



## CMS final rule overturns arbitration ban in long-term care resident agreements

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The Centers for Medicare & Medicaid Services (CMS) has issued a final rule amending the requirements that long-term care facilities must meet to participate in Medicare and Medicaid programs.

The Trump administration's final rule overturns an Obama-era ban that prevented facilities from entering into pre-dispute, binding agreements for binding arbitration with any resident or resident's representative. The final rule also prohibits facilities from requiring that residents sign arbitration agreements as a condition of admission to, or as a requirement to continue to receive care at, a facility.

However, in order to remain in compliance with the rule, long-term care facilities need to ensure that their residency agreements meet the following requirements:

- The agreement must be explained to the resident and his or her representative in a form and manner that he or she understands, including in a language that the resident and his or her representative understands. The agreement must also require that the resident acknowledge that he or she understands the agreement.
- 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.
- The agreement provides for the selection of a neutral arbitrator agreed upon by both parties.
- The agreement provides for the selection of a venue that is convenient to both parties.
- The agreement must explicitly grant the resident or his or her representative the right to rescind the agreement within 30 calendars of signing it.
- The agreement must explicitly state that neither the resident nor his or her representative is required to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility.

The final rule also requires that when a facility and a resident resolve a dispute through arbitration, a copy of the signed agreement for binding arbitration and the arbitrator's final decision must be retained by the facility for five years and be available for inspection upon request by CMS or its designee.

If a facility intends to use pre-dispute arbitration and continue to take residents which use CMS reimbursements, it needs to be in compliance with the foregoing by September 16, 2019.

For questions, please contact the attorney listed below.



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