On January 1, 2015, AB 2171 takes effect. This law identifies RCFE residents' rights or, more accurately for some provisions, obligations RCFEs have toward residents. Most of these rights and obligations already exist under current statute or regulation, so ensuring compliance could mainly involve updating forms and notices. But AB 2171 may have a broader reach that impacts how and when RCFEs enter into binding arbitration agreements with their residents.

AB 2171 prohibits RCFEs from requiring residents to waive the delineated rights as a condition of admission. Written very broadly, the non-waiver provision says:

> No provision of a contract of admission, including all documents that a resident or his or her representative is required to sign as part of the contract for, or as a condition of, admission to a residential care facility for the elderly, shall require that a resident waive ***benefits or rights*** to which he or she is entitled under this chapter or ***provided by federal or other state law or regulation***. (Health & Safety Code §1569.269(c) (emph. added.)

AB 2171

Will Your Arbitration Agreements Comply?

By Lori C. Ferguson, Hanson Bridgett LLP

The reference to "rights or benefits...provided by federal or other state law or regulation" could be interpreted expansively to prohibit RCFEs from requiring residents, as a condition of admission, to agree to arbitrate disputes and, thus, waive their right to a jury trial.

Federal law protects the rights of parties to enter into pre-dispute arbitration agreements in matters impacting interstate commerce—a broad term itself—and preempts conflicting state laws. Because of this, AB 2171's impact on the right to enter into pre-dispute arbitration agreements with residents at or before the time of admission could be negligible. To know this for sure, however, a legal dispute will have to make its ways through the courts. Until that occurs, RCFEs wishing to avoid potential regulatory penalties or challenges to the enforceability of arbitration agreements will want to re-examine their admission agreements and other admission paperwork.

Even assuming its non-waiver provision impacts arbitration agreements, AB 2171 does not prohibit RCFEs from asking residents to waive their right to a jury trial in favor of arbitration or other forms of alternative dispute resolution. Rather, it only prohibits obtaining any waiver of the right to litigate disputes in court through a "contract of admission" or "documents that a resident or his or her representative is required to sign as part of the contract for, or as a condition of, admission to a residential care facility for the elderly."

This means that an arbitration agreement that is not part of the contract of admission and not required as a condition of admission can be enforceable. ***The key is to remove the arbitration agreement from the admission agreement. The arbitration agreement should be a separate document. And it should be voluntary.***

While re-examining and updating arbitration agreements to prepare for the implementation of AB 2171, RCFEs should take the opportunity to look at other aspects of their agreements to maximize the likelihood they will withstand a challenge. To maximize enforceability, an arbitration agreement should:

1) Be clearly identified as an arbitration or alternative dispute resolution agreement. Residents should know by looking at both the title of the document and the text that they are agreeing to resolve disputes outside of the court system.
2) State in plain and conspicuous terms that signing the agreement results in a waiver of important rights, including the right to a jury trial.
3) State in the document itself that signing an arbitration agreement is not a condition of admission. There should be no doubt that the decision to enter into an arbitration agreement is optional and voluntary.
4) Encourage residents to consider carefully the decision to enter into an arbitration agreement. Consider allowing a rescission period—perhaps ten days—during which the resident can back out of the agreement.
5) Be mutual. The arbitration agreement should require both parties to arbitrate disputes.
6) Not unfairly limit the resident's discovery or potential recovery rights. Arbitration agreements that simply transfer the venue of the dispute from the courtroom to an arbitrator's conference room, leaving all causes of action and potential recovery rights intact, are more likely to be upheld than an agreement that limits liability.
7) Not effectively preclude a resident's use of arbitration because of excessive fees. If the arbitration fees are more than court costs or exceed the value of the claim itself, a court is more likely to find the agreement unconscionable and, therefore, unenforceable. The community should consider shouldering some or all arbitration fees.

It remains to be seen whether AB 2171's non-waiver provision will be used to restrict the circumstances in which RCFEs and residents enter into arbitration agreements. The good news is that best practices for RCFEs seeking to maximize the enforceability of arbitration agreements and compliance are compatible with a broad reading of the non-waiver provision of AB 2171. ■

Lori Ferguson is a partner at Hanson Bridgett, LLP. She has represented long-term care facilities, senior care communities, and various health care providers in civil, administrative, and regulatory proceedings involving a wide range of issues.

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