

May hospitals require indemnification as a prerequisite for credentialing?

Perhaps you have recently become aware or been reminded that many hospitals require indemnification from physicians as part of the credentialing or recredentialing process – and you question whether this is legal.

In my opinion, at least in Pennsylvania, the answer is no. As with most professional licensing issues, the authority to regulate the professional licensing and credentialing process is reserved to the respective states. In Pennsylvania, that authority would be applied to hospitals by the Penn-



sylvania Department of Health as part of defining what hospitals may or may not do with respect to qualifications for medical staff membership.

Pennsylvania law

The Pennsylvania regulations re-

garding hospital licensing status state in 28 Pa. Code § 107.3(c) as follows:

“No applicant shall be denied medical staff privileges on the basis of sex, race, creed, color, or national origin or on the basis of any other criteria lacking professional or ethical justification, including association with a prepaid group practice.”

Therefore, it seems that hospitals may not require indemnification in order to obtain or renew medical staff membership or clinical privileges. However, to the best of my knowledge, this

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issue has never been tested in Pennsylvania. In order to test the issue, I would suspect one of the following situations must arise:

a. A physician must refuse to sign the indemnification, be denied new or renewed medical staff membership, and challenge that result either in court or by complaint to the Department of Health.

b. A physician or group of physicians could file a complaint with the Department of Health stating that the hospital's license should not be granted or renewed, or revoked, based upon the imposition of requirements prohibited by the Pennsylvania Code.

c. During the process of adopting medical staff bylaws, the issue of the qualifications for membership must be raised and voted upon.

Health Care Quality Improvement Act

Also note that, regardless of the restrictions or regulations that may or may not be imposed by the Department of Health, there are other federal laws that may come into effect. For example, the Health Care Quality Improvement Act (HCQIA) includes a provision

for reimbursement of attorney's fees in credentialing actions, which I will discuss at the end of this article.

The fact that the Pennsylvania law does not permit the establishment of indemnification as a prerequisite for medical staff membership does not mean there is still not potential financial exposure for peer review litigation. The HCQIA, which is the statute that establishes the Data Bank reporting and hearing due process requirements for peer review disputes, also provides a section authorizing the payment of reasonable attorneys fees and costs in 42 U.S.C. § 11113, which provides as follows:

"In any suit brought against the Defendant, the extent a Defendant has met the standards set forth under Section 11112(a) of this title, and the Defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suite attributable to such claim, including a reasonable attorneys fee, with the claim, or the claimants conduct during the litigation of the claim, was frivolous, unreasonable, without foundation or in bad

faith. For purposes of this section, a Defendant shall not be considered to have substantially prevailed when the Plaintiff obtains an award for damages or permanent injunctive or declaratory relief."

Conclusion

Pennsylvania law apparently prohibits requiring indemnification as a condition of receiving medical staff membership or clinical privileges. However, although that statute might prohibit the upfront requirement, HCQIA still establishes at least potential liability if, after having been granted medical staff membership or clinical privileges and then becoming embroiled in a peer review dispute, the physician not only does not substantially prevail, but also is found to have engaged in bad faith, frivolous, or unreasonable conduct, including making claims without any foundation.

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