

Guidance

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The Prohibition of referral fees in LASPO 56 60

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Status

This guidance is to help you understand your obligations and how to comply with them. We will have regard to it when exercising our regulatory functions.

Who is this guidance for?

This guidance is for all authorised firms and individuals regulated by the SRA (regulated persons).

Purpose of this guidance

From 1 April 2013, LASPO prohibits the payment or receipt of referral fees in claims for damages following personal injury or death ("personal injury claims").

This guidance provides an overview of the approach we will adopt in determining whether or not a regulated person has paid or received a referral fee contrary to section 56 of LASPO.

The information provided in this guidance is intended to help you to understand our approach in this area and should not be relied upon as legal advice. Regulated persons will need to satisfy themselves of compliance with the requirements of LASPO and may be required to demonstrate compliance to us.

Application of the ban

A regulated person will be in breach of LASPO if that person:

- a. refers 'prescribed legal business' to another person or is referred 'prescribed legal business' by another person; and
- b. pays or is paid for the referral. (See section 56(1))

The ban applies to referrals between regulated persons (for example between a solicitor and a claims management company (CMC) or insurer, or between two firms of solicitors) as well as between a regulated person and another person who is not a regulated person for the purposes of LASPO (for example, a trade union or a charity).

A regulated person will also be in breach of LASPO if, when providing legal services in the course of 'prescribed legal business', that person arranges for another person to provide services to the client and is paid for making that arrangement (Section 56(2)). For example, if a solicitor is acting for a client in respect of 'prescribed legal business' and receives a payment from an insurance company for arranging after the event insurance for the client, or from a medical agency for referring a client for a medical report, this will be a breach.

What is a regulated person?

A "regulated person" for the purpose of the ban is:

- any person authorised by the Law Society or Bar Council to carry on reserved activities under the Legal Services Act 2007;
- authorised persons under the Financial Services and Markets Act 2000 (such as CMCs or insurers); or
- any person specified in regulations made by the Treasury or any other person specified in regulations made by the Lord Chancellor.

What is prescribed legal business?

"Prescribed legal business" is defined as business which involves the provision of legal services to a client in respect of:

- a claim or potential claim for damages for personal injury or death;
- any other claim or potential claim for damages arising out of circumstances involving personal injury or death (ancillary claims); or
- other claims or business specified in regulations made by the Lord Chancellor (At the time of publishing this document no such regulations have been made).

LASPO therefore not only prohibits the payment and receipt of referral fees in personal injury cases, but also for other claims for damages arising from the same circumstances. For example, if a personal injury claim resulting from a road traffic accident is referred to a solicitor, together with a claim in relation to uninsured loss recovery resulting from the same accident, the solicitor could not pay a referral fee in relation to either claim. In other

words, it is not possible to claim that a referral fee is for a related claim rather than for the personal injury claim.

Definition of a client

For the purposes of section 56 (4) (a), "client" is defined as "the person who makes or would make the claim". Although not specifically stated in the Act, we believe this definition is intended to apply also to section 56(2) (arranging for another person to provide services to the client). We do not consider that the payment of a fee in connection with the referral of a defendant in a personal injury claim will be prohibited by LASPO. However, if the defendant decides to make a counter claim in the matter, the defendant will become a client for the purposes of LASPO and any referral fee paid could put you in breach of the ban. Firms that pay referral fees in respect of defendant personal injury matters will need to consider putting systems in place to ensure they do not inadvertently pay referral fees prohibited by LASPO.

What is a referral?

There is a referral of prescribed legal business if:

- a person provides information to another;
- it is information that a provider of legal services would need to make an offer to the client to provide relevant services; and
- the person providing the information is not the client.

Sections 56(5) and 56(6) of LASPO provide definitions of "relevant services" and "legal services".

We consider that the communication of a client's name and contact details to or by a regulated person would amount to a referral, as this information would enable the recipient to make an offer to the client to provide relevant services.

Example 1 : An insurance company has an agreement with a firm of solicitors for the referral of clients. The insurance company is contacted by the claimant who notifies the insurer of a claim involving personal injury. The client's details are provided to the firm, who write to the claimant/client offering their services. The firm pays a fee for each email sent from the website.

We would regard this as a referral because the insurer has passed to the firm information which will enable the firm to offer to act for the claimant.

Example 2: A website offers to find a suitable firm of solicitors for members of the public. The potential client is required to input their postcode and the

area of law in which they need help. They then receive an email providing contact details of a suitable firm in their area.

We do not consider that this amounts to a referral within the terms of LASPO as the potential client's details are not being provided to the firm.

