

PUBLICATION

Fundamentals of CMS Updates to Appendix PP of the State Operations Manual: Administration

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F847: Entering into Binding Arbitration Agreements

If a facility chooses to ask a resident or their representative to enter into an agreement for binding arbitration, the facility must comply with all of the following requirements:

1. The facility must not require the signing of an arbitration agreement as a condition of admission or a requirement to continue to receive care at the facility and must explicitly inform residents of their right not to sign the agreement.
2. The facility must ensure that the agreement is explained in a form and manner that is understood and that the resident or their representative acknowledges that they understand the agreement.
3. The agreement must explicitly grant the right to rescind the agreement within 30 calendar days of signing it.
4. The agreement must explicitly state that neither the resident nor their representative is required to sign the arbitration agreement as a condition of admission to the facility or a requirement to continue to receive care.
5. The agreement may not contain language that prohibits or discourages communications with federal, state, or local officials, including federal and state surveyors, other federal or state health department employees, and representative of the Office of the State Long-Term Care Ombudsman.

SOM Additions of F847 Provide Guidance Regarding Arbitration Agreements

To cite deficient practice at F847, the surveyors' investigation will generally show that the facility failed to explain the terms of the agreement in a form or manner that is understandable, inform the resident or their representative that signing the arbitration agreement is not required as a condition of admission, or inform them that they have the right to rescind the agreement within 30 calendar days of signing. As for the arbitration agreement itself, noncompliance will be cited if the surveyors' investigation will generally show that the agreement contains language that prohibits or discourages communication with federal and state surveyors, federal and state agencies or the ombudsman or fails to contain language that clearly informs prospective residents they are not required to sign the agreement as a condition of admission.

Noncompliance at F847 will almost exclusively have a psychosocial impact or outcome. The failure of the facility to meet requirements causes more than minimal harm, so Severity Level 1 does not apply. Without evidence of actual harm, noncompliance is likely to be cited at Severity Level 2. If noncompliance has caused psychosocial harm, it should be cited at Severity Level 3. In order to cite Immediate Jeopardy, the investigation would have to show that noncompliance resulted in the likelihood for serious psychosocial harm or caused actual serious psychosocial harm and required immediate action to prevent further psychosocial harm.

Key Takeaways

The SOM guidance provides a new F-tag if a facility chooses to ask a resident or their representative to enter into an agreement for binding arbitration. The new guidance requires a facility to ensure that the arbitration agreement meets the requirements as stated therein and that representations otherwise are not communicated to the resident or their representative upon the presentation of the arbitration agreement.

F848: Select Arbitrator/Venue, Retention of Agreements

If a facility chooses to ask a resident or their representative to enter into an arbitration agreement, the facility must comply with all of the requirements of this section. Specifically, the facility must ensure that the arbitration agreement provides for the selection of a neutral arbitrator agreed upon by both parties and selection of a venue that is convenient to both parties. Moreover, a copy of the signed arbitration agreement and the arbitrator's final decision must be retained by the facility for five years after resolution of that dispute and be available for inspection upon request by CMS or its designee.

SOM Addition of F848 Provides Guidance Regarding Arbitration Agreements

To cite deficient practice at F848, the surveyors' investigation will generally show that the facility failed to do any one or more of the following:

- Ensure that the agreement provides for the selection of neutral arbitrator,
- Ensure that the agreement provides for the selection of venue that is convenient,
- Retain a copy of the agreement and the arbitrator's final decision after the dispute is resolved,
- Participate in arbitration for 5 years, or
- Refuse to make the agreement or final decision available for inspection upon request by CMS or its designee.

Noncompliance at F848 will almost exclusively have a psychosocial impact or outcome. Severity Level 1 may be the appropriate severity level if the facility fails to retain signed agreements and/or the arbitrator's final decision for five years. Failure for agreement to provide for the selection of neutral arbitrator or convenient location is likely to be cited at Severity Level 2. If noncompliance has caused psychosocial harm, it should be cited at Severity Level 3. To cite Immediate Jeopardy, the investigation would have to show that noncompliance resulted in the likelihood of serious psychosocial harm or caused actual serious psychosocial harm and required immediate action to prevent further psychosocial harm.

Key Takeaways

The SOM guidance provides a new F-tag if a facility chooses to ask a resident or their representative to enter into an agreement for binding arbitration. The new guidance requires a facility to ensure that the arbitration agreement provides for the selection of a neutral arbitrator and convenient venue. Moreover, the new guidance provides a retention period for the arbitration agreement and the arbitrator's final decision after the dispute is resolved.

F851: Payroll-Based Journal

Noncompliance at deficiency tag F851 will be cited if the facility fails to ensure that all staffing data entered in the PBJ system is auditable or can be verified through either payroll, invoices, and/or tied back to a contract.

SOM Revisions to F851 Provide Guidance on the Uniform Entry of Staffing Information

The new SOM requires that facilities submit direct care staffing information uniformly and electronically each day. A facility's failure to submit PBJ data as required will be reflected on their CASPER report and result in a deficiency citation.

Key Takeaways

Noncompliance at F851 focuses on the submission of staffing data and requires facilities to submit the required staffing information based on payroll data in a uniform format. Proper documentation is essential to demonstrating substantial compliance with this requirement of participation.

For specific guidance or more information about this alert, please contact [Howard Sollins](#), [Craig Conley](#), [Stefanie Doyle](#), or any other member of [Baker Donelson's Long Term Care Team](#).