



Iowa Health Care Association
Iowa Center for Assisted Living
Iowa Center for Home Care

Arbitration in Nursing Facilities: *An Overview and Summary of New CMS Rule*

IHCA's Regulatory & Legal Team Work Group
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ARBITRATION IN NURSING FACILITIES: AN OVERVIEW AND SUMMARY OF NEW CMS RULE

Arbitration is a private process where disputes are resolved between parties by agreeing to allow either one or several independent individuals to make a decision about the dispute after receiving evidence and hearing arguments. Arbitrators are often judges or attorneys who do not have a conflict with either party.

Arbitration is different from the mediation process because the neutral arbitrator, unlike a mediator, has the binding authority to make a decision about the dispute.

The arbitration process has similarities and differences to the court process. It is similar in that a party bringing a claim has the right to assert the same causes of action (theories of liability) and same claims for damages that can be asserted in a trial. In addition, the parties usually have the right to conduct limited discovery (request for documents, deposing witnesses) as well as make opening statements and presenting evidence to the arbitrator.

Unlike a trial, the parties usually agree to split the costs incurred by compensating an arbitrator or arbitrators for time spent in conducting pre-arbitration meetings, attending the arbitration hearing and drafting a written decision. Both parties waive their right to present their evidence before a jury.

The advantage of arbitration is that this forum, in comparison to a bench trial (in front of a judge) or a jury trial, usually takes significantly less time to prepare for the hearing and thus is less expensive. In addition, the arbitration hearings usually are shorter and less formal. At the conclusion of the hearing, the arbitrator issues a decision, both examining whether liability has been established, and if so, the appropriate monetary award to be issued.

While the arbitration process can be either binding or non-binding, binding arbitration is usually favored, as it brings a final resolution to the dispute, rather than giving parties the right to proceed to court proceedings if one party is unwilling to accept the arbitration decision.

The use of arbitration agreements in long term care was previously a contractual matter made by the long-term care facility and the resident, subject to language set forth in the arbitration agreement. In 2016, CMS proposed a new regulation that banned all pre-dispute agreements (agreement to arbitrate any future claims that may arise), banned requiring a resident to sign an agreement as a condition of admission, required that arbitration agreements had to be explained to residents and their representatives, and required that arbitration agreements and any awards made pursuant to arbitration agreements were required to be maintained by facilities and made available for inspection by state agencies and CMS.

AHCA filed a lawsuit against CMS seeking both a preliminary and permanent injunction that would prohibit CMS from implementing the arbitration ban set forth in the proposed rule. The court granted the injunction and the rule never went effect. CMS issued a letter to state survey agencies stating that CMS would not enforce that portion of the regulation that banned pre-dispute agreements as well as banning arbitration agreements a condition of admission.

CMS is now implementing a new rule relating to arbitration agreements which goes into effect September 16, 2019. The new rule provides that arbitration agreements must explicitly state that neither the resident nor the resident's representative is required to sign the arbitration provision as a condition of admission or continued residence in the facility.

AHCA's existing model arbitration agreement currently includes similar language, but AHCA will expand and highlight this language in an updated model agreement that is currently being drafted.

The rule also provides that a facility must ensure each of the following:

- Agreement is explained in a form AND manner that the resident and resident's representative understand.
- This understanding is acknowledged by the resident or the resident's representative.
- Agreement provides for selection of a neutral arbitrator agreed upon by both parties.
- Agreement provides for the selection of a venue that is convenient to both parties.
- Agreement explicitly includes ability for resident or resident's representative to rescind the agreement within 30 days of signing.
- Agreement may not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state or local officials such as surveyor or long-term care ombudsman.
- If there is a dispute resolved through arbitration, a copy of the signed agreement and the arbitration award must be retained by the facility for five years after the resolution of that dispute and be available for inspection.
- As this regulation is a condition of Medicare/Medicaid participation, violations could be cited as a deficiency on a survey.

AHCA's existing model agreement is in the process of being updated to assure that each of the foregoing requirements are covered in the revised agreement.

A recent Iowa Supreme Court decision (*Roth v. Good Samaritan, et al.*) has somewhat impaired the effectiveness of arbitration agreements in Iowa, as that decision held that while an arbitration agreement signed by a resident or their legal representative could potentially be binding on the resident, the agreement is not enforceable against children or spouses who may also be parties to the lawsuit. Effectively, this means that where a lawsuit is filed by a resident or an estate of a resident, and a spouse and adult children are also identified as additional parties, the claims will be bifurcated, which means that the claims by a resident or the estate will proceed in arbitration, while the claims brought by a spouse and children, will proceed through the court system, including a likely jury trial. This complicated procedure undercuts the advantages of resolving claims in arbitration.

Any member interested in including an arbitration provision in their admission agreement or as part of their admission process, or any members already utilizing an arbitration provision should be prepared to revise the language in their arbitration agreements/provisions. IHCA recommends that members utilize the AHCA agreement which is being finalized.

The new rule promulgated by CMS does not apply to assisted living programs, including those who participate in the Medicaid Waiver Program.

QUESTIONS

For questions, contact [Mary Jane Carothers](#), VP, Quality Improvement and Clinical Affairs or [Merea Bentrutt](#), VP, Government and Regulatory Affairs at 800-422-3106.