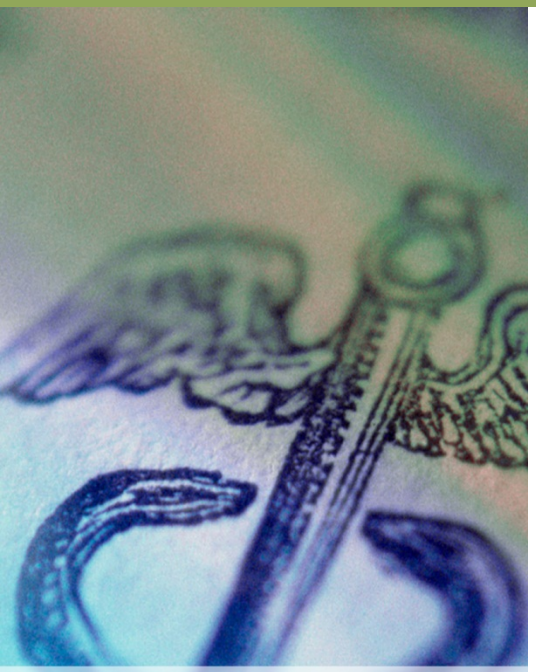

Medical Staff Bylaws: Compliance Gaps and Best Practices

Part 2

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Reappointment

- Compliance Gaps
  - Failure to have Department Chair/Credentials Committee review all relevant peer review, quality information generated over the past two years

Reappointment (cont'd)

- Failure to update eligibility criteria when reviewing "current competency"
- Failure to apply "current competency" standard to all existing/requested privileges
- Failure to query Data Bank
- Having Department Chairs serve on Credentials Committee
- Allowing physicians to "accumulate" privileges
- Failure to obtain health status information, especially for physicians older than 65 years
- Failure to follow up with all facilities where physician has membership and/or clinical privileges

Reappointment (cont'd)

- Failure to query Data Bank when physician requesting new privileges
- Reappointment exceeds two year standard

- Best/Evolving Practices
  - See Appointment Best Practices
  - Required disclosures through conflict of interest forms or activities with competitors
  - Request Quality/Utilization Scorecard
  - Request information on loss of membership in ACO, PHO, IPA, professional societies

Exclusive Contracts

- Compliance Gaps
  - Failure to give required notice of hearing opportunity and hearing
  - Failure to review impact on privileges of existing Medical Staff member
  - Failure to support with Board review and approval which cites to benefits for exclusive arrangement

Exclusive Contracts (cont'd)

- Best/Evolving Practices
  - Incorporate right to enter into exclusive contracts and applicable hearing rights into Bylaws
  - Incorporate a provision which states that when Bylaws conflict with exclusive/employment contract, then contract prevails
  - Determine whether to include a "clean sweep" provision, i.e., no hearing rights if contract terminated

Exclusive Contracts (cont'd)

- Consider adding the ability to offer a hearing if termination decision should be reported to Data Bank
  - Joint Commission has taken the position that termination based on quality/competence/conduct issues requires a hearing even if employed
  - Providing a hearing gives you HCQIA immunity protections
  - Fairness dictates that if reporting a physician they should be offered a hearing opportunity
- Provide advance notice to MEC regarding the proposed exclusive arrangement and Board's reasoning

Expedited Credentialing

- Compliance Gaps
  - Committee delegated with the authority to grant membership/privileges at appointment/reappointment must have at least two Board Members
  - Application must be completed
  - If MEC makes an adverse recommendation or places limitations, it cannot be expedited
  - Bylaws have to identify situations where applicant is ineligible
    - Adverse licensure decision
    - Termination, suspension from another medical staff

Temporary Privileges

- Compliance Gaps
  - Failure to obtain verification in all required areas before granting privileges
  - Failure to identify and/or enforce time limitations – cannot exceed 120 days
  - Failure to have both the President/CEO and Medical Staff President or their designees approval privileges
- Best/Evolving Practices
  - Include language that termination of temporary privileges does not entitle physician to a hearing unless decision is reportable

Remedial/Corrective Action

Best/Evolving Practices

- Collegial Intervention (See attached example “collegial intervention” provision)
  - Goal is to address quality/behavioral issues and attempt to resolve as early on as possible.
  - Department Chairs/Section Chiefs are required to engage in one on one discussions, “coffee cup communications”, with the physician to identify issues so as to avoid/prevent future problems.
  - Must be attempted and documented before considering request for remedial action.
  - Collegial Intervention is not a substitute for established peer review process – it is part of the process.

