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BREAKING NEWS: CMS Proposes Final Rule Regarding Arbitration Agreements

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On October 4, 2016, The Centers for Medicare & Medicaid Services (CMS) published a final rule that prohibited long-term care facilities from using pre-dispute, binding arbitration agreements. The rule also had guidelines for post-dispute arbitration agreements. A few days later, the American Health Care Association and a collection of nursing homes filed suit. They were awarded an injunction.

In response, in June of 2017, CMS published a new proposed final rule regarding the use of arbitration agreements by nursing homes. CMS opened the requisite comment period and collected thoughts and suggestions from the public. As of **July 16, 2019**, CMS has revised the rule, based on the consideration of those public comments, and has [issued a new proposed final rule](#) regarding the use of pre-dispute, binding arbitration agreements by long-term care facilities. While arbitration agreements are now allowed, there are several restrictions on them.

The proposed final rule includes:

- A nursing home may not, as a condition of admission to the nursing home (or as a condition to continued care), require a resident to sign a binding arbitration agreement.
- A nursing home must explicitly notify the resident of their right not to sign the agreement and the agreement must explicitly state that the resident is not required to sign it.
- The agreement must explicitly provide that the resident has the right to rescind the agreement within 30 calendar days of execution of the agreement.
- The arbitration agreement must be explained to the resident in a language in which they understand.
- If a resident chooses to sign the pre-dispute, binding arbitration agreement, the nursing home must ensure that the resident acknowledged that he or she understands the agreement.
- The agreement cannot contain any language that dissuades the resident from communicating with state or federal officials regarding any matter.
- The arbitration agreement must specify that if arbitration is entered into, a neutral arbitrator will be agreed upon by both parties.
- If arbitration is sought, the venue must be convenient to both parties.
- If a nursing home facility and a resident enter into arbitration, a copy of the binding decision must be retained by the facility for five years, and make that decision available for inspection by CMS.

*Any rule that applies to a resident also applies to his or her legal representative.

CMS stated “The overall impact of this final rule is to provide transparency in the arbitration process in nursing homes to the residents, his or her family and representatives, and the government.” The proposed rule is a part of CMS’s five-part plan to overhaul the oversight of nursing homes. Seema Verma, Administrator of CMS, [has indicated](#) she intends to strengthen oversight, enhance enforcement, increase transparency, improve quality, and put patients above paperwork.

While an outright ban of pre-dispute, binding arbitration agreements was a total win for nursing home residents and their families, it was unable to withstand legal scrutiny and be upheld within the court system. This new rule, while it does allow the use of such agreements, will give a

patient the ability to say “no” and not be denied services. Hopefully this is a happy medium between competing interests and the elder law community can inform their clients of their rights and [the possible pitfalls](#) of signing such agreements.

The public comment period for this new proposed rule ends September 16, 2019. We will keep an eye on this deadline to see if any adjustments are made to the rule.