



Medical Staff Bylaws: Compliance Gaps and Best Practices

Part 1

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Background

- Hospitals and their affiliated entities are participating in one of the most heavily regulated industries in the country
- Some of the relevant regulatory standards that apply to medical staff professionals include:
 - Medicare/Medicaid Conditions of Participation
 - Hospital Licensing Act
 - Medical Practice Act
 - Nurse Practice Act
 - Acts applicable to all other credentialed practitioners
 - State Peer Review Statute
 - Patient Safety and Quality Improvement Act of 2005
 - HIPAA/HITECH
 - EMTALA

Background (cont'd)

- ADA, Title VII and other discrimination statutes
- HCQIA
- Data Bank
- The Joint Commission, HFAP, DNV, NCQA
- Accountable Care Act – ACOs/Medicare Shared Savings Program, Value Based Purchasing
- CMS standards on never events, hospital acquired conditions, readmissions
- County and city statutes and ordinances
- Applicable case law

Background (cont'd)

- Failure to comply with these standards can have the following adverse implications
 - Loss or restriction of licenses
 - Accreditation watch or loss of accreditation
 - CMS determination of “immediate jeopardy” or loss of Medicare eligibility
 - Professional liability under respondeat superior, apparent agency and corporate negligence theories
 - Civil, criminal fines
 - Loss of insurance or significant increase in premiums
 - Loss of managed care contracts, MSSP and other performance based payments
 - False Claims Act liability
 - You lose your job

Background (cont'd)

- Evidence of compliance is largely demonstrated in corporate and medical staff governance documents including
 - Corporate Bylaws, Rules, Regs and Policy
 - Medical Staff Bylaws, Rules, Regs and Policies
 - Code of Conduct/Disruptive Behavior Policy
 - Appointment/Reappointment applications
 - Peer review policies
 - Credentialing manual
 - Fair hearing procedures
 - Medical staff development plan

Background (cont'd)

- Impaired physician/allied professional policy
 - Leave of absence and reinstatement policy
 - Conflict of interest policy
 - Anti-harassment policy
 - ED Call Policy
 - Department policies
- A single set of Medical Staff Bylaws cannot demonstrate compliance with all relevant requirements

Definitions

- Compliance Gaps
 - Definitions inconsistent when referenced in Bylaws
 - Definition of “medical staff” not consistent with state law
 - Podiatrist considered an allied health professional and not a physician
- Best/Evolving Practices
 - Include definitions for “peer review” and “peer review committee” consistent with state confidentiality protections in order to maximize confidentiality/privilege protections (see attached examples)

Definitions (cont'd)

- If participating in a PSO, consider adding definitions for “patient safety evaluation system” and “patient safety work product” (see attached examples)
- Definitions of “adverse” decisions should be limited to actions that require a state or Data Bank report or limited to what triggers a hearing under the Bylaws

Purposes/Preamble

- Compliance Gaps
 - Should reflect accreditation standard which references ultimate board authority
- Best/Evolving Practices
 - Medical Staff should be required to comply with Hospital Bylaws, Rules and Policies (which do not conflict with Medical Staff Bylaws)

Nature of Medical Staff Membership

- Best/Evolving Practices
 - Physicians, as a general matter, have no legal, statutory, constitutional right to medical staff membership/privileges. Therefore, hospitals can develop initial screening/eligibility criteria on front end to deny applications/appointment to “non-qualifying practitioners” including decisions based on economic factors such as whether physician is employed by a competitor or has a financial interest in a competing facility, i.e., surgicenter. See comments re: Pre-Application Process.

