Hospital Business Decisions: Strategies to Reduce the Risk of Physician Litigation

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When hospitals reduce or terminate physician privileges for business reasons, a question arises: must the hospital follow the due process procedures outlined in its bylaws? Courts across the country have struggled with the same question, because due process procedures generally contemplate a situation where the hospital terminates the physician for incompetence—not for business reasons. Uncertainty over this issue impedes hospitals' ability to make business decisions required to remain competitive in today's health care industry.

Most hospital medical staff bylaws contain due process procedures designed to protect physicians from unfair restriction of their clinical privileges, particularly with respect to challenges to physician conduct or competence reportable to medical licensing boards. The due process procedures typically require an adversarial evidentiary hearing where the physician has the opportunity to rebut the charges before peers. In Florida, for example, medical staff bylaws are a binding and enforceable contract between the hospital and its medical staff. Accordingly, a physician may sue the hospital for breach of contract if the hospital restricts the physician's privileges without providing the due process prescribed under its bylaws.

Courts disagree over whether these contractual due process procedures extend to hospital business decisions. The issue often arises in the context of exclusive provider relationships. The hospital may, for example, decide to retain an exclusive anesthesia, radiology, emergency, or hospitalist service provider and decline to credential physicians who are not part of the exclusive group. This issue also can arise if the hospital decides to stop performing particular services (for example, radiation therapy or open heart surgery), or if the hospital decides not to purchase or maintain particular equipment.

Hospital bylaws often are unclear whether the due process procedures apply to business-related decisions, including economic credentialing. Many courts have held that, unless the bylaws expressly state otherwise, a physician is not contractually entitled to due process procedures when a hospital business decision incidentally affects physician clinical privileges. Other courts disagree. The lack of court uniformity increases the risk of litigation.

Despite the litigation risk, hospitals can improve their flexibility in making business decisions and further protect themselves from lawsuits by disgruntled physicians. Hospitals should engage legal counsel to evaluate the state of the law in their jurisdiction, including any statutory requirements, and craft a strategy tailored to their particular needs and circumstances. Among other things, hospitals can consider:

1. Revising medical staff bylaws, with the requisite medical staff approval, to clarify whether physicians are entitled to due process procedures when business decisions affect physician clinical privileges.
2. Documenting the nature and scope of clinical privileges in communications with physician staff members.
3. Including due process waivers in employment, independent contractor, and exclusive provider agreements.
4. Waiting for the natural expiration of clinical privileges of affected physicians before implementing the business decision in question.[5]
5. With respect to exclusive provider arrangements, inviting credentialed physicians to join the exclusive provider group or carving out credentialed physicians from the exclusive provider arrangement.

Although taking one or more of these steps cannot ensure that disgruntled physicians will not sue the hospital, they can increase the likelihood of a speedy and favorable outcome.

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