

# HEALTH LAW

## Update

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

### **Hospital Accreditation in the Post-MIPPA Era: The Joint Commission Revises Its Requirements As Part of Its Application To Retain "Deeming" Status**

April 23, 2009

On January 5, 2009, The Joint Commission released revised hospital accreditation standards as part of its "deeming" application to the Centers for Medicare & Medicaid Services (CMS).<sup>1</sup> Hospitals that receive accreditation from certain approved organizations are "deemed" to meet most of the Medicare conditions of participation (CoPs) applicable to hospitals. Historically, The Joint Commission has been the exclusive "deeming" organization for hospitals, but the Medicare Improvements for Patients and Providers Act (MIPPA), enacted on July 15, 2008,<sup>2</sup> revoked the exclusivity for The Joint Commission and required The Joint Commission to re-apply to CMS for non-exclusive "deeming" status.

On March 26, 2009, after discussions with CMS, The Joint Commission released a further revised and reduced number of standards (the "Revised Standards").<sup>3</sup> This Health Law Update will provide the background and an overview of these Revised Standards.

#### **Background on The Joint Commission's Deeming Authority**

The Medicare provisions of the Social Security Amendments of 1965 granted the exclusive deeming authority to The Joint Commission for Medicare's hospital program. As a consequence, a hospital would be deemed to satisfy most of the CoPs (with certain limited exceptions) if it had been accredited by The Joint Commission.

During the years in which The Joint Commission served as the exclusive deeming authority, criticism arose from some sectors regarding the rigor and quality of the hospital surveys conducted

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<sup>1</sup> See The Joint Commission, Changes to Accreditation Requirements between January 5, 2009 and March 26, 2009 documents, Hospital Accreditation Program, available at [http://www.jointcommission.org/NR/rdonlyres/CCB65735C1124570B55A584534E010B4/0/CMSEPs\\_Changes\\_SideBySide\\_FINAL\\_20090325.pdf](http://www.jointcommission.org/NR/rdonlyres/CCB65735C1124570B55A584534E010B4/0/CMSEPs_Changes_SideBySide_FINAL_20090325.pdf)

<sup>2</sup> See Pub. L. 110-275 (July 15, 2008).

<sup>3</sup> See The Joint Commission, Revised 2009 Accreditation Requirements as of March 26, 2009, Hospital Accreditation Program, available at [http://www.jointcommission.org/NR/rdonlyres/C9298DD0-6726-4105-A007FE2C65F77075/0/CMS\\_New\\_Revised\\_HAP\\_FINAL\\_withScoring.pdf](http://www.jointcommission.org/NR/rdonlyres/C9298DD0-6726-4105-A007FE2C65F77075/0/CMS_New_Revised_HAP_FINAL_withScoring.pdf)

by The Joint Commission. In 1999, the Office of Inspector General of the Department of Health and Human Services (OIG) published a report which concluded that The Joint Commission was "unlikely to detect substandard patterns of care or individual practitioners with questionable skills."<sup>4</sup> In 2004, the Government Accountability Office (GAO) concluded that 78% of the time, The Joint Commission survey process did not identify serious deficiencies that were found by State Survey Agencies.<sup>5</sup> These "serious deficiencies" included several incidents where poor quality of care had, according to the GAO report, been overlooked by The Joint Commission during the survey process.<sup>6</sup>

The Joint Commission also received criticism for the fact that it announced its survey visits. Critics charged that, by giving hospitals prior notice, The Joint Commission was allowing hospital administrators to prepare for the surveys,<sup>7</sup> thereby threatening the validity and credibility of such surveys. In 2006, The Joint Commission switched to performing unscheduled hospital surveys for accreditation, which it believes has enhanced the credibility of the accreditation process by ensuring that surveyors observe the hospitals' performance under normal circumstances.<sup>8</sup>

On July 15, 2008, MIPPA revoked The Joint Commission's exclusive deeming authority. MIPPA authorizes the Secretary of Health and Human Services to deem a hospital to satisfy the specified CoPs if the hospital is accredited by *any* national accrediting organization approved by the Secretary (including, but not limited to, The Joint Commission). This provision of MIPPA takes effect July 1, 2010 and will not affect those hospitals currently being accredited or under accreditation by The Joint Commission. All accreditation and deeming status decisions that are rendered prior to July 15, 2010 will be valid for three years.<sup>9</sup>

On February 9, 2009, The Joint Commission submitted its renewal for deeming authority to CMS. The Revised Standards, as discussed below, were a part of The Joint Commission's deeming application process.