Remedial/Corrective Action (cont'd)

- Remedial action should only be requested when other measures have failed as part of the peer review process.
  - Collegial intervention
  - FPPE
  - Monitoring, proctoring, mandatory consultations
  - Re-education
  - Other actions which do not trigger hearing or state or Data Bank reports

Remedial/Corrective Action (cont'd)

- A resignation which occurs during the peer review process, as opposed to when remedial/corrective action is requested, is not reportable.
- Peer review process should not be defined or treated as an investigation.
  - But see draft Data Bank Guidebook which treats FPPE as an investigation.

Remedial/Corrective Action (cont'd)

- Only Department/Committee Chairs, Medical Staff President and CEO should be able to request remedial action.
- Request should not specifically request a particular action.
- If MEC believes the request has merit, meaning the record shows that collegial intervention and other non-reportable remedial measures have not succeeded in addressing the problem, then request can go forward and you are now in the investigation stage.
  - Physician's resignation at this stage is reportable.
- MEC should appoint an Ad Hoc Committee rather than conduct investigation on its own.
- Ad Hoc Committee should be composed of members from same Department or who have similar expertise.

Remedial/Corrective Action (cont'd)

- Members should not have had a role in peer review process leading up to remedial action request.
- Where possible, avoid appointing a direct competitor or someone with a known bias as a Committee member.
- Whatever information is collected to support the request should be shared with the Committee AND the physician sufficiently in advance of physician's meeting with the Committee.
- Physician meeting should be required before Committee makes a recommendation.

Remedial/Corrective Action (cont'd)

- Committee should not be limited in the form of remedial action requested even if such action was not previously successful.
- Committee should attempt to engage the physician in the design of any action plan.
  - This effort is a good way to evaluate physician's judgment and acceptance of whether to accept responsibility and commitment to improve.
- Committee should prepare written report to explain basis and reasons for recommendation. If recommending action which triggers hearing rights, i.e., suspension, termination, report should detail and explain why lesser forms of remedial action, in the opinion of the committee, will not suffice.

Remedial/Corrective Action (cont'd)

- MEC, before making final recommendations, should consider meeting with the Physician.
- MEC not limited in the form of recommended action.
- MEC should clearly describe in writing its rationale based on the information presented.
- If recommendation triggers hearing rights then proceed to a hearing – recommendation should not go to Board because it ultimately will make final decision on appeal.

Fair Hearing

Compliance Gaps

- Hearing procedures do not comply with state law and/or HCQIA.
  - Physician not given 30 days within which to request hearing.
  - Notice is defective and incomplete as to basis of decision, reference to relevant patient charts and citation to standards.
  - Failure to provide reasonable and timely access to information on which the decision was based.
  - Statutory or Bylaw process for selection of hearing committee members.
  - Summary suspension is imposed even though imminent danger to patient standard is not met.
  - Physicians who are competitors or have a known bias or who had an active role in the process leading up to adverse decision are appointed as members.

Fair Hearing (cont'd)

- Burden of proof standard placed on physician is inherently unfair - "adverse recommendation to be upheld if there is any basis in the record to support it".
- Failure to follow Bylaws/Fair Hearing procedures.
  - Courts do not interfere with disciplinary decisions as long a hospital and medical staff comply with stated procedures and the proceedings are fair.

