

CMS Reverses Its Position Regarding Arbitration Agreements in Long-Term Care

Long-term care (LTC) facilities received a boost last week when the Centers for Medicare and Medicaid Services (CMS) reversed its position regarding the use of arbitration agreements in this setting. On June 8, 2017, CMS published a proposed rule amending LTC facilities' conditions of participation in the Medicare and Medicaid programs to remove prohibitions on binding pre-dispute arbitration agreements. According to CMS, the proposed rule would increase the transparency of arbitration agreements in LTC facilities, support residents' right to make informed choices, and eliminate unnecessary burdens on providers. The revised rule comes in the wake of the U.S. Supreme Court's May 15 decision, *Kindred Nursing Centers v. Clark*, which reaffirmed a broad federal policy favoring arbitration.

In October 2016, CMS published a final rule prohibiting LTC facilities from entering into pre-dispute arbitration agreements with residents or resident representatives, or requiring them to sign an arbitration agreement as a condition of admission. The 2016 rule also required that any resident's agreement to engage in post-dispute binding arbitration be voluntary, that the parties agree on the selection of a neutral arbitrator, and that the venue be convenient to both parties.

A federal district court in Mississippi halted enforcement of the 2016 rule shortly after it was adopted, and CMS subsequently instructed state survey agency directors nationwide not to enforce the rule. In response to the court's decision, and no doubt also fueled by the *Kindred* decision, CMS's new proposed rule represents a profound change of course. If adopted, the rule would make arbitration much more widely available to LTC facilities - although state law restrictions on arbitration will still need to be considered, to the extent they survive *Kindred*.

The proposed rule would make several key changes. It would:

- Allow facilities and residents (or their representatives) to enter into pre-dispute agreements for binding arbitration;
- Permit facilities to require residents to sign arbitration agreements as a condition of admission; and
- Strike requirements that the arbitrator be agreed upon by both parties and that the venue be convenient to both parties.

by Pamela S. Kaufmann & Ann
Mary Olson



At the same time, the rule would preserve the following requirements:

- The arbitration agreement must be explained to the resident and representative in a form and manner the resident understands, including a language the resident understands;
- The resident must acknowledge that he or she understands the agreement;
- The arbitration agreement must contain no language that prohibits or discourages a resident from communicating with officials, including surveyors, health department employees, and representatives of the State Long-Term Care Ombudsman; and
- A copy of any signed arbitration agreement and the arbitrator's final decision must be retained by the facility for 5 years and be available for inspection upon request by CMS.

The revised rule would also add requirements that binding arbitration agreements be in "plain language" and that facilities post a notice describing their policy on the use of arbitration agreements in an area visible to residents and visitors. By emphasizing disclosure, the new rule would protect residents without unduly limiting the parties' options for streamlined dispute resolution.

The proposed rule is a welcome, pragmatic change for LTC facilities, which have long recognized the need for alternatives to litigation.

Comments regarding the proposed rule are due August 7.

For more information, please contact:

Pamela S. Kaufmann, Partner
415-995-5043
pkaufmann@hansonbridgett.com

Ann Mary Olson, Senior Counsel
415-995-5068
AMOlson@hansonbridgett.com