### **New Accreditation Requirements**

As part of its original deeming application to CMS, The Joint Commission released 165 new and revised Elements of Performance that were specifically developed to address CMS's CoP requirements. Between January and March of 2009, The Joint Commission worked closely with CMS to address ways to reduce the number of Elements of Performance. In doing so, The Joint Commission focused on reducing the overall burden of collection and measurement on the field and on the surveyor, integrating the CoPs with The Joint Commission standards for ease of compliance,

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<sup>4</sup> See The Office of Inspector General, The External Review of Hospital Quality A Call for Greater Accountability (July 1999), available at <http://www.oig.hhs.gov/oei/reports/oei-01-97-00050.pdf>

<sup>5</sup> See Government Accountability Office, CMS Needs Additional Authority to Adequately Oversee Patient Safety in Hospitals (July 2004), available at <http://www.gao.gov/new.items/d04850.pdf>

<sup>6</sup> See Gilbert, M. Gaul, The Washington Post, Accreditors Blamed for Overlooking Problems - Conflict of Interest Cited Between Health Facilities, Group That Assesses Conditions (July 25, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/24/AR2005072401023.html>.

<sup>7</sup> See Kowalczyk, Liz, Surprise Check faults MGH Quality of Care But Hospital Will Get Accredited (March 17, 2007), available at [http://www.boston.com/news/local/articles/2007/03/17/surprise\\_check\\_faults\\_mgh\\_quality\\_of\\_care/](http://www.boston.com/news/local/articles/2007/03/17/surprise_check_faults_mgh_quality_of_care/).

<sup>8</sup> See The Joint Commission, Facts about the Unannounced Survey Process, available at <http://www.jointcommission.org/AccreditationPrograms/unannounced.htm>

<sup>9</sup> See The Joint Commission, Hospital Deeming Authority Application – Teleconference (March 26, 2009). Transcript available at [http://www.jointcommission.org/NR/rdonlyres/CB5B44EA-DACE-4446-A420-E0629692908A/0/Deemed\\_Status\\_Teleconf\\_32609.pdf](http://www.jointcommission.org/NR/rdonlyres/CB5B44EA-DACE-4446-A420-E0629692908A/0/Deemed_Status_Teleconf_32609.pdf) ; see comments from Dr. Anna Scott Blouin, Executive Vice President of Accreditation Operations and Certification Operations, The Joint Commission, page 2.

and simplifying and using whenever possible existing Elements of Performance as opposed to creating new ones.<sup>10</sup>

On March 26, 2009, The Joint Commission released the Revised Standards. Through successful discussions with CMS, The Joint Commission reduced the original 165 Elements of Performance to 87.<sup>11</sup> The Joint Commission has emphasized that, if a hospital has been meeting The Joint Commission's standards in the past, then it will continue to meet The Joint Commission's Revised Standards, with very few exceptions.<sup>12</sup> These exceptions include the following: (1) Restraint and Seclusion; (2) History and Physicals; and (3) Pre- and Post- Anesthesia Assessment. The changes to the Elements of Performance in each of these categories are discussed in further detail below.<sup>13</sup>

### *Restraint and Seclusion*

The most significant revisions in the Revised Standards relate to restraint and seclusion. The Joint Commission decided to remove its existing restraint and seclusion standards and replace them wholesale with the CMS restraint and seclusion CoPs. The Joint Commission's existing restraint and seclusion standards (to be replaced by the Revised Standards) are based on old CMS standards, which were revised in 2006.<sup>14</sup> When The Joint Commission compared its existing restraint and seclusion standards with CMS standards it became apparent that it would be more effective to replace The Joint Commission's current standards wholesale with the revised CMS standards.

### *History and Physical*

The Revised Standards conform to the CoPs by requiring hospitals to list in their medical staff bylaws the requirements for completing and documenting medical histories and physical examinations.<sup>15</sup> The Revised Standards also require that each patient receive a medical history and physical examination no more than 30 days prior to, or within 24 hours after, inpatient admission or registration, but prior to surgery or a procedure requiring anesthesia services.<sup>16</sup> In addition, for a medical history and physical examination that was completed within 30 days prior to inpatient admission or registration, the Revised Standards require an update documenting any changes in the patient's condition to be completed within 24 hours after inpatient admission or registration, but prior to surgery or a procedure requiring anesthesia services, whichever comes first.<sup>17</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Supra* note 8, Dr. Robert Wise, The Joint Commission Vice President of Standards and Survey Methods, page 4.

