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CMS Issues New Rule Barring LTC Facilities From Signing "Pre-Dispute" Arbitration Agreements With Residents, as of November 28, 2016

On September 28, 2016, CMS released its final rule updating the requirements that Long-Term Care (LTC) facilities must meet to participate in Medicare and Medicaid. This final rule introduces a number of provisions aimed at reducing unnecessary hospital admissions, improving quality of care and strengthening protections for LTC residents.

One of the new requirements completely bars LTC facilities from entering into "pre-dispute" binding arbitration agreements with any facility resident or such resident's representative, including at the time of admission (the Arbitration Bar). The Arbitration Bar, which is contained in a new regulation (42 C.F.R. § 483.70(n)), came as a surprise to providers and other interested parties because CMS had proposed only certain restrictions on pre-dispute arbitration agreements rather than an outright ban.

As its stated justification for the Arbitration Bar, CMS noted "the unique circumstances of LTC facilities" and "concluded that it is unconscionable for LTC facilities to demand, as a condition of admission, that residents or their representatives sign a pre-dispute" binding arbitration agreement. Many LTC providers and organizations had opposed such restrictions as unduly burdening residents' rights and had provided concrete examples that agreements to arbitrate disputes served the interests of all parties and could, in fact, be entered into voluntarily. Focusing on arbitration agreements that are a condition of admission ("take it or leave it"), however, CMS stated that pre-dispute arbitration agreements jeopardize the wellbeing and care of residents.

There are two exceptions to the Arbitration Bar: (1) it does not apply to any agreements with residents entered into before the November 28, 2016 effective date; and (2) it does not apply to arbitration agreements that are entered into after a dispute arises (though, it imposes certain restrictions on such post-dispute agreements, including that a resident may not be required to sign the agreement as a condition of staying at the LTC facility).

In summary, the Arbitration Bar goes into effect November 28, 2016, and specifically does the following:

- Prohibits LTC facilities from entering into any **new** pre-dispute binding arbitration agreements with any resident or resident's representative, including those as a condition of admission to the LTC facility.
- Imposes requirements on binding arbitration agreements entered into between LTC facilities and residents **after** a dispute has arisen between the resident and the facility.
- If a dispute is resolved through arbitration, requires the LTC facility to retain a copy of the signed binding arbitration agreement and the arbitrator's final decision for five years, and the agreement and decision must be available for inspection upon CMS's request.
- Finally, the rule does not apply to mediation arrangements.

CMS's Arbitration Bar in the LTC setting may be the start of a trend. CMS also expressed its concerns regarding the use of pre-dispute binding arbitration agreements as a condition of receiving services "regardless of provider type," but stated that LTC facilities are its "first priority." This suggests that CMS may in the future target other providers and suppliers that use such arrangements.

Given the widespread use of pre-dispute arbitration agreements in LTC facilities, the new rule will likely require significant changes to LTC operations and litigation risk assessments. The full final rule regarding LTC facilities, including the Arbitration Rule is available on the Federal Register at https://www.gpo.gov/fdsys/pkg/FR-2016-10-04/pdf/2016-23503.pdf.

If you would like to discuss the implications of this final rule for your business, please speak to one of the individuals listed in this publication or your usual firm contact.

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