

Time To Look At Your Resident Agreement - Certain Binding Arbitration Agreements Barred For Healthcare Facilities Who Accept Medicare And Medicaid

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On September 28, 2016, the United States Department of Health and Human Services revised regulations that may substantively impact resident agreements related to dispute resolution between residents and facilities. Effective November 28, 2016, long-term care facilities who participate in Medicaid and Medicare (including nursing homes and assisted living facilities) are prohibited from entering into pre-dispute binding arbitration agreements with their residents or their representatives. This regulation, which was initially proposed in July 2015, follows years of criticism that arbitration agreements were being used to shield long-term facilities from allegations of wrong doing by compelling private arbitration proceedings rather than the dispute being handled in the court system with public scrutiny. Despite strong opposition, the regulation was finalized yesterday.

However, this new regulation (42 CFR §483.70) does not impact existing arbitration agreements or render them unenforceable. Similarly, the new regulation does not impact healthcare facilities that do not accept Medicaid or Medicare or prohibit post-dispute arbitration agreements. Despite this, long-term care facilities cannot require that a resident sign a post-dispute arbitration agreement as a condition precedent for the resident to remain at the facility.

After a dispute arises, the resident may execute an arbitration agreement. If the dispute is resolved through arbitration, a copy of the signed arbitration agreement and the arbitrator's final decision must be retained by the long-term care facility for at least five (5) years and be available for inspection.

This sweeping reform requires all long-term care facilities review their resident agreements and other contractual agreements to revise their dispute resolution provisions. Although the regulation does not require existing resident agreements be revised to reflect this change, it is critical it be done prior to implementation date for any new residents as of November 28, 2016. It is preferable to have the same dispute resolution forum for all residents.