

CMS Proposes Rule to Reverse Pre-Dispute Binding Arbitration Ban

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On June 8, 2017, the Centers for Medicare & Medicaid Services (“CMS”) published a proposed rule that would remove the ban on pre-dispute arbitration agreements instituted in an extensive final rule (*The Reform of Requirements for Long-Term Care Facilities*) issued by the agency in 2016. If the proposed rule is adopted, long-term care facilities will be free to enter into pre-dispute arbitration agreements as long as certain transparency requirements are met. CMS proposes to remove the provision precluding facilities from entering into pre-dispute agreements for binding arbitration with any resident or resident’s representative found at §483.70(n). Further, the agency proposes to remove the provision banning facilities from requiring residents to sign arbitration agreements as a condition of admission.

The proposed rule requires:

- The agreement to be explained in a form and manner that the resident or his or her representative understands;
- The resident to acknowledge that he or she understands the agreement;
- The agreement does not contain language that prohibits or discourages the resident or anyone else from communicating with federal, state or local officials, and the facility must keep a copy of the signed arbitration agreement for 5 years;
- The facility must ensure the agreement is in plain language;
- If signing the agreement for binding arbitration is a condition of admission into the facility, the language of the agreement must be in plain writing and in the admissions contract; and
- The facility must post a notice regarding its use of binding arbitration in an area that is visible to both residents and visitors.

CMS explains that the agency has reconsidered whether a complete ban on pre-dispute arbitration agreements promotes efficiency and fairness. The agency concluded that arbitration agreements are advantageous to both providers and beneficiaries because they allow for the expeditious resolution of claims without the cost and

delay of litigation. Additionally, CMS notes that it believes the 2016 final rule may have underestimated the financial burdens placed on providers who are forced to litigate claims in court.

CMS acknowledges comments from those in support of the arbitration ban but explains that this proposed rule would sufficiently address any concerns because it would strengthen the requirements necessary to ensure transparency of arbitration agreements. Further, the agency now believes that an outright ban on pre-dispute arbitration agreements does not strike the best policy balance because an outright prohibition would significantly increase the cost of care and would require facilities to divert scarce resources from the care of residents to the defense of litigation. Finally, CMS notes that it believes the proposed rule is consistent with the Federal Arbitration Act (“FAA”), signaling reference to the U.S. Supreme Court decision on May 15, 2017 in *Kindred Nursing Ctrs. Ltd. P’ship v. Clark* that struck down a rule discriminating against arbitration agreements established by the Kentucky Supreme Court.

CMS’ proposed rule follows the decision by the U.S. District Court for the Northern District of Mississippi to issue a preliminary injunction prohibiting enforcement of the 2016 arbitration ban since its passage on October 4, 2016. Initially, CMS appealed the District Court decision but withdrew from the appeal on June 2, 2017. Comments on the proposed rule are due by August 7, 2017.

The preliminary injunction will stay in effect until CMS approves the proposed rule in August 2017. Because the preliminary injunction has stayed enforcement of the arbitration ban, long-term care facilities may still enter into pre-dispute binding arbitration prior to the rule being finalized in August. Once the rule is finalized, facilities will be required to comply with the additional requirements when entering into pre-dispute binding arbitration agreements with residents.

Going forward, long-term care facilities will be free to enter into pre-dispute binding arbitration agreements with residents as a condition of admission. However, the facility must comply with the regulations retained and added by the proposed rule to ensure transparency and protect residents.

The full proposed rule can be found [here](#).

For more information and guidance on how best to draft arbitration agreements in compliance with the proposed rule, please contact [David J. Alfini](#) or [Adam S. Guetzow](#) or [Aimee Delaney](#).

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