

# Insights

## Forthcoming Changes to Nursing Facility Arbitration Agreements

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August 30, 2016

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On July 17, 2015, CMS released a proposed rule to revise the requirements that Long-Term Care facilities must meet to participate in the Medicare and Medicaid programs. The proposed rule included a requirement regarding binding arbitration agreements. In the commentary CMS expressed concern that some nursing facility may be requiring residents to sign agreements for binding arbitration as a requirement for admission into the facility. CMS also expressed concern that even if the nursing facility is not requiring the agreement as a condition of admission, some facilities may be requesting the resident to sign the agreement without fully explaining the rights the resident is waiving and the consequences of that waiver. Therefore, CMS proposed the following requirements to apply if a nursing facility enters into a binding arbitration agreement with its residents:

- (1) The facility must ensure that:
  - a. The agreement is explained to the resident in a form and manner that he or she understands, including in a language the resident understands, and
  - b. The resident acknowledges that he or she understands the agreement.
- (2) The agreement must:
  - a. Be entered into by the resident voluntarily;
  - b. Provide for the selection of a neutral arbiter;
  - c. Provide for selection of a venue convenient to both parties.
- (3) Admission to the facility must not be contingent upon the resident or the resident representative signing a binding arbitration agreement.
- (4) The agreement must not contain any language that prohibits or discourages the resident or anyone else from communicating with Federal, State, or local officials, including but not limited to, Federal and State surveyors, other federal or state health department employees, and representatives of the Office of the State Long-Term Care Ombudsman, in accordance with § 483.11(i)
- (5) The agreement may be signed by another individual if:

- a. Allowed by state law;
- b. All of the requirements in this section are met; and
- d. That individual has no interest in the facility.

In the commentary CMS stated that it considered prohibiting binding arbitration agreements. While CMS did recognize that there are advantages to alternative dispute resolution, CMS is concerned that even with the above requirements, residents may still feel "pressure" to sign the agreements. Therefore CMS requested comments on whether binding arbitration agreements should be prohibited.

It is our understanding that CMS has reviewed all the comments to this proposed rule and the final rule is now at the Office of Management and Budget for final review, before publication. Final action is expected next month.

Although this proposed, and to be final, rule only applies to skilled nursing facilities and therefore, in its current state, does not apply to assisted living and independent living facilities, it is important to note, as the courts may over time consider the final rule and apply similar positions to assisted living facilities participating in Medicaid waiver programs, or even non-Medicaid assisted living facilities and independent living facilities.

[Click here for a copy of the commentary and final rule.](#)

For more information on this proposed rule and upcoming final rule, please contact Meghan McNab at [mmcnab@kdlegal.com](mailto:mmcnab@kdlegal.com).