Medical Staff v. Human Resources

GETTING PRACTICAL WITH

MEDICAL STAFF

GOVERNANCE, CREDENTIALING & PEER REVIEW

Medical Staff v. Human Resources

Why so much tension?

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Overview

- Hospital/Physician Relationships
- Strategies: Advantages and Disadvantages

Hospital/Physician Relationships

- Independent physicians owning private practices and having Medical Staff membership and privileges
- Independent contractor relationships between hospitals and physicians
  - Common for hospital-based service lines
  - Part-time medical directors
- Employment by Hospital/Health Care System
  - Often through affiliated medical group

Increasing Employment

- **Very recently and for the first time less than half of practicing physicians in US owned their medical practice**
  - AMA Economic and Health Policy Research, May 2017
- **Employment of physicians projected to grow 13% between 2016 and 2026**
  - U.S. Bureau of Labor Statistics

Changes in the Hospital/Physician Relationship

Independent	Employed
Individual influence over delivery of care	Assumed greater organizational influence over delivery of care
Physician responsible/liable for their actions	Hospital has liability/responsibility for physicians
Physicians traditionally volunteered for Medical Staff duties and call	Increased expectation to be compensated for all roles and activities

Changes in the Hospital/Physician Relationship

Independent	Employed
Compensation largely based on productivity	Compensation tied to quality/patient satisfaction
Compensation also from ancillaries	No compensation from ancillaries
Often compete with hospital (ASC, imaging centers, office based surgery)	No competition with hospital/may require use of hospital facilities
Focused on role/work of individual physician	More focus on team approach, service lines

Changes in the Hospital/Physician Relationship

Independent	Employed
Hospital had little influence over physician offices	Hospital more able to influence physician office operations
May contribute to fragmented care	May facilitate coordinated care
Hospital relationship with physician filtered/buffered through organized Medical Staff	Direct relationship with physicians without involving organized Medical Staff
Relationship directed by Medical Staff	Relationship primarily directed by contract terms

Changes in the Hospital/Physician Relationship

- Hospitals now responsible for and liable for physician quality and conduct
- Hospitals now held accountable for provider-level performance, e.g., payor contracting, etc.
- Results in increased pressure for effective oversight and control over quality and conduct of employed physicians – Medical Staff plays a large role here

Strategies to Avoid and Address Quality and Conduct Issues

- First, avoid future challenges
  - Have an effective application, pre-application process
  - Do not just rely on a CV, etc.
  - Have physician apply Medical Staff membership and privileges before signing contract?
  - Include self-triggering effective date on membership and privileges?

Strategies to Avoid and Address Quality and Conduct Issues

- Submit application for Medical Staff membership and privileges so that you can then query NPDB and obtain references
  - Get information on malpractice history
  - Get reports of disciplinary actions
  - Reports regarding actions at other Hospitals
- Coordinate Credentialing and Recruitment **(Don't laugh)**

Strategies to Avoid and Address Quality and Conduct Issues

- Don't rely on contract terms that a physician must obtain Medical Staff membership and privileges – the "investment" may have already occurred
- Possible malpractice history or disciplinary actions that might not prevent someone from getting privileges, but you still don't want to employ them

Strategies to Avoid and Address Quality and Conduct Issues

- When quality or conduct issues arise, a key consideration is whether to handle the issue through either:
  - Medical staff processes (peer review and hearing); or
  - HR/contractual processes

Strategies to Avoid and Address Quality and Conduct Issues

- Advantage of HR/contractual approach
  - Faster, simpler, less costly (maybe)
    - No need to go through multiple levels of the Medical Staff (quality committee, department, credentials, MEC)
    - Medical Staff often prefers*
    - No right to a hearing or appeals
    - Handled by administration

Strategies to Avoid and Address Quality and Conduct Issues

- Advantage of HR/contractual approach
  - Proper contract terms regarding without or not-for-cause termination may reduce risk of litigation
  - May be able to avoid mandatory reporting requirements

Strategies to Avoid and Address Quality and Conduct Issues

- Advantage of HR/contractual approach
  - Better control over process and outcome
  - Not dependent on unpredictable findings
  - Follow HR procedures rather than Medical Staff bylaws
  - Simplified process, less chance of error

Strategies to Avoid and Address Quality and Conduct Issues

- Disadvantage of HR/contractual approach
  - Loss of state law confidentiality and immunity protections
    - State law confidentiality protections may be important in cases involving potential medical malpractice claims
    - Employment files/actions are discoverable

Strategies to Avoid and Address Quality and Conduct Issues

- Disadvantage of HR/contractual approach
  - Loss of HCQIA immunity protections if action taken
    - In reasonable belief action is in furtherance of quality health care
    - After reasonable effort to obtain facts
    - After adequate notice and hearing
    - In the reasonable belief action was warranted
  - But, no immunity for civil rights claims

Strategies to Avoid and Address Quality and Conduct Issues

- Advantages to Medical Staff approach (???)
- Disadvantage of Medical Staff approach
  - Procedural-laden, time consuming and expensive
  - More limited ability to resolve issues because of reporting requirements
  - Medical Staff recommended action may be difficult to implement

Strategies to Avoid and Address Quality and Conduct Issues

- Disadvantage of Medical Staff approach cont.
  - Required reporting to NPDB if practitioner resigns while under or to avoid investigation, among other scenarios
  - Required reporting to state

Strategies to Avoid and Address Quality and Conduct Issues

- Considerations in deciding whether to use HR or Medical Staff approach
  - Site of events, hospital v. office
  - Nature of events, clinical v. behavioral
  - Likelihood of litigation, by practitioner or patient (any patient injury)
  - Medical Staff's appetite
  - Moral duty?

Strategies to Avoid and Address Quality and Conduct Issues

- Considerations in deciding whether to use HR or Medical Staff approach
  - Sensitivity of information
    - Could information be used in a malpractice suit
    - Do you really care if information is discovered
  - Each case should be looked at individually

Strategies to Avoid and Address Quality and Conduct Issues

- Be careful about using standard HR approaches in physician employment cases
  - Usual non-disparagement clauses in settlement agreements can create problems complying with reporting obligations
  - Be sure inquiries are correctly handled as HR matters or Medical Staff matters

Strategies to Avoid and Address Quality and Conduct Issues

- Sharing information between Medical Staff and affiliated physician group
  - Medical Staff peer review information may become discoverable if in employment file
  - Depends on state statute and whether employment review/action is considered to be peer review

The Sharing Dilemma

- Can we? It depends
- Remember that it's all about what the peer review law permits and protects
- What and why are you sharing?
  - Sharing for mutual quality-related benefit is smartest approach
  - Any other reason risks waiving privilege
- But does it matter?

Helpful Contract Provisions

- Co-terminus clauses automatically terminating Medical Staff membership and privileges aka "clean sweep"
  - Can avoid reporting requirements
- Require assistance with defense of malpractice claims after termination

Helpful Contract Provisions

- Limit practice to hospital facilities
- Stark Law compliant required referrals to hospital affiliated entities
- Non-compete, non-solicitation provisions
- Ability to terminate contract if reimbursement methodologies or legal requirements materially change
- Agreement by practitioner to group sharing quality and clinical performance information with Hospital

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Please visit the Hall Render Blog at https://www.hallrender.com/resources/blog/ for more information on topics related to health care law.

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