

New Regulations for Binding Pre-Dispute Arbitration Agreements with Long-Term Care Residents

In 2016, the Centers for Medicare and Medicaid Services (CMS) issued regulations that prohibited long-term care facilities from entering into pre-dispute arbitration agreements with residents and their families. Shortly thereafter, those regulations were successfully challenged in federal court, and CMS has not attempted to enforce them.

On July 18, 2019, CMS issued a final rule that will formally rescind the ban on pre-dispute arbitration agreements with long-term care residents. On September 16, 2019, amendments to 42 C.F.R. § 483.70(n) take effect that permit long-term care facilities to enter into binding pre-dispute arbitration agreements as long as they meet certain requirements. These requirements are:

- The facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission or a requirement to continue to receive care at the facility;
- The facility must explicitly inform the resident or the resident's representative of his or her right not to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility;
- The facility must ensure that the agreement is explained to the resident and his or her representative in a form, language, and manner they understand;
- The facility must ensure that the resident or his or her representative must acknowledge he or she understands the agreement;
- The agreement must provide for the selection of a neutral arbitrator agreed upon by both parties;
- The agreement must provide for the selection of a venue that is convenient to both parties;
- The agreement itself must explicitly grant the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it;
- The agreement must explicitly state that neither the resident nor his or her representative is required to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility;
- The agreement may not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials, including



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- but not limited to federal and state surveyors, other federal or state health department employees, or representatives of the Office of the State Long-Term Care Ombudsman; and
- A facility that resolves a resident dispute through arbitration must retain a copy of the signed arbitration agreement and arbitrator's final decision for five years and "make them available for inspection upon request by CMS or its designee."

The final rule adopting these changes to 42 C.F.R. § 483.70(n) can be accessed at <https://www.govinfo.gov/content/pkg/FR-2019-07-18/pdf/2019-14945.pdf>.

Long-term care facilities that wish to enter into binding arbitration agreements with residents should ensure that their arbitration agreements and the procedures for presenting them to residents and their representatives and retaining them comply with the new requirements.

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