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Insights

Final Changes To Nursing Facility Arbitration Agreements

November 20, 2016

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We previously published an article regarding the CMS proposed rule (published July 17, 2015) to revise the requirements that Long-Term Care ("LTC") facilities must meet to participate in the Medicare and Medicaid programs, and its proposed changes to LTC facilities use of arbitration agreements. See the following link for our August 31, 2016 article on the proposed rule.

Over a year after the proposed rule was published, CMS finally issued the final rule on October 4, 2016, with a November 28, 2016 effective date.

Regarding arbitration agreements, the final rule prohibits Medicare and Medicaid-participating LTC facilities from using pre-dispute binding arbitration agreements (42 CFR 483.70), which is a much stricter approach than CMS took in the proposed rule (described in our August 31, 2016 article). Although in the final rule, CMS prohibits pre-dispute binding arbitration agreements, CMS does allow the parties to enter into an arbitration agreement after the dispute arises, subject to various requirements. The following is the language of the final rule:

42 CFR 483.70 (n) Binding arbitration agreements

1.) A facility must not enter into a pre-dispute agreement for binding arbitration with any resident or resident's representative nor require that a resident sign an arbitration agreement as a condition of admission to the LTC facility.

2.) If, after a dispute between the facility and a resident arises, and a facility chooses to ask a resident or his or her representative to enter into an agreement for binding arbitration, the facility must comply with all of the requirements in this section.

i. The facility must ensure that:

(a) The agreement is explained to the resident and their representative in a form and manner that he or she understands, including in a language the resident and their representative understands, and
(b) The resident acknowledges that he or she understands the agreement.

ii. The agreement must:

(a) Be entered into by the resident voluntarily.
(b) Provide for the selection of a neutral arbitrator agreed upon by both parties.
(c) Provide for selection of a venue convenient to both parties.

iii. A resident's continuing right to remain in the facility must not be contingent upon the resident or the resident's representative signing a binding arbitration agreement.

iv. The agreement must not contain any language 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, in accordance with §483.10(k).

v. The agreement may be signed by another individual if:
(a) Allowed by state law;
(b) All of the requirements in this section are met; and
(c) That individual has no interest in the facility.

vi. When the facility and a resident resolve a dispute with arbitration, a copy of the signed agreement for binding arbitration and the arbitrator's final decision must be retained by the facility for 5 years and be available for inspection upon request by CMS or its designee.

CMS also clarifies in the preamble that "this final rule… does not have any effect on existing arbitration agreements or render them unenforceable …. Has no effect on LTC facilities that do not participate in the Medicare or Medicaid programs … does not create any new standard for determining whether an arbitration agreement is unconscionable." As addressing in our previous article, the proposed, and now final, rule only applies to skilled nursing facilities and does not apply to assisted living and independent living facilities. Indeed, CMS noted that there has been confusion on whether the rule applies to assisted living facilities, to which CMS replied: "We note that CMS does not issue regulations or guidance for assisted living facilities, nor are they eligible for Medicare reimbursement. While some assisted living facilities do provide health services (such as medication supervision, nurse support, and emergency medical assistance for residents), they are not classified as health care providers or suppliers under the Act. Some states do regulate them, often as social service providers rather than health care providers. The requirements in this rulemaking may be helpful to other health care and social service settings, but only LTC facilities are required to meet them." However it is important to note as, in the future, the courts or states may apply similar positions to assisted living facilities participating in Medicaid waiver programs, or non-Medicaid assisted living facilities and independent living facilities.

Click here for a copy of the commentary and final rule.

Note – Since promulgation of the final rule, the American Health Care Association ("AHCA") filed a lawsuit challenging the legality of CMS' ban on pre-dispute arbitration agreements in nursing facilities. The AHCA also filed a request for a preliminary injunction, which the United States District Court for the Northern District of Mississippi granted this week. There is no time period for the injunction, rather, the ruling states that implementation of the arbitration rule will be halted until "the doubts regarding its legality can be definitively resolved by the courts." Therefore, due to the ongoing injunction, the final rule's ban on pre-dispute arbitration agreements will likely not go in effect on the November 28, 2016 effective date originally set forth by the final rule.

For more information on this final rule and injunction, please contact Meghan M. Linvill McNab.