Binding Arbitration Again an Option for Long-Term Care Facilities

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After being banned in 2016, binding arbitration is back as a permissible remedy for long-term care (LTC) facilities and their residents.

The Centers for Medicare and Medicaid Services (CMS) removed the 2016 ban on the use of binding arbitration agreements by LTC facilities on July 16. Prior to 2016, the LTC industry widely utilized binding arbitration as the preferred means of resolving resident disputes, offering an informal and cost-effective process for resolving disputes without litigation. In 2016, the federal government banned binding arbitration for LTC facilities that participated in Medicare and Medicaid, despite strong objections from the LTC community. The industry later challenged the CMS ban in federal court and won. CMS then instructed state survey agencies not to enforce the ban pending further evaluation.

In the CMS Final Rule, binding arbitration is back (with some limitations). Some of the restrictions include:

- The facility cannot condition the resident's admission on the signing of an arbitration agreement. Indeed, the facility must inform the resident (or legal representative) that he/she does not have to sign. This must be stated clearly in the agreement itself.

- The agreement must allow the resident to rescind within 30 days of signing. Because the resident can rescind up to 30 days, or not sign at all, it is advisable to document the arbitration agreement separately from other resident agreements.

- The agreement cannot contain language that prohibits or discourages the resident from communicating grievances to state or federal officials. Some consumer advocates objected that binding arbitration is an inappropriate forum for serious resident injuries or abuse. CMS responded, stating that binding arbitration does not prevent residents from reporting serious injuries or abuse to public authorities, nor does it relieve facilities of their obligation to self-report.

- The agreement, and any arbitration decision, must be retained by the facility for five years, and available for inspection. This same requirement, however, does not apply to settlement agreements. This may encourage more use of settlement agreements to resolve resident disputes, although any documentation relating to quality of care is likely open to inspection.

In its final rule, CMS acknowledged that it has no authority to annul existing arbitration agreements that are legally valid, and that its restrictions are prospective only. At the same time, CMS will allow facilities to enter into arbitration agreements with existing residents, even if initially banned in 2016. However, the arbitration agreement must meet current CMS requirements, and facilities cannot condition the resident's continued care upon signing the agreement.

Some in the industry expect further legal challenges to the new CMS rule. Therefore, LTC facilities that believe in the benefits of arbitration should act now to implement CMS-compliant arbitration agreements for new and existing residents. Doing so now may protect these agreements from future legal challenges or changes.

If you have questions about the new CMS requirements for LTC arbitration agreements, or would like to discuss, please contact me or any member of the Barley Snyder Senior Living Industry Group.

:

Christopher J. Churchill

Partner

Tel: (717) 399-1571

Email: cchurchill@barley.com