

CMS Reconsiders Pre-Dispute Arbitration Ban at Long Term Care Facilities after Injunction

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After a rocky start, the Centers for Medicare & Medicaid Services (“CMS”) is reconsidering its October 4, 2016 final rule that sets forth requirements for long-term care (“LTC”) facilities that offer arbitration agreements to residents.¹ Under the rule, LTC facilities are barred as parties to pre-dispute arbitration agreements.

Shortly after the rule’s adoption, the American Health Care Association challenged the rule by filing a complaint in federal court seeking a preliminary and permanent order enjoining enforcement of the rule’s prohibition on pre-dispute arbitrations.² On November 7, 2016, the district court granted the preliminary injunction, and a month later, CMS issued a nationwide directive that halted enforcement of the rule while the injunction was in effect.³

In the ongoing effort to strike the balance between the rule’s financial, practical, and legal implications on LTC facilities, residents, and their families, and after reconsidering the policy goals underlying the rule, CMS published a new proposed rule earlier this month.⁴

Summary of the Main Provisions under the Newly Proposed Rule

CMS recognizes that arbitration provides an alternative avenue to litigation that often leads to low-cost and efficient dispute resolution. By prohibiting pre-dispute arbitration agreements, LTC facilities are likely to face increased financial burdens from litigating cases in federal court that take away from resources that can improve resident care. The proposed rule’s revisions include the following:

- A removal of the prohibition on LTC facilities that prevented them “from entering into pre-dispute agreements for binding arbitration with any resident or resident’s representative” and which barred them from requiring that “residents sign arbitration agreements as a condition of admission to a facility.”⁵

In allowing residents to retain control over the administration of their care while still ensuring their rights are fully protected, CMS hopes to retain some provisions from the original rule including the following:

- The provision requiring LTC facilities to explain arbitration agreements to a resident or his or her representative in a form and manner that he or she understands, including language, and obtain acknowledgment of that understanding.
- The provision that bars LTC facilities from using language in their arbitration agreements “that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials, including but not limited to, federal and state surveyors, other federal or state health department employees, and representatives of the Office of the State Long-Term Care

Ombudsman.”

- The provision that LTC facilities preserve “a copy of the signed agreement for binding arbitration and the arbitrator’s final decision” when LTC facilities and residents resolve a dispute through arbitration, including making the documents available for inspection by CMS or designee request.

CMS also proposes additional requirements so residents are better able to make well-informed decisions in light of medical conditions that may hinder such decision-making, including the following:

- A provision that LTC facility agreements for binding arbitration be in plain language in the admission contract if such an agreement is a condition of admission.
- A provision requiring LTC facilities to “post a notice in plain language that describes its policy on the use of agreements for binding arbitration in an area that is visible to residents and visitors.”⁶

Because the district judge in the pending federal suit believes plaintiffs are likely to prevail on their claim⁷, CMS is taking initiative and reconsidering its rule to meet the immediate needs of LTC facilities, residents, and their families as promptly as possible. CMS is currently accepting comments on the proposed amendments until August 7, 2017.

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¹ 81 Fed. Reg. 68,688 (Oct. 4, 2016).

² [Complaint for Declaratory and Injunctive Relief at 1, Am. Health Care Ass’n v. Burwell, No. 3:16-00233 \(N.D. Miss. filed Oct. 17, 2016\), ECF No. 1.](#)

³ [Order on Motion for Preliminary Injunction at 1, Am. Health Care Ass’n v. Burwell, No. 3:16-00233 \(N.D. Miss. filed Oct. 17, 2016\), ECF No. 44. Ctr. for Clinical Standards & Quality/Survey & Certification Grp. Memorandum at 1, U.S. Dep’t of Health & Human Servs. \(2016\).](#)

⁴ 82 Fed. Reg. 26,649 (June 8, 2017).

⁵ *Id.*

⁶ *Id.*

⁷ 82 Fed. Reg. 26,649, 26,650 (June 8, 2017)