Among hospitals and those who work with hospital medical staffs, there remains a lack of clarity regarding what qualifications for medical staff membership must be in the medical staff bylaws. Although medical staffs must describe qualifications for membership in their bylaws, neither the Centers for Medicare and Medicaid Services (“CMS”) Conditions of Participation (“CoPs”) nor the most commonly relied upon hospital accreditation standards include much specificity as to what exactly must be included in the bylaws. Rather, each medical staff and hospital has a surprising amount of leeway in setting the qualifications for membership, so long as they also...
comply with any requirements under state law.

**Qualifications for Membership Required by CMS and Hospital Accreditation Organizations**

The CMS CoPs require that a hospital’s medical staff bylaws “describe the qualifications to be met by a candidate in order for the medical staff to recommend that the candidate be appointed [to the medical staff] by the governing body.”¹ The CoPs also require consideration of the following criteria: individual character, competence, training, experience, and judgment.²

However, the CoPs provide little discrete guidance on what must be included as qualifications other than: 1) requiring that, at a minimum, the hospital medical staff be composed of doctors of medicine or osteopathy (and other types of practitioners if permitted by state law),³ and 2) prohibiting a medical staff from solely relying on the fact that a MD/DO is, or is not, board certified in making a judgment on staff membership.⁴

The standards set by the most commonly used national accreditation organizations provide few rules regarding what qualifications for medical staff membership must be included in a hospital’s medical staff bylaws. Hospitals that use The Joint Commission (“TJC”) accreditation for deemed status purposes must include the qualifications for appointment to the medical staff in the medical staff bylaws. But beyond mirroring the CoP requirement regarding state law (licensure), the TJC standards do not go into greater detail regarding the actual qualifications themselves that must be included in the bylaws.⁵

Similarly, hospitals that use DNV Healthcare accreditation for deemed status purposes must include qualifications that must be met for the medical staff to recommend a candidate’s appointment, but the DNV National Integrated Accreditation for Healthcare Organizations (“DNV-NIAHO”) standards again do not go into detail regarding which qualifications must be included in the bylaws.⁶

While the CMS CoPs and hospital accreditation standards provide sparse explicit guidance as to what qualifications must be included in the bylaws, they do require that individual character, competence, training, experience, and judgment must be verified,⁷ and also require primary source verification of certain information at the time of initial appointment and/or reappointment. From this, we can extrapolate additional mandatory qualifications to be included in the medical staff bylaws. For example, since education and training must be verified, we can conclude that the qualifications for medical staff membership must also include graduation from an appropriately accredited professional school and completion of graduate medical education and training (e.g., residency and fellowship).

Of course, medical staffs may need to look beyond the CMS CoPs and accreditation standards to determine what qualifications should be included in the bylaws. Under the Health Care Quality Improvement Act of 1986 (“HCQIA”), hospitals must query the National Practitioner Data Bank (“NPDB”) when an applicant applies for medical staff membership and at a minimum every two years thereafter (i.e., when the
applicant reapplies for membership).  

Hospitals similarly must screen all providers for whom a service may be billed directly or indirectly to a federal health care program against the Office of Inspector General (“OIG”) List of Excluded Individuals and Entities (“LEIE”) at the time that the individual first begins providing services at the hospital and regularly thereafter. The OIG recommends screening the LEIE at least monthly. A hospital may face Civil Monetary Penalties if it is determined that the hospital employed or contracted with an excluded provider. As a result, the hospital may include as a qualification for medical staff membership that an applicant not be excluded from participation in any federal health care program, including Medicare, Medicaid, and Tricare.

In addition, only those individuals in possession of a current Drug Enforcement Agency (“DEA”) number may prescribe controlled substances. Medical staffs must verify that any members seeking privileges that contemplate prescribing controlled substances at the Hospital have the appropriate certification to do so. Therefore, the bylaws should include possession of a current federal DEA number, and, if applicable, a state-controlled substance license or registration as a minimum qualification, when applicable.

