party and the receiving party. However, the third party to the contract (or some other person) might need to give its express consent to the assignment occurring. The terms of the contract being assigned will usually clarify whether consent to assignment is required, and the rules surrounding such consent, including the circumstances in which consent can be withheld.

A 'deed of novation' is typically used to novate contracts. As noted above, at least three parties would usually sign the deed of novation, being the transferring party, the receiving party, and the third party to the contract being novated. There may be more than one such 'third party' to the contract, in which case *each* third party would typically need to be party to the deed of novation.

The issue of third party 'consent to novation' is fundamental, in that the third party would usually need to sign the deed of novation for novation to occur. Hence, if it does not consent to the novation, it would not agree to sign the deed of novation. There can be exceptions to this general rule, but we do not expect them to arise in the context of these Medicare Local transitions.

What provisions does a deed of novation usually contain?

A deed of novation will usually include clear rules about the risks and liabilities to be retained by the transferring party (e.g. the GPN), and the risks and liabilities to be assumed by the receiving party (e.g. Medicare Local).

A deed of novation will commonly include provisions along the following lines:

- *Novation* - this will be effected from a particular point in time (the 'Effective Time'), and the receiving party (e.g. the Medicare Local) replaces the transferring party (e.g. the GPN) under the agreement as if the receiving party is a party to the agreement, and any reference in the agreement to the transferring party should be read as a reference to the receiving party. The terms and conditions of the agreement would otherwise remain unchanged.
- *Assumption of rights and liabilities* - from the Effective Time, the receiving party (e.g. the Medicare Local) must comply with the agreement. From that time, the receiving party obtains the rights and assumes the obligations of the transferring party (e.g. the GPN) under the agreement. However, any rights or liabilities of the transferring party that accrued or arose *before* the Effective Time would usually remain with the transferring party.
- *Agreement to comply* - The receiving party (e.g. the Medicare Local) and the third party must comply with the agreement on the basis that the receiving party has replaced the transferring party (e.g. the GPN).
- *Release of the transferring party* - the transferring party (e.g. the GPN) is typically released from all obligations and liabilities under the agreement from the Effective Time, with the exception of any obligations and liabilities that arose *before* the Effective Time - for example, a breach of the contract by the transferring party prior to the Effective Time.

Occasionally, a transferring party may seek to be released from all past obligations - this is a matter for commercial negotiation.

Do the parties need to include provisions about assignment or novation in other agreements?

Possibly. If the GPN and Medicare Local are entering into a 'transfer agreement' (as discussed in our earlier Report [Transitioning Issues](#)), it is common practice to include provisions in a transfer agreement requiring the transferring party (e.g. the GPN) to assign or novate all key contracts to the receiving party (e.g. the Medicare Local).

A transfer agreement will usually include provisions outlining the process for the assignment or novation of contracts, including rules which will apply in respect of the contracts until the assignment or novation takes place.

Because third party consent may be required, the process of assigning or novating the contracts may be time-consuming and may not be completed for some time after the transfer agreement is signed. The transferring party and the receiving party need to be clear about the process that should be followed, and the rules that will apply between the time of the transfer and the assignment or novation of any contracts.

For example, a transfer agreement might include clauses along the following lines:

- The parties agree to transfer the contracts by assignment or novation.
- If third party consent is required, the transferring party (e.g. the GPN) must use its best endeavours to obtain that consent.
- Where third party consent is required:
 - The assignment or novation must be in a form reasonably acceptable to the transferring party. Each assignment or novation must provide that the transferring party is not liable to perform any obligation under the agreement which must be performed after the 'Effective Time'.
 - The transferring party and the receiving party (e.g. the Medicare Local) must cooperate with each other so far as is necessary to enable them to meet their obligations.
- Until the consent of the third party is obtained, or if the assignment or novation is unable to be obtained, the transferring party may be required to hold the contract on trust for the receiving party, and the receiving party must perform that contract on behalf of the transferring party at the receiving party's own expense. Similarly, the transferring party must pay all benefits arising from the contract to the receiving party. If such an arrangement is desired, it will be important to consider a number of other issues surrounding the trust arrangement, as it can give rise to complexity if it is not properly thought out or documented.

Is there a way to streamline the process?

Usually, the party to the agreement with the greatest bargaining power sets the terms of the novation or assignment (for example, the landlord, or the funding partner).



Government departments that provide funding to GPN's, including the Commonwealth Department of Health and Ageing, are likely to receive a large number of requests for novation of existing funding agreements to Medicare Locals. Given that a large number of GPNs are transitioning to Medicare Locals, a government department may wish to streamline the novation process, for example, by using a 'standard form' deed of novation for novating all such funding agreements.

While this is ultimately a decision for the government department in question, we understand that AGPN is discussing the possibility of securing this outcome with a number of funding partners.

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