<sup>12</sup> *Id.*

<sup>13</sup> Other revised standards include relate to blood transfusion and the handling of infected blood. These were addressed in the previous standards, but are described in more detail in the Revised Standards. See *Supra* note 2 at HR.01.02.01, PC.02.01.01, PC.05.01.09.

<sup>14</sup> See Medicare and Medicaid Programs: Hospital Conditions of Participation: Patient's Rights; 71 Fed. Reg. 71378 (December 8, 2006). These new CoPs included new requirements for the use of restraint and seclusion and apply to all hospitals participating in Medicare and Medicaid, including both general hospitals and freestanding psychiatric hospitals. The rule became effective on January 8, 2007.

<sup>15</sup> *Supra* note 2, MS.01.01.01.

<sup>16</sup> *Supra* note 2, PC.01.02.03.

<sup>17</sup> *Supra* note 2, PC.01.02.03.

### *Pre and Post Anesthesia Assessment*

The Revised Standards require a pre-anesthesia evaluation to be completed and documented within 48 hours prior to surgery or a procedure requiring anesthesia services.<sup>18</sup> In addition, with respect to post-anesthesia assessment, the Revised Standards require that a post-anesthesia evaluation be completed and documented by no later than 48 hours after surgery or a procedure requiring anesthesia.<sup>19</sup>

### **Implementation of Revised Standards**

The Joint Commission is currently working with CMS to implement the Revised Standards. It is expected that by the end of the year, CMS will make a decision regarding The Joint Commission's deeming status for hospital accreditation. The Joint Commission has expressed its confidence that it will receive deeming authority from CMS.<sup>20</sup> In an August 4, 2008 letter to the health care field, Dr. Mark R. Chassin, The Joint Commission's President, stated that "The Joint Commission fully expects that it will be successful and, without interruption, will remain as the nation's leading hospital accrediting body."<sup>21</sup>

There is some confusion in the hospital industry regarding how to handle Periodic Performance Reviews ("PPR")<sup>22</sup> that are scheduled to take place after the Revised Standards take effect (which is July 1, 2009) but before CMS renders its deeming decisions. The Joint Commission will not update the PPR tool until CMS makes its final disposition at the end of the year on the way that the standards and the Elements of Performance are worded.<sup>23</sup> Officials from The Joint Commission have indicated that The Joint Commission will issue "clear guidance" on how to submit PPRs prior to the PPR tool being updated.<sup>24</sup>

### **Conclusion**

The Joint Commission will continue working with CMS this year toward its goal of achieving deeming authority for its hospital program. In the meantime, the hospital industry will need to understand the Revised Standards and how they will impact the accreditation process, and track any further changes to these standards. If you have any questions on this *Health Law Update*, please do not hesitate to contact any of the attorneys in our Healthcare Practice Area listed on the following page.

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<sup>18</sup> *Supra* note 2, PC.03.01.03.

<sup>19</sup> *Supra* note 2, PC.03.01.07.

<sup>20</sup> See Joint Commission Hospital Accreditation Program Deeming Applications Process, available at [http://www.jointcommission.org/NewsRoom/newsroom\\_HAP\\_deeming\\_app\\_process.htm](http://www.jointcommission.org/NewsRoom/newsroom_HAP_deeming_app_process.htm)

<sup>21</sup> See Chassin, Mark R., Letter to Healthcare Field (August 4, 2008), available at <http://www.jointcommission.org/NR/rdonlyres/72CA09F30C1D46B68C6DF3B6775A9AE8/0/August4DeemedStatusDearcolleaguemessage.pdf>.

<sup>22</sup> The Periodic Performance Review is a compliance assessment tool designed to help organizations with their continuous monitoring of performance and performance improvement activities. The PPR provides the framework for continuous standards compliance and focuses on the critical systems and processes that affect patient care and safety. See [http://www.jointcommission.org/AccreditationPrograms/Hospitals/AccreditationProcess/PPR\\_QA.htm](http://www.jointcommission.org/AccreditationPrograms/Hospitals/AccreditationProcess/PPR_QA.htm).

<sup>23</sup> *Supra* note 6, page 11, per Anna Scott Blouin.

<sup>24</sup> *Supra* note 6, page 17, per Anna Scott Blouin.

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