

CMS Issues Final Rule Repealing Prohibition on Nursing Home Arbitration Agreements

Healthcare Alert | July 23, 2019

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On July 16, 2019, the Centers for Medicare & Medicaid Services (CMS) issued a final rule, “Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements” (84 FR 34718) (2019 Final Rule), revising certain conditions that Long-Term Care (LTC) facilities were required to meet in order to participate in the Medicare and Medicaid programs.

The 2019 Final Rule amends the requirements of a 2016 rule entitled “Reform of Requirements for Long-Term Care Facilities” (81 FR 68688) (2016 Rule). Among other things, the 2016 Rule prohibited LTC facilities from entering into pre-dispute, binding arbitration agreements with any resident. The 2016 Rule also prohibited LTC facilities from requiring residents to sign an arbitration agreement as a condition of admission to the LTC facility.

Many elder-rights advocates hailed the 2016 Rule as an important step towards protecting vulnerable nursing home residents who may not understand the implications of signing binding, pre-dispute arbitration agreements, i.e. under such agreements nursing home residents would relinquish their right to sue nursing homes for negligence or abuse in a public court before a jury, in favor of settling such disputes in a private forum before an arbitrator. In contrast, opponents of the 2016 Rule argued that it created too much burden on LTC providers who were already struggling under onerous regulatory requirements that strained their available resources.

The 2019 Final Rule appears to be a compromise between proponents of the 2016 Rule, who did not want it modified whatsoever, and opponents who wanted the 2016 Rule rescinded completely. The 2019 Final Rule repeals the prohibition on the use of pre-dispute, binding arbitration agreements, while at the same time it strengthens the transparency of arbitration agreements.

2019 FINAL RULE REVISIONS TO ARBITRATION REQUIREMENTS

Under the 2019 Final Rule, a LTC facility must:

- Not require that a resident or his or her representative sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility.
- Ensure that the agreement is explained to the resident or his or her representative in a form and manner (and language) that he or she understands, and that the resident or his or her representative acknowledges that he or she understands the agreement.
- Ensure that the agreement provides for the selection of a neutral arbitrator agreed upon by both parties and a venue that is convenient to both parties.

- Ensure that the agreement does not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials.
- Retain copies of the signed agreement for binding arbitration and the arbitrator's final decision for 5 years after the resolution of any dispute resolved through arbitration with residents, and make these documents available for inspection upon request by CMS or its designee.
- Grant residents a 30 calendar day period during which they may rescind their agreement to arbitrate.

The 2019 Final Rule becomes effective on September 16, 2019.

If you have questions or need more information, contact Dana Petrillo (215.864.7017; petrillod@whiteandwilliams.com) or another member of the Healthcare Group.

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