Nature of Medical Staff Membership (cont'd)

- Aside from the standard language which states that licensure does not guarantee Medical Staff membership, many hospitals are requiring a higher degree or evidence of loyalty or demonstrated history of meeting quality/utilization standards consistent with hospital standards
- Bylaws should not limit Hospital's discretion and authority to develop Medical Staff Development/Needs policies which establish areas of need or which limit access to membership

Qualifications for Membership

- Compliance Gaps
 - Should reference obligation to comply with applicable Code of Conduct/Disruptive Behavior Policies
 - Should reference requirement to comply with reporting requirements concerning malpractice suits, sanctions, loss of privileges, licensure, and other regulatory requirements
 - Board certification/recertification
 - Board certification is not a regulatory condition of membership although required by managed care organizations

Qualifications for Membership (cont'd)

- Do the Bylaws refer to re-certification?
- Are privileges and membership revoked/reduced?
- Best/Evolving Practices
 - Board can grant board certification exceptions where physician filling specialized need
 - Consider granting an extension of time
 - Consider reducing membership category instead of termination albeit under some form of continuous review
 - Consider grandfathering option
 - Need to justify any exception and apply standard uniformly

Insurance Requirements

- Compliance Gaps
 - Privileges to admit/treat automatically suspended – should not be allowed to co-admit
 - Physician should report reductions or loss of coverage

Insurance Requirements (cont'd)

- Best/Evolving Practices
 - Obtain coverage schedule in addition to certificates of insurance – includes limits and exclusions
 - Obtain five (5) year coverage history
 - Find out if coverage schedule applies at multiple hospitals and if claims made/occurrences
 - Get insurance company rating and make sure company is certified by the State
 - Consider requiring tail or prior acts coverage if they leave Medical Staff
 - Require report if coverage reduced to explain basis of reduction

ED Coverage

- Compliance Gaps
 - Bylaws, Rules and Regs do not reflect ED response times and on call responsibilities consistent with EMTALA, trauma center and other statutory requirements
 - Physician does not identify back up coverage if not available
 - Transfer standards

ED Coverage (cont'd)

- Post ED obligation to provide follow up care – patient abandonment issue
- Non-compliance can lead to EMTALA violations with resulting fines and possible litigation against the hospital and therefore violations need to result in remedial action
- Best/Evolving Practices
 - Need to decide what Medical Staff categories have ED coverage responsibilities
 - Place requirement in Bylaws
 - Delegate coverage schedule to Department Chair BUT subject to MEC review and approval

ED Coverage (cont'd)

- Remember that ED call is a duty and not a privilege. Can be removed without triggering hearing rights
- If patients who are admitted or are referred out of hospital for no justifiable reason, ED call duty can be revoked – no hearing rights
- ED call can be provided to an exclusive group for pay consistent with regulatory standards
- Make sure that physician identifies back up in advance of going out of town

Ethical Standards

- Best practices
 - Remember to include reference to all professional associations

Ability to Work with Others/Health Status

- Compliance Gaps
 - Need to have a Code of Conduct/Disruptive Behavior Policy in place that applies to physicians/practitioners as well as Board members and all hospital employees
 - Physician Wellness Committee cannot recommend or impose disciplinary action
- Best/Evolving Practices
 - Establish separate Physician Wellness Committee
 - Avoid use of corrective action/disciplinary procedures
 - Be mindful of reporting requirements re: state and Data Bank

Ability to Work with Others/Health Status

(cont'd)

- Implement progressive remedial action standards
- Implement a Bylaw standard to require evaluation if there is a reasonable suspicion of impairment
- Refusal to be evaluated can result in recommendation for remedial action
- Consider adding a requirement for physical/fitness for duty evaluation for practitioner 65 years or older on yearly basis

Compliance with Quality/Utilization Metrics

- Metric Standards
 - ACO, P4P, Value Based Purchasing, ACE
 - Has a direct impact in liability, compliance and reimbursement standards
 - Standards need to be incorporated into privileging/credentialing standards as a condition of appointment/reappointment on Medical Staff and/or ACO/CIN

Compliance with Quality/Utilization Metrics (cont'd)

- Best/Evolving Practices
 - Ask for quality/utilization scorecard at time of appointment/reappointment
 - Prepare and send quarterly reports which compare physician's practice to peers based on utilization and quality metrics standard BUT make sure reports are created in a way to maximize confidentiality and privilege protections under state and/or federal law

