

PUBLICATION

CMS Lifts Ban on Arbitration Agreements and Proposes Rules for Transparency in the Arbitration Process

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In a new proposed rule published in June 2017, the Centers for Medicare and Medicaid Services (CMS) proposed to abandon its previous rule prohibiting long term care facilities from entering into pre-dispute arbitration agreements and provided guidance to promote transparency in the arbitration process. CMS received more than 9,800 comments on the previous rule prohibiting arbitration agreements, with many commenters arguing that arbitration was beneficial for residents, residents' families and long term care facilities. Enforcement of the rule banning arbitration agreements was suspended following a court-order injunction in November 2016.

In support of its new proposed rule, CMS stated: "Upon reconsideration, we believe that arbitration agreements are, in fact, advantageous to both providers and beneficiaries because they allow for the expeditious resolution of claims without the cost and expense of litigation." The new rule allows residents and their representatives to enter into pre-dispute, binding arbitration agreements and provides no limitations on the use of arbitration agreements as a condition of admission to a long term care facility. The CMS rule outlines requirements for arbitration agreements that are intended to "protect residents and alleviate many of the residents['] and advocates['] concerns about the arbitration process." The new proposed rule requires arbitration agreements to comport with the following guidelines:

- All agreements for binding arbitration must be in plain language.
- If the agreement is a condition of admission, the language must be in plain writing and in the admissions contract.
- The agreement must be explained to the resident or his or her representative in a form and manner they understand, including in a language they understand.
- The resident must acknowledge that he or she understands the agreement.
- 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 surveyors, other health department employees or representatives of the State Long-Term Care Ombudsman.
- If the facility resolves a dispute with a resident through arbitration, it must retain a copy of the signed agreement for binding arbitration and the arbitrator's final decision for five years so it can be inspected by CMS or its designee.
- The facility must post a notice regarding its use of binding arbitration in an area that is visible to both residents and visitors.

If you have questions or concerns regarding whether your arbitration agreement is in compliance with the new CMS proposed rule, please contact Chelsea Sudbury or a member of our [Long Term Care Team](#).