Fair Hearing (cont'd)

Best/Evolving Practices

- Hearing Committee
  - To avoid the appearance of a conflict of interest, do not appoint employed physicians or physician under contract with the Hospital.
- Appointment of Hearing Officer
  - Given the high stakes at issue for both sides, an experienced hearing officer can greatly facilitate the hearing particularly if attorneys are given the right to direct and cross examine witnesses.
  - Hearing officer should not have any conflicts of interest, i.e., should not have previously represented the hospital, the physician or the medical staff.

Fair Hearing (cont'd)

- Should offer to have physician pay half of the fee although this suggestion usually is declined.
- Hearing officer should sign a HIPAA business associate agreement.

- Pre-Hearing Procedures
  - Bylaws should require that there be a pre-hearing process to address procedural issues and disputes so as to facilitate a smooth hearing.
  - There should be a record of these proceedings and the hearing officer should prepare a written decision.
  - Challenges to hearing committee members through a voir dire or similar process should be addressed at this time – no automatic challenges to proposed members should be provided to either side.

Fair Hearing (cont'd)

- Role of legal counsel
  - Consider limiting role of legal counselor to acting as an adviser to his/her client with the right to make procedural objections but no right to direct/cross examine witness.
  - Role can be expanded by hearing committee if physician not able to handle.
- Burden of proof – hearing
  - Burden should be on the medical staff to show that the adverse recommendation is supported by a preponderance of the evidence – i.e., a majority of the evidence.

Fair Hearing (cont'd)

- Hearing committee should be required to make written findings of fact and detailed explanation to support recommendation.
- Both parties should be given the right to appeal hearing committee recommendation.
- Appellate Procedures
  - Burden of proof – appeal
    - Is the hearing committee recommendation supported by a preponderance of the evidence?
    - Was the adverse recommendation arbitrary or capricious?
    - Did hospital and medical staff substantially comply with its bylaws/fair hearing plan?

Fair Hearing (cont'd)

- Board should appoint an appellate committee of the board which has at least one physician member rather than have the entire board participate.
- Any board member, including hospital administrators who had a role in the recommendation and process leading to the adverse decision, should recuse themselves and not participate on the committee or when the board renders its final decision.
- Oral argument should be at the discretion of the board and not a matter of right.
- Parties should be required to submit written memos setting forth the basis for accepting or contesting the hearing committee's recommendation.

Fair Hearing (cont'd)

- Committee should have access to the complete administrative record and be required to review it in advance of its recommendation to the Board.'
- Committee should be required to prepare written findings to support its recommendation tied to burden of proof standard.
- Remaining Board members should at least review hearing committee recommendation, memos from the parties and Appellate Committee recommendation and report before rendering final decision.

Officers

Compliance Gaps

- Bylaws do not set forth specific standards for eligibility and removal.
  - Failure to carry out responsibilities under the bylaws.
  - Conflict of interest.
  - No longer in “good standing”.
- Voting procedures for election and removal not very clear.

Officers (cont'd)

Best/Evolving Practices

- Conflict of interest should serve as a basis of removal, i.e., is an elected officer/board member of a competing hospital or health care facility, or to prevent vote or involvement in conflicted matter.
- Board should not have the right to approve/remove an elected officer but can remove from Board consistent with Board policies.
- Although new CMS standards state that Boards no longer have to have physician members, hospitals should continue this practice but could reconsider practice of ex officio appointments.

Department Chairs

Compliance Gaps

- Same as officers.
- Department Chair responsibilities do not track with state/accreditation standards.

Best/Evolving Practices

- Department Chairs are being paid for administrative duties by the Medical Staff and/or the hospital.
- Hospital-employed physicians should not be barred from being elected as Chair.

Departments

Compliance Gaps

- Department responsibilities do not track state and accreditation standards.
- No reference to OPPE/FPPE standards and policies.
  - Who is responsible for reviewing performance data?
  - How often is data reviewed? – 12 months is periodic and not ongoing.
  - What is process to be implemented to use data to make decision?
  - How will data be incorporated into credentials file?
  - How are decisions documented?
  - Types of data to be collected and monitored for OPPE and FPPE are to be identified by each department.