Taking all of the above together, medical staffs should include the following minimum qualifications for medical staff membership in their bylaws:

1. Possession of a valid state license to practice medicine;
2. Possession of a current DEA certificate, if the privileges contemplate prescribing controlled substances;
3. Graduation from an appropriately accredited professional school and completion of an approved graduate medical education and training program; and
4. Not be excluded from participation in any federal health care program, including Medicare, Medicaid, and Tricare.

**Best Practices Beyond Mandatory Qualifications**

The mandatory qualifications for medical staff membership noted above provide a solid starting point for many hospitals and their medical staffs. Yet most hospitals include additional threshold qualifications even though they are not mandated by law or applicable accreditation requirements. In formulating these requirements, each medical staff should bear in mind their own hospital’s needs and resources. For example, a smaller hospital with few physicians in the geographic area may not wish to include an exhaustive list of threshold qualifications that would preclude otherwise qualified physicians capable of meeting their community’s health care needs. In contrast, a hospital providing many specialty services to a complex population may decide to include stricter standards. Whatever the approach the medical staff decides to take in establishing qualifications, they should ensure that their standards are not arbitrary, discriminatory, or have an illegal anti-competitive
effect. A few examples of additional threshold qualifications a medical staff may want to consider are described below.

Professional Liability Insurance

Although only some states require physicians to carry professional liability insurance coverage, most hospital medical staffs will want to include coverage at a minimum amount specified by the medical staff and the board of directors. This requirement should specify that all requested privileges must be covered.

Location

Most medical staffs will include a requirement that its members with admitting or surgical privileges be located close enough to the hospital to provide continuous care to their patients and to fulfill any emergency call requirements.

Infectious Disease Consideration

As the COVID-19 pandemic has come to dominate so many aspects of our lives and the health care industry in the past two years, another minimum qualification for medical staff membership is the requirement that practitioners participate in any vaccination, screening, or personal protective equipment requirements. Most medical staff bylaws will already include within the basic responsibilities of medical staff membership that all members will abide by any policies of the hospital. Including vaccine, screening and PPE requirements within the basic qualifications for medical staff membership, however, allows the hospital to maintain safety standards without obligating it to go through a long, drawn out hearing and appeal process for any practitioner who refuses to comply with the applicable hospital policies.

Challenging Areas

Some of the minimum qualifications that many hospital medical staffs will want to include in their bylaws, such as provider health care status, criminal history, board certification, exclusive contracts, and provide unique legal challenges for hospitals. While challenging, the qualifications discussed below are nonetheless important considerations for hospitals in determining whether to grant a practitioner medical staff membership.

Health Status

TJC standards requires an applicant to submit a statement that “no health problems exist that could affect their ability to perform the privileges requested.” The Joint Commission goes on to note that: “the applicant’s ability to perform privileges requested must be evaluated.” Therefore, current physical and mental health status should be included as a qualification for membership in the bylaws. However, through what source the medical staff verifies this health information, when the medical staff considers the information, and whether an accommodation should or
must be offered may depend on the relationship of the practitioner to the hospital and state and federal disability laws, as applicable.

**Criminal History**

Many medical staff bylaws include language under the qualifications for medical staff membership requiring that the applicant not have been convicted of, entered a plea of guilty, or no contest to any felony, or to misdemeanors substantially related to a physician’s qualifications (e.g., health care fraud and abuse, controlled substances misdemeanors, etc.). There are very good and practical reasons why a medical staff will want to include such qualification requirements as the consideration goes to whether the applicant meets the desired “character” criteria. Some states even include such a requirement in mandated uniform medical staff applications. For example, the Colorado Health Care Credentials Uniform Application Act at CRS § 25-1-108.7 includes two mandatory questions relating to whether the applicant has ever been convicted of, pled guilty to, or pled no contest to certain felonies or misdemeanors.

