

PUBLICATION

CMS Updates to Appendix PP of the State Operations Manual – Arbitration Agreements

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The Centers for Medicare & Medicaid Services (CMS) released a revised CMS State Operations Manual (SOM) Appendix PP on June 29, 2022, that became effective on October 24, 2022. The updates are designed to enhance nursing home quality and oversight, and to clarify CMS expectations of facilities. Surveyors will use this revised guidance to identify noncompliance with the Requirements of Participation.

New F847 – Entering into Binding Arbitration Agreements

If a facility chooses to ask a resident or their representative to enter into an agreement for binding arbitration, the facility must comply with *all* of these requirements:

1. The facility must not require signing of an arbitration agreement as a condition of admission or a requirement to continue to receive care at the facility and must explicitly inform the resident or the resident's representative of their right not to sign the agreement.
2. The facility must ensure that the agreement is explained in a form and manner that is understood and that the resident or their representative acknowledges that they understand the agreement.
3. The agreement must explicitly grant the right to rescind the agreement within 30 calendar days of signing it.
4. The agreement must explicitly state that neither the resident nor their representative is required to sign the arbitration agreement as a condition of admission to the facility or a requirement to continue to receive care.
5. The agreement may not contain language that prohibits or discourages communications with federal, state, or local officials, including federal and state surveyors, other federal or state health department employees, and representatives of the Office of the State Long-Term Care Ombudsperson.

SOM Additions of F847 Provide Guidance Regarding Arbitration Agreements

To cite deficient practice at F847, a surveyor's investigation will generally show that the facility failed to explain the terms of the agreement in a form or manner that is understandable, inform the resident or their representative that signing the arbitration agreement is not required as a condition of admission, or inform that the resident has the right to rescind the agreement within 30 calendar days of signing it. As for the arbitration agreement itself, the surveyor's investigation will generally show that the agreement contains language that prohibits or discourages communication with federal and state surveyors, federal and state agencies, or the Ombudsperson, or fails to contain language that clearly informs residents and/or their representatives that they are not required to sign agreement as a condition of admission or continued treatment.

Noncompliance at F847 will almost exclusively have a psychosocial impact or outcome. The failure of the facility to meet requirements creates more than minimal harm, so Severity Level 1 does not apply. Without evidence of actual harm, noncompliance is likely to be cited at Severity Level 2. If noncompliance has caused

psychosocial harm, it should be cited at Severity Level 3. To cite Immediate Jeopardy, the investigation would have to show noncompliance resulted in the likelihood for serious psychosocial harm or caused actual serious psychosocial harm and required immediate action to further prevent harm.

Procedures and Probes

The SOM guidance for F847 provides surveyors with several sample interview questions to be addressed to a variety of individuals involved in the process. The following are some of the sample interview questions for certain individuals or groups.

- Resident and/or Resident's Representative
 - What is your understanding of the arbitration process when a dispute arises?
 - Do you understand that you are giving up your right to litigation in a court proceeding?
 - Were you told that the facility could not require you to enter into an arbitration agreement to be admitted to or remain in the facility?
 - Did you feel you were obligated, required, forced, or pressured to sign the arbitration agreement? If yes, how so?
 - Is there anything you would have liked to know before signing the arbitration agreement?
- Resident's Council/Family Council
 - Has the Resident's Council ever voiced any concerns to the facility about arbitration agreements?
 - Do you know if residents feel forced to sign the arbitration agreement? If yes, how so?
- Facility Staff
 - When and under what circumstances do you request a resident or their representative agree to an arbitration agreement?
 - How do you ensure the resident or representative understands the terms of an agreement?
 - How do you ensure an agreement is explained in a form and manner that accommodates a resident's or representative's needs?
 - What is your process for allowing rescission of an arbitration agreement in the first 30 days?
- State Long-Term Care Ombudsperson
 - Did any resident or representative report having felt forced or pressured into signing an agreement as a condition of admission?
 - Do you know any resident to whom the facility may have refused admission or who was discharged due to refusal to sign?
 - Are you aware of any residents or representatives who sought to rescind an agreement?
- Record Review
 - The agreement clearly states that a resident or representative is not required to enter into the agreement as a condition of admission.
 - There is evidence that an agreement was explained in a form, manner, and language that is understood by the resident or representative.

Key Takeaways

The SOM guidance provides a new F-tag if a facility chooses to ask a resident or resident representative to enter into an agreement for binding arbitration. The new guidance requires a facility to ensure that the arbitration agreement meets the requirements as stated therein and that representations otherwise are not communicated to the resident or resident representative upon the presentation of the arbitration agreement.

