

Medical Staff Update: October 2009

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Practice Area: Medical Staff and Credentialing

As health care regulations and accreditation standards continuously evolve, so do medical staff requirements.

The Joint Commission's Telemedicine Standard

The Centers for Medicare and Medicaid Services ("CMS") currently requires that telemedicine providers be credentialed by both the originating and distant sites. In an attempt to bring its accreditation standards in line with this requirement, The Joint Commission ("TJC") has revised its telemedicine standards to comply with this rule, effective July 15, 2010. See TJC Standard MS.13.01.01. This is a marked change from TJC's previous telemedicine standard, which accepted the credentials and privileges granted by the distant site (where the provider is located) if the distant site is TJC accredited and complies with appropriate Medical Staff standards. TJC will continue to work with CMS to accept credentialing by proxy by the distant site, but providers should review their current telemedicine requirements to ensure compliance with CMS requirements and TJC's revised standard until further progress is made on this issue.

Board Certification Requirements

The American Board of Medical Specialties ("ABMS") announced in March 2009 a new set of standards designed to further enhance physician qualification principles assessed through its ABMS Maintenance of Certification ("MOC") program. Included in this uniform set of standards is evidence of participation in practice-based assessment and quality improvement every two to five years. This requirement is in response to the national movement toward performance measurement and requires that physicians provide evidence of practice changes to improve quality and re-evaluation to determine the effect of a change in the practice progress or structure of care. Although this does not affect hospital providers' medical staff documentation requirements, it will affect board certification and re-certification requirements for their medical staff. See www.abms.org.

History & Physical Requirements for Medical Staff Documents

The Division of Quality Assurance ("DQA") recently has taken the position that hospital providers will be issued a deficiency at survey for not including detailed history and physical ("H&P") information within its medical staff bylaws pursuant to 42 C.F.R. § 482.22(c)(5), even if such information is included in governing rules and regulations or other policies adopted by the governing body. This position runs contrary to recent guidance we have received from TJC, as well as state law requirements. However, to avoid any scrutiny on this issue from DQA, providers should place H&P information within the body of their medical staff bylaws, as discussed below.

The recording of H&P examinations is required as part of a hospital provider's medical staff documentation requirements. This requirement stems from Medicare Conditions of Participation ("CoPs"), which mandate that provisions addressing routine examinations upon admission and authentication of verbal orders be included in a hospital's medical staff bylaws. See 42 C.F.R. § 482.22(c)(5). In an attempt to align with this requirement, TJC Standard MS.01.01.01, EP 20, also was revised to state that, "[f]or hospitals that use Joint Commission accreditation for deemed status purposes: [t]he medical staff bylaws include the requirements for completing and documenting medical histories and physical examinations." (Emphasis added). This revision became effective June 1, 2009.

TJC's revisions attempt to align its standards with CMS requirements based on TJC's ability to provide deemed status. But the inclusion of specific H&P examination requirements in medical staff bylaws cuts against the fact that medical staff bylaws are intended to provide a basic structure for the medical staff; more specific practice requirements generally are addressed through hospital rules and regulations or other governing policies. Wisconsin Admin. Code HFS § 124.12(5)(b)(8),(11) acknowledges this approach and requires that H&P requirements be included in a hospital's medical staff bylaws or rules.

We have received guidance (even after June 1, 2009) from John Herringer, Standards Interpretation Group, The Joint Commission, that supports the placement of H&P requirements in any governing medical staff document. Specifically, TJC has stated that its current position is that the H&P requirements may be in other documents if they are jointly approved by the medical staff and governing body. But this guidance has been brought into question by the DQA's recent position that hospital providers will be cited as deficient for not including detailed H&P information within its medical staff bylaws, even if such information is included in governing rules and regulations or other policies adopted by the governing body. Thus, despite contrary authority, we recommend that providers ensure that H&P requirements are contained within the body of the medical staff bylaws in strict conformance with the CoPs.

We would be happy to provide examples of how these requirements can be incorporated. We will continue to work with the DQA on this issue.

The Joint Commission's Statement of Duties and Privileges Standard

In addition to the H&P requirements, TJC has also revised Standard MS.01.01.01, EP 21 to state that "[f]or hospitals that use Joint Commission accreditation for deemed status purposes: [t]he medical staff bylaws include a statement of the duties and privileges related to each category of the medical staff (for example, active, courtesy)." (Emphasis added). This revised standard mirrors 42 C.F.R. § 482.22(c)(2), which provides identical language requiring this information to be in the medical staff bylaws. Given the DQA's interpretation of the H&P requirement, we recommend that accredited providers review their medical staff bylaws to ensure this information is contained in the main bylaws, in addition to credentials manuals or other governing documents.

Recent Development in Economic Credentialing

On September 29, 2009, the Tenth Circuit issued *Four Corners Nephrology Assoc. v. Mercy Med. Ctr. of Durango*. In this case, the Tenth Circuit upheld a previous ruling that refusal to allow a physician to use inpatient nephrology facilities did not constitute anticompetitive conduct under either the Sherman Act or applicable state law. The Court further held that a refusal to grant active medical staff privileges to a physician for economic reasons did not result in a federal or state antitrust injury. Characterizing the physician plaintiff's case as an attempt to share—not undo—the hospital defendant's putative monopoly, the Court upheld the hospital's denial of medical staff privileges as allowable competitive conduct. See *Four Corners Nephrology Assoc. v. Mercy Med. Ctr. of Durango*, F.3d, 2009 WL 3085882(C.A.10 (Colo.)).

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