CMS Proposes Removal of Ban on Pre-Dispute Arbitration Agreements

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On June 5, 2017, the Centers for Medicare and Medicaid Services ("CMS") proposed revisions to the "Reform of Requirements for Long-Term Care Facilities." The Reform of Requirements, published October 4, 2016, banned pre-dispute arbitration agreements. Implementation of the ban was ultimately stayed by a federal district court and the stay has not yet been lifted. The proposed revisions would remove the ban but would require additional efforts to promote transparency in arbitration agreements as well as to ensure that residents make informed choices. The proposed revisions also add requirements that arbitration agreements utilize plain language and that facilities post a notice regarding their use of binding arbitration in conspicuous locations.

Several of the safeguards ushered in by the Reform of Requirements would be retained, including:

- Requirement that the arbitration agreement is explained to the resident (or the representative) in a manner that he/she can understand;
- Requirement that residents (or the representative) acknowledge that he/she understands the arbitration agreement;
- Prohibition against arbitration agreements including any language that prohibits or otherwise discourages residents (or anyone else) from communicating with federal, state, or local officials; and
- Requirement that facilities retain copies of signed arbitration agreements and final arbitration decisions for inspection by CMS if a dispute is resolved through arbitration.

The proposed revisions indicate CMS experienced a change of heart, stating "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 costs and expense of litigation."