

HEALTH LAW UPDATE

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Will This One Stick? The Latest Incarnation of the Joint Commission's Medical Staff Bylaws and Medical Executive Committee Standard

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On December 17, 2009, The Joint Commission posted standard MS 01.01.01 (the "New MS Standard") for a six-week field review that ended January 28, 2010. The New MS Standard is a revision of former MS 1.20, which was withdrawn after stringent criticism from the hospital community. The New MS Standard, like its predecessor, outlines the content and detail required in medical staff bylaws, but appears to be more flexible and hospital-friendly than its predecessor, although some in the industry are still voicing concerns.

Background

Previous versions of MS 1.20, created in 2004 and revised in 2007, drew criticism from physicians and hospitals due to a host of concerns related to potential unintended consequences, including the significant cost and effort associated with revising bylaws and the potential disruption of established relationships between medical staff and the governing body. Two provisions of MS 1.20 caused particular concern in 2007, including a provision that appeared to increase the scope and detail of what must be included in the medical staff bylaws and a provision that allowed a medical staff to bypass the medical executive committee (MEC) and take concerns or requested bylaw revisions directly to the hospital's governing board or board of directors.¹

Due to the significant concerns raised by MS 1.20, The Joint Commission assembled a Task Force that included representatives from several hospital associations and physician groups, including the American Hospital Association, American Medical Association, American College of Surgeons, American College of Physicians, American Dental Association, Federation of American Hospitals, and National Association of Medical Staff Services. The Task Force agreed that MS 1.20 should be revised and

¹ See our previously issued Health Law Update, *Final Accreditation Standard MS.1.20: The Joint Commission Does an About-Face*, issued November 19, 2007, available at www.bassberry.com.

subsequently unanimously approved the proposed draft of the New MS Standard in March 2009.

Medical Staff Bylaws

The New MS Standard addresses the above-referenced industry concerns by scaling back on the scope and detail that is required to be included in the medical staff bylaws and also by requiring the medical staff to discuss concerns with the MEC before going to the board of directors or governing body. The Standard appears to mandate fewer additions to the medical staff bylaws when compared to MS 1.20. Specifically, while requirements for certain substantive elements of performance (EPs) that involve a medical staff process, such as privileging and credentialing, must be included in the bylaws, the "associated details" of the EPs may instead be included in policies, rules or regulations.

Some commentators believe that the New MS Standard does not go far enough in resolving the issues related to medical staff bylaws. Specifically, some commentators still believe that the required changes will take a considerable amount of time, effort and expense, especially for medical staffs that have developed separate fair hearing plans, credentialing, and other related manuals containing details that may need to be reincorporated into the bylaws.

Further, the very flexibility created by the New MS Standard may also be considered burdensome to some organizations. For example, important terms such as "associated details" are left for medical staffs to define, leaving open the possibility that surveyors will find that organizations have failed to comply with the New MS Standard, even though they have made a concerted effort to do so. The Joint Commission has responded that there will be no need to totally revise medical staff bylaws and that a limited number of revisions may suffice for most organizations.²

Circumvention of the MEC

The other key concern raised over MS 1.20 was the inclusion of a provision that appeared to allow the organized medical staff to circumvent the MEC. Specifically, MS 1.20 would have permitted a hospital's organized medical staff to bypass the MEC and take concerns or requested bylaw revisions directly to the hospital's governing body or board of directors.

The New MS Standard addresses industry concerns by requiring medical staffs to give the MEC notice and an opportunity to discuss and resolve their concerns before going to the governing body or board of directors. The medical staff also must notify the MEC

² The Joint Commission; *Frequently Asked Questions Regarding Standard MS.01.01.01 (formerly MS.1.20)* at #14; available at http://www.jointcommission.org/NR/rdonlyres/C0B70F1F-5DFC-48BF-A9D5-659C068890CB/0/Attach_MS010101FAQs.pdf

when it wishes to propose to the governing body a revision to rules, regulations or policies. This requirement for notification of proposed changes must also be made by the MEC to the medical staff, which can be done by email or posting on the organization's intranet. Further, the New MS Standard indicates that either the medical staff or the MEC can go directly to the board of directors after first advising the other party. In any event, The Joint Commission asserts that the New MS Standard does not diminish the responsibility of the MEC to act on behalf of the medical staff.

The New MS Standard also requires that the bylaws include a process to manage conflict that may arise between the medical staff and MEC. The Joint Commission noted in the FAQs released with the New MS Standard that this conflict management process could be implemented where disagreements exist between the medical staff and the MEC and further noted that the creation of a conflict management process should help to reduce conflict by promoting communication between the medical staff and the governing body.³

Implementation

The members of the Task Force signed a proclamation of support for the New MS Standard in August 2009. This support, according to commentators, indicates that the Standard is likely to be adopted virtually intact. Commissioners are expected to vote on the New MS Standard at the March 2010 meeting. It is not clear when the adopted standard will be implemented, although twelve to eighteen months after final adoption is a customary time frame. If you have any questions, please do not hesitate to contact any of the attorneys in our Healthcare Practice Group listed below.

³ *Id.* at #11.

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