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Professional Development Forum Online

Guidelines for Minimizing Legal Risks of Professional Certification Programs

Professional Development Forum Online, December 2008

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What do you have to watch out for as you set up a professional certification program? Lisa Stegink gives an overview of the legalities.

A professional certification program can create visibility for a profession and be a source of both income and prestige for the sponsoring association. At the same time, however, there are legal risks associated with establishing such a program. What are the areas of law relevant to certification, and which provide guidelines for developing and implementing a professional certification program designed to minimize liability for the credentialing organization?

Certification is an indication that persons have met certain minimum criteria established by the certifying body. Typically, those criteria include some combination of education, experience, and examination. Certification does not guarantee anyone's competence to do a particular job. Any organization that sponsors a certification or credentialing program, therefore, should be careful when marketing the program not to equate certification with job competence. Legal safeguards should be established and certain guidelines followed for implementing a successful certification program that minimizes the credentialing organization's liability. The primary areas of the law that are relevant to professional certification programs are antitrust, the common law fairness doctrine, negligent credentialing, the Americans With Disabilities Act, and contract law.

Certification activities may give rise to potential antitrust liability exposure. Antitrust laws prohibit unreasonable restraints of trade. In the context of certification, the pro-competitive benefits of the program must be balanced against any anti-competitive effects. Because developing and implementing a professional certification program involves collaboration among competitors, by its very nature such a program may exclude certain professionals from the marketplace. Procedures should be developed that document the reasonableness of proposed certification requirements. Typical areas of potential exposure include who makes the credentialing decisions, whether the education and training or experience requirements are reasonable, and whether the examination is testing what it claims to test or simply excludes qualified candidates. In all cases, such programs may never be used to fix prices or exclude competitors from the market. To counter any implication of anti-competitive activity, a

certification program generally should follow these guidelines:

- The professional credentialing body's policy-making functions and individual credentialing decisions must be independent of any related professional association. There are various ways to set up the relationship between the certifying body and the association to maintain the necessary independence. While the law does not require the certifying body to be a separate corporation, control over policies and individual credentialing decisions must remain with the certification body.
- Certification must be voluntary, although a group with authority such as a state licensing board may choose to make it mandatory.
- Certification criteria should include a reasonable combination of education, examination, and experience requirements, and should be developed with input from a cross-section of affected and interested parties, not only association members or the individuals to be certified.
- Criteria should be no more stringent than necessary to insure that minimum levels of competence are achieved.
- Participation in the program should not be denied on the basis that the individual is not a member of the sponsoring association.
- Fees charged for participation in a certification program must be reasonable related to the direct and indirect costs involved.
- Individuals denied certification or subject to revocation should receive written notice of the denial or revocation, including the process and reasons for the denial or revocation, and an opportunity for appeal to a body other than that originally denying or recommending revocation of certification.

In addition to antitrust concerns, common law doctrines of fairness also have been applied to certification activities. Although private credentialing bodies are not subject to the same Constitutional requirements as are governmental bodies to conduct their activities in accordance with due process, courts have imposed fundamental fairness requirements on organizations, such as credentialing bodies, that have the power to affect an individual's ability to pursue his or her profession. Both substantive fairness and procedural fairness are important. Substantive fairness means establishing objective criteria reasonably related to a legitimate organizational purpose. If the criteria for certification are arbitrary, established in bad faith, or without reasonable basis they will be subject to challenge on substantive grounds. In addition to following the above guidelines to ensure the criteria are substantively fair, the following procedural requirements also should be met:

- Process, in general, must be transparent, i.e. clear, accessible, and consistently applied.
- Individuals denied certification should be provided notice and an opportunity to appeal the determination. The nature of the appeal, however, can vary according to the circumstances (e.g., a hearing, an opportunity to re-take exam, a re-grading of exam).
- Prior to revocation of certification, a credentialed individual generally should be provided
 - a. Notice of the basis for the revocation;
 - b. A hearing before an impartial tribunal;
 - c. An opportunity to examine witnesses, if any; and
 - d. An opportunity to make a defense and refute the evidence produced in support of

the charge.

- The grounds for revoking certification and standards for recertification should be set forth in writing before any credentialing is performed.

Negligent credentialing is another area of concern. The common law imposes a duty on individuals and organizations to refrain from conduct that creates an unreasonable risk of harm to others. If a certified individual causes injury, the certifying organization could be held liable if it did not take appropriate steps to ensure the individual was properly certified and employers, consumers, or others relied on the certification. To minimize liability for negligent credentialing, organizations should follow these guidelines:

- Applicants for certification should be required to provide proof of education and training.
- In promoting the credential, the credentialing body should not "warrant the competency" of the credentialed individuals. Instead, it should simply explain the criteria for certification and state that the credentialed individuals have met them.
- Recertification standards and the grounds for revocation of certification should be established at the outset.

Title III of the Americans With Disabilities Act prohibits discrimination on the basis of disability by private entities in places of public accommodation. The regulations adopted under Title III outline specific requirements for entities that conduct examinations and courses for educational, professional, or trade purposes. Such examinations and courses must be offered "in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals." In addition, costs associated with accommodations must be shared by all, not just the individual requiring accommodation.

Recent amendments to the ADA have broadened the definition of disability under the act and lowered the standard for determining whether an impairment substantially limits an individual's major life activity. Those changes likely will require credentialing bodies to provide accommodations to a wider range of individuals than before, likely increasing costs. As more testing accommodations are provided, organizations also must ensure they address score comparability and fairness concerns. As organizations consider ADA issues, they should:

- Refer to industry testing standards for accommodation strategies.
- While reasonable accommodations must be made, such accommodations should not, and cannot, jeopardize the validity of the credentialing decision.
- Organizations should ensure that responsibilities for meeting accessibility requirements with respect to the testing site are shared, or shifted, under contract.
- To the extent necessary, the credentialing body may be required to make additional accommodations to facilitate communication with applicants.

Finally, general principles of contract law, which govern the relationship between the credentialing organization and the individual taking the exam, also should be kept in mind:

- As a general matter, the organization should establish and follow fair and valid education and training criteria.

- Examination materials should include a statement advising the applicant that the credentialing body reserves the right to cancel any test scores it reasonably deems questionable.
- In turn, the credentialing body should exercise due care in maintaining the security of the examination (using sign-in procedures, proctors, etc.) and cancel or refuse to report examination results only after good faith investigation (including fair procedures).

There are related issues to address as well, including minimizing bias in testing, use of releases (e.g., for obtaining or verifying education or experience requirements), avoiding defamation of individuals denied certification or whose certification was revoked, and obtaining insurance to protect the organization if it is sued for activities relating to credentialing. With proper attention to legal issues upfront, a professional credentialing program can provide benefits for the profession, for certified individuals, and for the employers, consumers, and industries those individuals serve while minimizing potential liability exposure for the organizations undertaking such programs.

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