Departments (cont'd)

- Core/bundled privileges and basis for granting not clearly delineated in bylaws or policies.
- Basis for granting specialized privileges not clearly delineated in bylaws or policies.
- Physicians have the right to request deletion of certain privileges.
- If physician not competent to perform the core privileges, then core must be modified.
- Medical staffs should not be able to create a new Department or Section without Board approval.

Committees

Compliance Gaps

- MEC responsibilities do not track state and/or accreditation standards.
- Bylaws do not reflect how MEC authority is delegated or removed.
- Committee responsibilities not clearly stated and committee rarely meets.
- Business conducted and recommendations made in violation of committee charter or bylaws.
- Medical staff has committees with overlapping/conflicting responsibilities.
- Voting standards not clear.

Committees (cont'd)

- Best/Evolving Practices
  - Move non-core committees and descriptions to rules and regulations or a committee Policy.
  - Put Physician Wellness Committee in Bylaws but leave details to a policy.
  - Maintain requirement that majority of members be present for core committees, i.e., MEC, Credentials.
  - Eliminate redundant committees or combine responsibilities.

Meetings/Voting

Compliance Gaps

- Medical staff does not fully comply with its own meeting, voting, quorum and notice requirements.
  - Can lead to an argument that recommendation/decisions are invalid.

Best/Evolving Practices

- Quorum and voting requirements modified to reflect realities of actual attendance.
- Telephone participation is considered being physically present for quorum and voting at committee meetings, but not for general or special meetings of the medical staff.

Meetings/Voting (cont'd)

- Proxy voting at all meetings, except for Core Committees, becoming more acceptable.
- Voting by email?

Bylaw Amendments

Compliance Gaps – The Joint Commission

- Organized medical staff not given right to propose bylaws, rules, regs and policies directly to the Board.
  - Must first be submitted to MEC.
- Bylaws, rules, regs or policy do not contain a conflict management process when there is a dispute between the organized medical staff and the MEC or between OMS/MEC and Board.
- Bylaws, rules, regs or policy does not reflect a process allowing an urgent amendment to rules and regulations.
  - Applies when rule or reg cannot be amended in timely manner consistent with current amendment process.

Bylaw Amendments (cont'd)

- No reference to corporate and medical staff bylaws being compatible and that neither the medical staff nor the board can unilaterally amend the Bylaws.
- BUT CMS just approved accreditation standards for the Center for Improvement in Healthcare Quality which allows a unilateral amendment if needed to "comply with law, regulations, accreditation standards or situations that pose a serious and direct threat to the safety of patients" after notice given to medical staff and it refuses or is unable to make necessary amendments.

Rules and Regulations

Compliance Gaps

- MEC cannot adopt or amend rules and regulations without the approval of voting members of the OMS unless permitted to do so under the bylaws – even if permitted MEC must first communicate change to Medical Staff.
- Standard for conducting histories and physicals cannot only be in the rules and regulations – must be in the bylaws.
- Basic steps of Elements of Performance 12-36 in MS.01.01.01 that require a process must be in the bylaws and cannot be in the rules and regulations.

Immunity Provision

Compliance Gaps

- Language regarding what activities, recommendations and decisions are protected from liability claims is too narrowly drawn or is not consistent with state immunity statute.
- Should cover at a minimum pre-screening, appointment, reappointment, peer review, OPPE/FPPE, investigations and hearings and all employees, physicians and consultants involved in these processes.

Immunity Provision (cont'd)

Best/Evolving Practices

- Should consider using "absolute waiver of liability requirement even if it exceeds state/HCQIA immunity protections.
  - At least one federal circuit court of appeals believed that such language was acceptable although resident's lawsuit against a hospital based on alleged disclosure about prior disciplinary action was dismissed on other grounds.
- Language should require that physician must first exhaust all internal hearing and appeals procedures under the Bylaws before filing suit.
- Physician should be required to agree that peer review information be shared with other facilities within the system where they have membership/clinical privileges.

QUESTIONS?