

Minimizing Legal Risks of Certification Programs

Q: What are the legal risks associated with implementing a professional or product certification program, and how can we minimize them?

A: The primary areas of legal risk from certification programs are antitrust, the common law fairness doctrine, negligent credentialing, the Americans with Disabilities Act and contract law.

Antitrust laws prohibit unreasonable restraints of trade. Because developing and implementing a certification program involves collaboration among competitors in setting criteria for certification, by its very nature such a program may exclude certain professionals or products from the marketplace. To counter any implication of anti-competitive activity, follow these guidelines:

1. The credentialing body's policy making functions and individual certification decisions must be independent of any related trade or professional association. While the law does not require the certifying body to be a separate corporation, control over policies and individual certification decisions must remain with the certification body.
2. Certification must be voluntary.
3. Certification criteria should be objective, reasonable, and developed with input from a cross-section of affected and interested parties. Professional certification should include a combination of education, examination and experience requirements; for product certification, performance standards, rather than design standards, should be used.
4. Criteria should be no more stringent than necessary so competence or quality are achievable.
5. Non-members must be allowed to participate, although they may be charged a reasonably higher fee.
6. Certification fees must be reasonable.

7. Due process should be followed (e.g., notice and opportunity to appeal certification decisions).

Common law doctrines of fairness also have been applied to certification activities and certifying bodies, which have the power to affect an individual's ability to pursue his or her profession or a product's ability to compete in the marketplace. Substantive fairness requires establishing objective certification criteria reasonably related to a legitimate organizational purpose. Procedural fairness requires:

1. A clear, accessible and consistently applied and transparent process.
2. Individuals or products denied certification should receive notice and an opportunity to appeal the decision.
3. Participants whose certification is being revoked generally should receive notice of a hearing and an opportunity to present evidence to refute the basis for the revocation.
4. Define the standards for certification and recertification, and the grounds for revoking certification in writing before certification begins.

Negligent credentialing is another legal risk. If a certified person or product causes injury, the certifying organization could be held liable if it did not take appropriate steps to ensure proper certification, and others relied on the certification. To minimize such liability, follow these guidelines:

1. Require applicants for professional certification to provide proof of education and training.
2. Do not promote, guarantee or "warrant" the competency or quality of the certified individuals or products, but simply state that the certification standards were met.
3. Establish recertification standards and grounds for revocation of certification to ensure the certification criteria continue to be met.

Regulations adopted under Title III of the Americans with Disabilities Act outline specific requirements for entities that conduct examinations and courses for educational or professional certification purposes. Examinations and courses must be offered "in a place and manner accessible to persons with disabilities" or alternative accessible arrangements offered. With testing accommodations, organizations also must address score comparability and fairness. Costs for accommodations must be shared by all, not charged to the individual requiring accommodation. As organizations consider ADA issues, they should:

1. Refer to industry testing standards for accommodation strategies.
2. Make reasonable accommodations without jeopardizing the validity of the certification decision.
3. Consider shifting responsibilities for meeting test site accessibility requirements to the test site provider under contract.
4. Make additional accommodations to facilitate communication with applicants, if necessary.

Finally, general principles of contract law govern the relationship between the certifying body and the program participant. The organization should establish — and follow — fair and valid certification and testing criteria. Certification materials should include a statement that the certifying body reserves the right to cancel any test results it reasonably deems questionable.

The above provides a starting point for minimizing legal risks with certification programs. The best protection is to plan ahead and seek legal advice on the many potential issues related to certification. **■**

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.