Medical Record Completion

- Compliance Gaps
 - Medicare CoPs require that Bylaws include standard for conducting histories and physicals
 - Medical Record completion requirement not followed or is not enforced
 - Physician not trained in or is not compliant with EMR standards and policies

Medical Record Completion (cont'd)

- Best/Evolving Practices
 - Physician not reappointed and privileges lapse if records not completed – has to reapply
 - Repeat offenders will be reported to Data Bank
 - Where incompletions relate to lack of H&P, discharge summary, treatment plan or other substantive portion of record, as opposed to a missing signature, physician can be reported according to the Data Bank

Medical Staff Categories

- Compliance Gaps
 - Wrong treatment of podiatrists as allied health practitioners
 - Utilization requirement as a condition of Active Staff membership is not defined or uniformly enforced or is out of date
 - Credentialing process not the same for all categories
 - Standard on geographic distance or response time to treat patients not uniformly enforced or is overly restrictive

Medical Staff Categories (cont'd)

- Best/Evolving Practice
 - Creation of new category where physician is a Medical Staff member but has no clinical privileges – need not go through formal appointment/reappointment process
 - Creation of Telemedicine Staff
 - Creation of Hospitalist Staff
 - Adding APN, PAs to medical staff if permitted by state law and Board

Telemedicine

- Compliance Gaps
 - Under CoPs, hospital and distant site hospital where telemedicine physician is credentialed and privileged fail to enter into a formal written agreement that satisfies all requirements
 - Provide list of credentials at distant site hospital
 - Applies internal peer review process to practitioner and informs hospital of any adverse events and complaints
 - Appointment/reappointment process not consistent with Medicare CoPs or accreditation requirements
 - Telemedicine practitioner must be licensed in your state
- Best/Evolving Practices
 - Don't rely on credentialing by other hospital or accredited entity

Allied Health/Advanced Practice Professionals

- Compliance Gaps
 - Practicing outside scope of license/certification
 - Not utilizing collaborative agreement when required
 - Physicians not letting them practice to full extent of license
 - Not reporting impaired or disciplined professional to the state – reporting to Data Bank is optional
- Best/Evolving Practices
 - Let them practice within full scope
 - Query Data Bank for all who obtain clinical privileges

Pre-Application Process

- Compliance Gaps
 - Process not reflected in Bylaws as required
 - Failure to provide written explanation for denying an application including whether decision was based on economic factors
 - Physician or physician committees are improperly given the right to decide who is given or not given an application

Pre-Application Process (cont'd)

- Best/Evolving Practices
 - Require signed waiver form
 - Include in pre-app form whether they are employed by or had their practice purchased by a competitor or have a financial interest in a competing entity
 - Require disclosure of whether they are an officer, director, medical staff leader, department chair in a competing hospital, ACO, ACE or other competing or similar entity.
 - Include other questions the answers to which will decide whether or not to give them an application or to appoint them

Appointment

- Compliance Gaps
 - Giving veto authority to a Department Chair or physician committee over who does or does not receive an application
 - “Sitting on” applications
 - Processing before all information received and/or not following up on incomplete or “red flag” responses
 - Relying on outdated information on older application used by physician for another hospital
 - Use of waiver of liability forms and Bylaws language which uses “in good faith and without malice” standard

Appointment (cont'd)

- Not reporting to Data Bank when required
- Health status information not updated
- Best/Evolving Practices
 - Language which places burden on applicant to produce any and all information requested at any time during the process
 - Failure to produce information results in withdrawal of application
 - No hearing rights
 - Cannot reapply for one year

Appointment (cont'd)

- No hearings for denied applicants unless decision reportable to State or Data Bank
- Use “absolute waiver of liability” standard in Bylaws and waiver forms (see attached example)
 - Fall back is reference to the state standard
- Require physician to attest that information provided is current and accurate – “my assistant prepared the application” is not acceptable
- Peer references should include physicians who are not partners or members of group practice

Appointment (cont'd)

- Department chair
- CMO/VPMA
- Other?
- Criminal background checks becoming more common

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

QUESTIONS?