



Long-Term Care Facilities – Update Your Residential Agreements with Binding Arbitration Provision

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According to the Centers for Medicare & Medicaid Services (CMS) final rule, effective September 16, 2019, long-term care (LTC) facilities can try to cut down on the cost of litigation by implementing a pre-dispute arbitration agreement with residents.

The rule permits LTC facilities to include pre-dispute arbitration provisions in their agreements with residents entering their facility, something that had previously been banned, by amending the requirements for LTC facilities to participate and receive reimbursement under the Medicare and Medicaid programs.

Attempting to push resident disputes to arbitration can be a big cost-saver for LTC facilities – minimizing expenses associated with the discovery process, attorneys' fees, and operations. This is something LTC facilities will want to consider when designing a resident's agreement.

In 2016, CMS released a [rule banning pre-dispute arbitration agreements](#) in LTC facilities or nursing homes. After being enjoined from enforcing the 2016 rule, the CMS issued a proposed rule and received thousands of public comments. Now, the CMS has released a final rule which repealed the 2016 pre-dispute arbitration agreements ban and detailed the requirements for LTC facilities when using pre-dispute arbitration agreements.

[According to CMS](#), the final rule seeks to "provide transparency in the arbitration process in nursing homes to the residents, his or her family and representatives, and the government." It achieves this goal by balancing the LTC industry's desire for pre-arbitration agreements against the legitimate concerns of consumer advocates, legal organizers, health care providers and practitioners, as well as members of the public who supported the 2016 rule.

If an LTC facility chooses to ask a resident or his or her representative to enter into a pre-dispute arbitration agreement, it

must adhere to the following requirements described in the finalized rule:

- An LTC facility may not require a pre-dispute arbitration agreement as a condition of admission to its facility, nor as a requirement to continue receiving care at the facility. The arbitration agreement must state that neither the resident or his or her representative is required to sign the agreement as a condition of admission to the facility or to continue to receive care at the facility.
- The arbitration agreement must be written in an understandable manner, form, and language for the resident or his or her representative. The resident or his or her representative must acknowledge that they understand the agreement.
- The arbitration agreement must allow for the selection of a neutral arbitrator agreed upon by the parties as well as a convenient venue for both parties.
- The arbitration agreement must grant the resident or his or her representative the right to rescind the agreement within 30 days of signing it.
- The arbitration agreement cannot contain language that discourages the resident from communicating with federal, state, or local officials, including federal or state surveyors, other federal or state health department employees, or representative of the [Office of the State Long-Term Care Ombudsman](#).
- If there is a resolution through arbitration, the LTC facility must retain a copy of the signed arbitration agreement and the arbitrator's final decision for 5 years.

LTC facilities need to be aware of the finalized rule's requirements for pre-dispute arbitration agreements and its effective date of September 16, 2019.

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