

# Final U.S. Rule Allows Nursing Home Arbitration Agreements, But With Limits

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The federal government has now finalized its rule allowing pre-dispute arbitration agreements in nursing homes. The final rule, announced July 16, abandons an Obama-era rule that would have banned pre-dispute arbitration agreements but never went into effect. Some restrictions are imposed under the final rule.

In October 2016 the U.S. Centers for Medicare and Medicaid Services (CMS) issued a regulation prohibiting pre-dispute binding arbitration agreements in nursing homes and other long-term care facilities participating in Medicare or Medicaid. The regulation also prohibited nursing homes from requiring arbitration agreements as a condition of admission to the facility. The American Health Care Association and a group of nursing homes promptly filed suit and in November 2016 a U.S. District Court in Mississippi preliminarily enjoined enforcement of the regulation. CMS did not enforce the regulation while the injunction remained in effect, and in June 2017 it issued its proposed rule abandoning the arbitration ban. That rule is now final.

With this rule, nursing homes will continue to be free to execute pre-dispute arbitration agreements with their residents or the residents' representatives. However, the facilities will be prohibited from requiring such agreements as a condition of admission or continued care.

Facilities, as outlined in 42 CFR 483.70, will also now be required to:

- Explicitly inform residents or their representative of their right not to sign;
- Ensure that the agreement is explained in a manner and language that the resident or representative understands, and ensure that the resident or representative acknowledges understanding;
- Provide for the selection of a mutually agreeable neutral arbitrator and a mutually convenient venue for arbitration;
- Explicitly grant the right to rescind the agreement within 30 days of signing;
- Use language that does not discourage the resident or anyone else from contacting surveyors or any other federal, state or local officials; and

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- When a dispute is resolved through arbitration, retain a copy of the signed arbitration agreement and the final decision for five years after resolution, and make it available for inspection by CMS.

CMS said, in announcing the final rule, that “resident rights must be protected by allowing them the ability to choose their method of dispute resolution, while preserving access to all possible choices, including arbitration, a method that often (costs residents) much less than litigation.”

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