However, a requirement that an applicant for medical staff membership disclose such a felony or misdemeanor arguably conflicts with the spirit, if not the letter, of what are commonly referred to “ban the box” prohibitions, which prohibit an employer from requiring the disclosure of an applicant’s criminal history on an initial written or electronic application form. Several states already have ban the box laws in place applicable to private employers, and many more states are considering similar legislation or have ban the box laws that apply only to governmental employers, which could apply to some hospitals.

Many ban the box laws include limited exceptions that could potentially apply to hospitals and the credentialing and privileging process. Ultimately, each hospital and medical staff must conduct its own risk assessment to reconcile compliance with the applicable state laws, and their desire to include an effective mechanism in place to reject an application for medical staff membership from an applicant who has certain felonies or misdemeanors on their record. In addition, medical staffs including such a provision should consider whether the requirement should only apply to more recent criminal actions, such as within the last five years or other time period.

**Board Certification**

Some hospitals include a requirement that members of the medical staff obtain and maintain certification by a recognized board in the clinical specialty for which privileges have been requested. Hospitals should approach board certification thoughtfully when establishing board certification as a minimum qualification for medical staff membership. Some practitioners may be granted medical staff membership early in their career while they are still board eligible but have not yet achieved certification, while other practitioners later in their career may have been granted membership before board certification in their specialty was established (for example, board certification in hospice and palliative care was not introduced by the American Board of Hospice and Palliative Medicine until 1997 and by the American Board of Internal Medicine until 2008). Further, some specialties do not
have a process for board certification (e.g., dentistry, except for oral and maxillofacial surgeons). Board certification can also be a challenging minimum qualification if the hospital wishes to allow residents to moonlight, as most residents will not be board eligible or certified. In addition, since CMS prohibits a hospital from relying solely on the applicant’s board certification as noted above, the hospital may include certain exemptions and a possible option for the Governing Board to waive the board certification requirement. Hospitals and medical staffs should also be aware of state laws prohibiting or limiting requirements regarding maintenance of board certification.

**Conclusion**

The qualifications for medical staff membership discussed above are by no means exhaustive of everything that a medical staff may want to take into consideration when determining whether to grant medical staff membership to an applicant. The CoPs and accreditation standards provide nominal concrete guidance regarding the minimal qualifications that a hospital must include in the medical staff bylaws, particularly in comparison to the many important considerations and legal risks that a hospital must consider when determining whether to grant medical staff membership and privileges to an applicant. Moreover, many hospital medical staffs will also include certain subjective qualifications related to the practitioner’s competence, clinical judgment, and professionalism that are not directly addressed by the more objective criteria discussed above, and which can be difficult to define within the bylaws. Ultimately, each hospital and medical staff should give the qualifications for medical staff membership included in the bylaws careful consideration and would be well advised to seek legal counsel to avoid glaring gaps and potential legal pitfalls that may not be readily apparent at first glance.

**Footnotes**

1. 42 CFR § 482.22(c)(4).
2. 42 CFR § 482.22(a)(6).
3. 42 CFR § 482.22(a).
4. 42 CFR § 482.12(a)(7).
5. TJC, MS.01.01.01, EP 13.
6. DNV-NIAHO, MS.8.
7. TJC, MS.06.01.03, EP 6, and DNV-NIAHO, MS.8.
8. 45 CFR § 60.17.
10. *Id.*
11. 42 CFR § 1003.120.
12. 21 CFR § 1301.11
13. TJC, MS.06.01.05, EP 6
14. Id.
15. See History of AAHPM, available at [http://aahpm.org/about/history](http://aahpm.org/about/history), and ABIM Exam Administration History, available at [https://www.abim.org/about/exam-information/exam-administration-history](https://www.abim.org/about/exam-information/exam-administration-history) (last visited on February 10, 2022).
16. 42 CFR § 482.12(a)(7).

© Polsinelli PC, Polsinelli LLP in California

National Law Review, Volume XII, Number 85