New F848 – Arbitrator/Venue Selection and Retention of Agreements

If a facility chooses to ask a resident or resident representative to enter into an arbitration agreement, the facility must comply with all of the requirements of this section. Specifically, the facility must ensure that the arbitration agreement provides for the selection of a neutral arbitrator agreed upon by both parties and provides for the selection of a venue that is convenient to both parties. Moreover, a copy of the signed arbitration agreement and the arbitrator's final decision must be retained by the facility for five years after resolution of that dispute and be available for inspection upon request by CMS or its designee.

SOM Addition of F848 Provides Guidance Regarding Arbitration Agreements

To cite deficient practice at F848, the surveyor's investigation will generally show that the facility failed to do any one or more of the following:

- Ensure that the agreement provides for the selection of neutral arbitrator.
- Ensure that the agreement provides for the selection of venue that is convenient.
- Retain a copy of the agreement and the arbitrator's final decision for five years after the dispute is resolved through arbitration.
- Refuse to make the agreement or final decision available for inspection upon request by CMS or its designee.

Noncompliance at F848 will almost exclusively have a psychosocial impact or outcome. Severity Level 1 may be the appropriate level where the facility fails to retain signed agreements and/or the arbitrator's final decision for five years. Failure for agreement to provide for the selection of neutral arbitrator or convenient location is likely to be cited at Severity Level 2. If noncompliance has caused psychosocial harm, it should be cited at Severity Level 3. To cite Immediate Jeopardy, the investigation would have to show that noncompliance resulted in the likelihood for serious psychosocial harm or caused actual serious psychosocial harm and required immediate action to prevent further such harm.

Procedures and Probes

Like F847, the SOM guidance for F848 provides surveyors with a number of sample interview questions to be addressed to a variety of individuals involved in the process. The following are sample interview questions for certain individuals or groups.

- Resident and/or Representative
 - How were you included in selecting the arbitrator?
 - Were you given a choice in an arbitrator?
 - Do you agree with the arbitrator who was selected?
 - How were you included in selecting the venue?
 - Were you given a choice in venue?
- Resident's Council/Family Council
 - Are you aware of any concerns about the selection of an arbitrator and/or a venue?
- Facility Staff
 - How do you ensure that a resident or representative has an equal role in selecting an arbitrator?
 - What is your process for selecting a neutral arbitrator?

- How do you ensure that a resident or representative has an equal role in selecting a venue?
 - What is your process for selecting a convenient venue?
 - When a resident or representative does not agree with the arbitrator and/or venue, what are the next steps?
 - How does the agreement provide for selection of an arbitrator agreed upon by both parties?
 - Are there any active complaints regarding selection of an arbitrator or a venue?
 - What information do you provide residents or representatives regarding specific arbitrators or arbitration services companies?
- State Long-Term Care Ombudsperson
 - Did any resident or representative ask for your assistance in selecting an arbitrator or a venue?
 - Did any resident or representative complain that they were forced or pressured to select a particular arbitrator or venue?
 - Did any resident or representative complain that a venue was inconvenient?
 - Record Review
 - Is there evidence that a resident or representative was provided with an opportunity to select an arbitrator and/or a venue?
 - Is there evidence that the facility retained a copy of the signed agreement and the arbitrator's final decision after resolution of a dispute through arbitration for five years?

Key Takeaways

The SOM guidance provides a new F-tag if a facility chooses to ask a resident or representative to enter into an agreement for binding arbitration. The new guidance requires a facility to ensure that the arbitration agreement provides for the selection of a neutral arbitrator and convenient venue. Moreover, the new guidance provides a retention period for the arbitration agreement and the arbitrator's final decision after the dispute is resolved.

New F847 and F848 – Other Takeaways

Arbitration agreements may be embedded in other contracts or agreements and not necessarily be standalone documents. Nevertheless, all requirements related to arbitration agreements still apply. It must be explained that the admission agreement includes an arbitration agreement. Moreover, the admissions packet should clearly distinguish the arbitration agreement from the admission agreement. Surveyors should determine how the facility ensures residents or representatives are made aware of arbitration agreements embedded within another document. Finally, surveyors should obtain copies of any documents or agreements that include information about arbitration.

Conclusion

Given the new SOM guidance, facilities need to review their admissions packets with an eye toward ensuring that their arbitration agreements comply. The admissions department also has to be well-versed in relation to the SOM guidance to ensure that they are complying with the guidance in how they present and explain the arbitration agreement to residents or resident representatives.