

PUBLICATION

Arbitration Agreements in Your Long Term Care Community – CMS Says It's Mandatory to Be Optional

Authors: Christy T. Crider, Caldwell G. Collins

August 22, 2019

The Centers for Medicare & Medicaid Services (CMS) issued a final rule last month advising that arbitration agreements are permissible in long term care communities that receive federal funding, but there's a catch: CMS imposed mandates that are more onerous than those required by federal and state laws, which have long favored arbitration as a fair venue for resolving disputes. A Federal District Court struck down CMS's last attempt to impose arbitration-related regulatory obligations on long term care communities that are different than those the law imposes on all other businesses, many of which have used arbitration agreements for decades as a more efficient, effective, and less stressful venue for dispute resolution. And the courts may well strike down CMS's latest attempt. Until they do, long term care providers can likely enforce arbitration agreements that comply with federal and state law, but may face regulatory sanctions from CMS for failure to comply with the stricter regulations imposed by the new rule. So, if you don't want to take that risk, you may need to make adjustments to your arbitration agreement, and your process for offering it, by September 16, 2019, and keep those in place until the courts can determine the legality of CMS's new rule. Talk to your attorney to ensure your arbitration agreement complies with the law. Following are a few talking points to start the conversation with your attorney on compliance with the CMS rule:

1. **Make the arbitration agreement optional for admission and continued residency.** Federal and state laws give every business, including long term care communities, the right to make their arbitration agreement mandatory. In fact, most of our provider clients have made arbitration agreements a condition of admission, and courts have upheld those as long as the terms were fair. CMS's final rule, however, requires that long term care communities make the agreement optional. So if you don't want to face possible regulatory sanctions, it's time to rethink that for now and make your agreement voluntary in compliance with the final rule.
2. **The arbitration agreement provides for the selection of a neutral arbitrator agreed to by both parties.** That's easy and most of you are already getting that right, but it's worth a quick review to confirm that your agreement affirmatively requires selection of a neutral arbitrator.
3. **The arbitration agreement provides for the selection of a venue convenient for both parties.** Choosing the county where the community is located makes sense; after all, the resident and your caregivers live in the same community.
4. **The arbitration agreement must be in a form the signatory can understand, and she must acknowledge that she understands it.** Use plain language and include in the arbitration agreement an acknowledgment that the signatory understands and agrees to what she is signing. (It's also nice to include a provision encouraging the signatory to ask questions.) Consider how you will address signatories whose native language is not English. The law states that a signatory not understanding what she signs does not relieve her of the obligations. If your agreement explains arbitration in a plain way, and the signatory acknowledges as part of signing that she understands and agrees, that is the

best you can do. The law says that is enough – hopefully CMS will as well.

5. **The arbitration agreement must give the signatory the right to revoke the agreement within 30 days after signing if she changes her mind.** Again, this is more than is required by federal and state laws. For best practices on your revocation clause, your attorney can provide guidance.
6. **The arbitration agreement must not contain language discouraging communication with government officials.** In our decades of experience drafting and enforcing arbitration agreements, we have never seen any agreement that discourages communication with anyone, especially not government officials.
7. **If you arbitrate a dispute to a final decision, keep a copy of the signed arbitration agreement and the arbitrator's final decision for five years.** If you see a case all the way through arbitration, your attorney should remind you to keep a copy of the arbitrator's final decision, along with the signed arbitration agreement, for five years. It's a question the surveyors could ask. The answer should either be "We have not had an arbitration in the last five years," or "Here it is."

Based on our experience, arbitration is a fair and efficient venue for resolving disputes with families that would otherwise go to court. For that reason, courts favor arbitration, and CMS and long term care providers should as well. It's time to take a fresh look at your arbitration agreement, get with your attorney, and keep up the good work of taking great care of our elderly. It's a noble profession.