



Health Care Client Alert

CMS Allows “Transparent” Pre-Dispute Arbitration Agreements in Long-Term Care Facilities

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The Centers for Medicare & Medicaid Services (CMS) recently updated the requirements for Long-Term Care facilities (LTCs) related to the use of pre-dispute, binding arbitration agreements. As part of the comprehensive reform of LTC regulations in 2016, CMS completely banned the use of pre-dispute arbitration agreements with nursing home residents. CMS was unable to enforce the ban due to a legal challenge and resulting injunction. In response to the injunction, CMS published a proposed rule in 2017 repealing the ban and imposing certain safeguards on use of arbitration agreements to protect residents. Following notice and comment, the proposed rule was adopted and becomes effective September 16, 2019.

In the final rule, CMS has authorized use of pre-dispute arbitration agreements, but LTCs seeking an arbitration agreement with a resident must be more transparent in using them. Specifically, LTCs must:

- Explicitly inform residents that signing an arbitration agreement is not a condition of admission or continued receipt of care and include such language in the agreement;
- Ensure the agreement is explained to residents in a form, manner, and language they understand and require residents to acknowledge that they understand the agreement;
- Ensure the agreement provides for the selection of a neutral arbitrator agreed upon by both parties and a venue convenient to both parties;
- Ensure the agreement contains no language prohibiting or discouraging residents (or anyone else) from communicating with federal, state, or local officials;
- Expressly grant residents the right to rescind the agreement within 30 calendar days of signing it to allow residents time to seek legal advice; and
- For disputes resolved through arbitration, retain copies of the signed agreement and the arbitrator’s final decision for five years after resolution and make them available for inspection by CMS.



CMS will monitor compliance with these requirements through the annual survey process. Non-compliant LTCs may be cited for deficiencies, placed on probation, or decertified from Medicare. LTCs that transfer or discharge a resident for refusing to sign an arbitration agreement may be terminated from Medicare and Medicaid.

The final rule is not retroactive, but CMS encourages LTCs to give current residents the opportunity to replace existing arbitration agreements with compliant ones. In any event, LTCs desiring to seek pre-dispute arbitration agreements with their residents should seek legal counsel to assist in confirming their policies, procedures, and agreements comply with the final rule requirements.

If you need assistance regarding health care policies, procedures, or agreements, please contact any [member of the GableGotwals Health Care Practice](#).



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