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## CMS Issues Final Rule Regulating Use of Binding Arbitration Agreements by Long-Term Care Facilities.

November 22, 2016

On September 28, 2016, the Centers for Medicare & Medicaid Services (“CMS”) issued a final rule revamping and consolidating the conditions for long-term care facilities to participate in Medicare and Medicaid. Perhaps the most controversial aspect relates to the final rule’s prohibition against pre-dispute arbitration agreements. Simply stated, a facility receiving funding under either Medicare or Medicaid may no longer enter into **pre-dispute** agreements for binding arbitration with any resident or a resident’s representative.

The ban on pre-dispute arbitration agreements was scheduled to take effect on November 28, 2016; however, the American Health Care Association and several long-term care facilities have filed suit challenging the ban. On November 7, 2016, the federal court hearing the case issued an injunction delaying the final rule from taking effect until its legality is determined. **As a result, facilities should continue to request that residents** (or their representatives, as appropriate) **execute arbitration agreements until a final ruling is issued.** It is important to note that arbitration agreements executed prior to the final rule’s ultimate effective date will not be deemed a violation of the conditions of participation.

A facility may, however, enter into a binding arbitration agreement **after** a dispute between the facility and a resident arises. In order to do so, the following is required:

- A facility must explain the agreement to the resident and his or her representative in a form, manner, and using language easily understandable.
- The resident must acknowledge that he or she understands the agreement.
- The resident must enter into the agreement voluntarily.
- The agreement may be signed by another individual on behalf of the resident if it is permitted by state law, all of the other requirements of the section are met, and the individual has no interest in the facility.
- The agreement must permit the parties to select a neutral arbitrator that is mutually agreeable to the parties.
- The agreement must provide for a venue selection that is convenient for all parties.

Furthermore, a resident’s right to remain in a facility cannot be made contingent upon the resident’s (or the representative’s) agreement to the terms of a binding arbitration agreement. A facility must retain a copy of the arbitration agreement as well as the arbitrator’s final decision for five years after a dispute is resolved with arbitration and must make them available for CMS’s inspection. Finally, the agreement may not prohibit or otherwise discourage residents (or anyone else) from communicating with federal, state, or local officials.

If you have any questions or if you would like assistance with this or any other matter, please do not hesitate to contact us.