



Alerts

CMS Proposes Regulations to Prohibit Mandatory Arbitration Provisions in Nursing Home Contracts

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Long-Term Care Alert

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Wednesday, October 14, 2015, ended the 90-day comment period on CMS's proposed regulatory update for nursing homes. As part of the more than 100 pages of changes, CMS proposes a ban on the use of pre-dispute, forced arbitration agreements in nursing home contracts. If adopted, this change will prohibit facilities regulated by CMS from using mandatory arbitration provisions in their contracts. Such a change would have a far-reaching impact on the industry.

The Regulation: As part of the Department of Health and Human Services, the Centers for Medicare & Medicaid Services (CMS) has the authority to make decisions regarding the interpretation, implementation, and enforcement of certain regulations adopting administrative simplification standards. This includes promulgation of some regulations for facilities receiving Medicare and Medicaid funding. On July 16, 2015, CMS issued proposed revisions to the requirements that long-term care facilities must meet to participate in the Medicare and Medicaid programs. (Specifically, 42 CFR Parts 405, 431, 447, 482, 483, 485, and 488.)

The Change: The proposed change to 42 C.F.R. § 483.70(n) reads as follows:

Binding Arbitration Agreements: We propose specific requirements for the facility and the agreement itself to ensure that if a facility presents binding arbitration agreements to its residents that the agreements be explained to the residents and they acknowledge that they understand the agreement; the agreements be entered into voluntarily; and arbitration sessions be conducted by a neutral arbitrator in a location that is convenient to both parties. **Admission to the facility could not be contingent upon the resident or the resident representative signing a binding arbitration agreement.** Moreover, the agreement could not

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prohibit or discourage the resident or anyone else from communicating with federal, state, or local health care or health-related officials, including representatives of the Office of the State Long-Term Care Ombudsman. Quality Assurance and Performance Improvement (QAPI) (§ 483.75) (*emphasis added*)

Why this Change: The Federal Register states that the "proposed changes are necessary to reflect the substantial advances that have been made over the past several years in the theory and practice of service delivery and safety. These proposals are also an integral part of our efforts to achieve broad-based improvements both in the quality of health care furnished through federal programs, and in patient safety, while at the same time reducing procedural burdens on providers."

The changes have been vigorously promoted by The American Association For Justice (personal injury plaintiff's attorneys) along with former U.S. Rep. Henry Waxman (D-CA) and more than 35 advocacy groups such as AARP, the Fair Arbitration Now Coalition and the National Consumer Voice for Quality Long-Term Care.

What is the Industry Response to the Proposed Changes: The American Health Care Association (AHCA) President and CEO Mark Parkinson has written in opposition of the new regulations on behalf of the industry. In his strongly worded opposition, Parkinson stated that (1) the proposals exceed CMS's statutory authority; (2) the proposals are not necessary to protect resident health and safety; and (3) many of the stated factual and legal grounds for the proposals are incorrect.

Will this Proposed Change be Promulgated: This is unclear. AHCA makes a strong point with respect to CMS exceeding statutory authority with this proposed change. Specifically, the Federal Arbitration Act (FAA) appears to protect the rights of facilities to enter into arbitration agreements free from interference from federal agencies.

What Would this Change Mean for your Facility: In short, modification of your contracts and possible increased litigation. Your facility would need to redraft its contracts consistent with the new regulation. While optional arbitration provisions would be permissible, acceptance into the facility could not be contingent on agreeing to have disputes arbitrated. This will undoubtedly lead to more residents and families opting out of the arbitration provision leading to an increase in fully litigated matters.

What is the Timetable: Now that the 90-day comment period has expired, CMS will review and consider the public comments. There have been more than 9,000 such comments to this proposed change. There is no specific timetable for when or if the changes will be published in the Federal Register.

STAY TUNED FOR ADDITIONAL UPDATES.

For more information and guidance, please contact [David Alfini](#) or [Adam Guetzow](#).

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.