What is a payment?

Payment includes any form of consideration, whether the benefit is received by the regulated person or a third party. This would, for example, prevent a regulated person setting up another entity to receive a referral fee, or otherwise arranging for someone else to receive the payment.

Example 3: A firm agrees to provide free wills for members of a union in return for the union referring members with personal injury claims to the firm. We consider that this would fall within the definition of payment as it is consideration for the referrals.

We consider that a fee sharing arrangement, for example, where a solicitor agrees to pay a proportion of their fees in referred matters with an introducer, would be caught by the ban, unless they could show that the payment could be justified on the basis of work carried out by the introducer. (For example, a payment to another firm of solicitors that has done work on the client's matter).

Payment does not include the provision of hospitality that is reasonable in the circumstances. What is reasonable will be considered on a case by case basis.

When is there a payment for a referral?

Our view is that where there is a referral of a matter to or by a regulated person, or an arrangement for another person to provide services, a payment will be prohibited to the extent that it is being paid for the referral or arrangement. Where a payment is for the provision of other services of for another reason, the payment would not be in breach of LASPO.

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Example 4: A company carries out marketing for a group of firms. Enquiries are made to a call centre, details of potential clients are passed to member firms on a rota basis and each firm pays an equal share of the costs of advertising and operating the scheme. There has been a referral within the

terms of LASPO because the details of potential clients have been passed to firms by the company carrying out the marketing. The firms involved will need to be satisfied that any payments they make to the marketing company are for the marketing and not for the referral of clients. If a payment is made for each "lead", or the payment varies according to the number of referrals made, this is likely to suggest that the payment is for the referrals rather than for the marketing. Even if there is no specific number of leads guaranteed the solicitor would need to be satisfied that the payment they are making is reasonable in view of the services being provided.

If it appears to us that a payment may have been made for a referral or for making an arrangement, we will treat that as a prohibited referral fee for the purposes of LASPO, unless the regulated person can show that the payment was made for services or for another reason and not as a referral fee. Where you advertise jointly and pay only for that service, you are unlikely to breach the provisions of LASPO - however, you will need to be satisfied that the arrangement does not contain a referral fee element.

Example 5 : A CMC advertises in local newspapers in its own name and has a panel of firms to which they refer cases. When a potential client contacts the CMC, the CMC takes brief details and asks a standard set of questions to ensure the claim is not time barred. The client is told that a solicitor will contact them within the next 24 hours. Firms pay a fixed fee in respect of each client referred. The CMC says that the payments are for advertising, operating the call centre and vetting potential claims.

A firm in this situation would need to show that the payments were genuinely for the services described. In this case the vetting would appear to be minimal and it is difficult to see how the payment for advertising could be genuine as it is being paid "per client" rather than reflecting the actual cost of advertising. It is therefore likely that the payment would include a referral fee element.

When determining whether referral fees are being paid, we will take into account all of the circumstances but the following factors may indicate a prohibited referral fee:

- payment for services appear to be excessive;
- an arrangement where receipt of referrals is conditional upon payment;
- payments that are made per referral or which are otherwise linked to the number of referrals;
- no evidence that a genuine service is being provided.

Where it appears to us that a referral fee may have been paid, the onus will be on the regulated person to demonstrate that the payment was not for the

referral (see section 57(7) of LASPO). Firms should therefore fully investigate all relevant matters before making or receiving referrals of prescribed legal business.

Effect of the ban

Contravening the ban on referral fees is a regulatory breach; it does not make a person guilty of a criminal offence and does not give rise to a right of action for breach of statutory duty. We may require you to demonstrate how you have achieved compliance with section 56 of LASPO in order to show that you have complied with the Principles and the Standards and Regulations.

For example, if you were to breach the referral fee ban, you would find yourself in breach of Principle 2 which requires you to act in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons. You might also have acted in breach Principle 3 (act with independence) and Principle 7 (act in the best interests of each client).

You would also need to demonstrate that you have fully complied with the standards set out in paragraphs 5.1 to 5.3 of the Code of Conduct for solicitors, RELs, and RFLs and paragraph 7.1 (b) of the Code of Conduct for Firms.

A breach of LASPO does not make anything void or unenforceable. However, a contract to make or to pay for a referral or an arrangement which is in breach of section 56 of LASPO is unenforceable.

Further information

Read Q&As on the ban of personal injury referral fee
[<https://www.sra.org.uk/solicitors/guidance/ban-personal-injury-referral-fees/>]

If you require further assistance, please contact the Professional Ethics helpline [<https://www.sra.org.uk/contact-us/#helplines>] .