ARBITRATION AGREEMENTS

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Those of you who followed the plight of AB 2947 know all too well that arbitration agreements are under attack by trial lawyers. AB 2947 would have made it virtually impossible for an RCFE to enter into an enforceable pre-dispute arbitration agreement with its residents. Fortunately, the Governor vetoed AB 2947. Nevertheless, it would be a mistake for providers to be complacent about the enforceability of arbitration.

Among the justifications proffered for AB 2947 was that consumers don't know that they have agreed to arbitration, that consumers are coerced into agreeing to arbitration, and that consumers are being required to give up significant rights when they agree to arbitration. In numerous cases around the country, plaintiffs' personal injury attorneys have attacked arbitration clauses as being unconscionable for these reasons.

Traditionally, many RCFEs that wished to arbitrate disputes simply included a provision in the Admission Agreement that stated that by signing the Agreement the resident was agreeing to arbitrate all disputes. Though mandatory provisions of this type insure that every resident is arguably subject to arbitration, the fact is that such provisions are susceptible to attack in the courts (as well as politically) and, depending on the facts of the specific case, the validity of an arbitration clause may be successfully challenged.

In recent years, a number of providers have shifted to voluntary arbitration agreements. An informal survey of companies that have done so reveals that providers who have done a good job of educating consumers on the merits of arbitration find that the overwhelming majority of their new residents willingly enter into agreements to arbitrate disputes. Providers who wish to maximize the likelihood that an arbitration agreement will be deemed enforceable may wish to consider the following suggestions.

1. Make it clear that a resident is not obligated to agree to arbitration as a condition of admission. By doing so, you eliminate the argument that a resident was coerced into agreeing to arbitration.
2. Have a stand alone arbitration agreement that is not simply part of the text of the Admission Agreement itself. This helps to undermine the argument that a resident did not realize what they were signing.
3. Make sure that the arbitration agreement is in fact explained to the resident and/or his or her responsible person at the time the agreement is signed. Document in the resident's file that there was a discussion of the arbitration agreement and that it was signed voluntarily.
4. Make sure that the arbitration agreement is written in plain English. Avoid legalese. It should be understandable to someone with a limited education. (Note, the RCFE law requires that all components of the Admission Agreement be written in plain English.)
5. Avoid provisions that unfairly disadvantage the resident. For example, some arbitration agreements severely restrict the number of depositions that may be taken. In most personal injury cases, a defendant RCFE has relatively few witnesses that they need to depose, whereas a plaintiff may have many. Including one-sided provisions like these, even if they appear neutral on their face, can undermine the enforceability of your agreement.
6. Similarly, provisions that limit your liability are likely to be thrown out and may jeopardize the validity of the entire arbitration agreement.
7. Make sure that the statement regarding waiver of the right to a jury trial is prominently set forth so that residents recognize the consequence of agreeing to arbitration.
8. If your arbitration agreement sets forth a particular forum, make sure that the forum that you designate does not have unreasonably expensive filing fees. Also make sure that you do not list a forum that will not honor a pre-dispute arbitration agreement. For example, the American Arbitration Association will not honor a pre-dispute arbitration agreement in a "healthcare context."
9. Consider including a rescission right for a specified period of time. If a resident has the right, for example, to rescind the decision to arbitrate within ten days after signing, this tends to undermine the argument that the decision to arbitrate was not made knowingly and willingly.

If a resident is competent, he or she should personally sign the arbitration agreement along with the resident's responsible person, if any. If the resident is not competent, the arbitration agreement must be signed by either a person holding power of attorney for the resident or a conservator. The California Supreme Court recently determined that a spouse of an incompetent resident, who served as the resident's "responsible person" for purposes of admitting them to an RCFE, did not have the authority to waive the resident's right to a jury trial and agree to arbitration.

There are certain matters that you may wish to exclude from arbitration. At a minimum, any claim that can be brought in small claims court should not be subject to arbitration.

Attorneys are not permitted in small claims court and the filing fees are minimal. If these small disputes are subject to arbitration, the cost of filing for arbitration and the fees for the arbitrator can easily exceed the amount in dispute. Many providers also choose to exempt eviction proceedings from arbitration. Evictions are subject to expedited proceedings in court and arbitration may slow the process down. In addition, an arbitrator cannot issue an order to evict that a sheriff can execute so it would still be necessary to go into court to obtain an order. Some businesses also choose to exclude class actions from arbitration.

In sum, arbitration is a sound risk management strategy and it is prudent to take steps to increase the likelihood that your arbitration provisions will be enforced. Nevertheless it is important to recognize that arbitration is not a panacea, and it is not a substitute for sound risk management policies and practices.