

AUGUST 14, 2019

## **SKILLED NURSING ARBITRATION AGREEMENTS ARE BACK WITH RESTRICTIONS - CMS ISSUES FINAL REGULATIONS ON SKILLED NURSING ARBITRATION AGREEMENTS**

On July 18, 2019, the Centers for Medicare & Medicaid Services ("CMS") published **final regulations** titled "Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements" ("Final Regulations") to Part 483 to Title 42 of the Code of Federal Regulations the Requirements for States and Long-Term Care Facilities. The Final Regulations revise the requirements for arbitration agreements when they are used by skilled nursing facilities to resolve disputes with their residents.

### **BACKGROUND**

In 2016, CMS issued final regulations at 42 CFR Section 483.70(n) to prohibit skilled nursing facilities from entering into pre-dispute, binding arbitration agreements with any resident or his or her representative, or requiring that a resident sign an arbitration agreement as a condition of admission to the skilled nursing facility. CMS also required that an agreement for post-dispute binding arbitration be entered into by the resident voluntarily, that the parties agree on the selection of a neutral arbitrator and that the arbitral venue be convenient to both parties. The arbitration agreement could be signed by another individual only if allowed by the relevant state's law, if all of the other requirements in this section of the regulations were met and if that individual had no interest in the skilled nursing facility.

A national association filed a complaint in the United States District Court for the Northern District of Mississippi, Oxford Division seeking a preliminary and permanent injunction enjoining enforcement by CMS of the prohibition on pre-dispute, binding arbitration agreements, as provided in 42 CFR Section 483.70(n)(1). On November 7, 2016, the district court preliminarily enjoined enforcement of that regulation prohibiting the use of pre-dispute, binding arbitration agreements.

On December 9, 2016, CMS issued a **memo** to all state survey agencies directing them not to enforce the 2016 final rule's prohibition of pre-dispute, binding arbitration provisions during the period that the court-ordered injunction remained in effect.

On June 8, 2017, CMS published **proposed regulations** entitled "Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements" that proposed to remove the provision prohibiting pre-dispute, binding arbitration agreements and added requirements regarding the transparency of arbitration agreements in skilled nursing facilities. CMS received over 1,000 comments concerning the changes to the requirements regarding arbitration.

### **FINAL REGULATIONS**

In the Final Regulations, CMS finalized its proposals to remove the requirement at 42 CFR Section 483.70(n)(1) that precluded skilled nursing facilities from entering into pre-dispute, binding agreements for binding arbitration with any resident or his or her representative, and the provisions at 42 CFR Section 483.70(n)(2)(ii) regarding the terms of arbitration agreements. CMS did not finalize the proposed removal of the provision in 42 CFR Section 483.70(n)(2)(iii) banning skilled nursing facilities from requiring that residents sign arbitration agreements as a condition of admission to a skilled nursing facility.

In response to commenters' concerns that skilled nursing facilities may still coerce or intimidate the resident and his or her representative into signing the agreement, CMS included a requirement that a skilled nursing facility must explicitly inform the resident or his or her representative that signing the agreement is not a condition of admission and ensure that this language is also in the agreement.

Under the Final Regulations, if a skilled nursing facility chooses to ask a resident or his or her representative to enter into an agreement for binding arbitration, the skilled nursing facility must comply with the following requirements:

- A skilled nursing facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the skilled nursing facility.
- A skilled nursing facility must explicitly inform the resident or his or her representative of his or her right not to sign the agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the skilled nursing facility.

- The skilled nursing facility must ensure that an agreement for binding arbitration is explained to the resident and his or her representative in a form and manner that he or she understands, including in a language the resident and his or her representative understands.
- The skilled nursing facility must ensure that the resident or his or her representative acknowledges that he or she understands the agreement for binding arbitration.
- The skilled nursing facility must ensure that the agreement for binding arbitration provides for the selection of a neutral arbitrator agreed upon by both parties and the selection of a venue that is convenient to both parties.
- The agreement for binding arbitration must explicitly grant the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it.
- The agreement for binding arbitration may 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.
- When the skilled nursing facility and a resident resolve a dispute through arbitration, a copy of the signed agreement for binding arbitration and the arbitrator's final decision must be retained by the skilled nursing facility for five years after the resolution of that dispute on and be available for inspection upon request by CMS.

#### **EFFECTIVE DATE**

The Final Regulations are effective on September 16, 2019.

#### **PRACTICAL TAKEAWAYS**

- Skilled nursing facilities that wish to use agreements for binding arbitration need to review and revise their agreements to ensure that they comply with the permissible provision under the Final Regulations.
- Skilled nursing facilities should review and revise their policies and procedures for staff to follow on agreements for binding arbitration.
- Skilled nursing facilities should review and revise their policies and procedures on retaining copies of the agreements for binding arbitration.
- Skilled nursing facilities should review their entire admission packets to ensure compliance with the Final Regulations and ensure admissions staff are aware of the details to that must be provided to residents and their representatives if an arbitration agreement is utilized.

#### **ARBITRATION AGREEMENT FINAL REGULATION CHECKLIST AVAILABLE**

Hall Render has developed a checklist to assist skilled nursing facilities in achieving compliance with the Final Regulations on arbitration agreement requirements. For more information about the checklist, please contact Sean Fahey at (317) 977-1472 or [sfahey@hallrender.com](mailto:sfahey@hallrender.com).

If you have questions or would like assistance reviewing and revising your agreements for binding arbitration, please contact:

- **Sean Fahey** at (317) 977-1472 or [sfahey@hallrender.com](mailto:sfahey@hallrender.com);
- **Todd Selby** at (317) 977-1440 or [tselby@hallrender.com](mailto:tselby@hallrender.com);
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- Your regular Hall Render attorney.

More information about Hall Render's Post-Acute and Long-Term Care services can be found [here](#).