

CMS: Change in Direction on Arbitration

Ban

AUTHOR: OLIVIA WATTERS

On September 28, 2016, CMS created the “Arbitration Rule”, banning arbitration agreements in nursing home admission agreements. By creating this Rule, CMS took the position that, due to the inequality of bargaining power between potential nursing home residents and long term care facilities, those facilities could no longer require, or even offer, binding arbitration as part of the admission process or at any point prior to a dispute arising.

Supporters of the Rule argued that pre-dispute arbitration agreements force residents to waive their 7th Amendment right to a trial. The “Arbitration Rule” was to take effect in November of 2016, and would have effectively ended arbitration as a means of resolving long-term care disputes. However, in October 2016, the American Health Care Association and others, filed complaints seeking injunctions against the enforcement of the Rule. A federal court agreed with the AHCA’s position and issued a preliminary injunction, preventing CMS from implementing the Rule. In January of 2017, CMS filed its notice of appeal and had been working towards the appeal of this decision.

On Friday, June 2, 2017, CMS abandoned its appeal without explanation. Further, CMS has proposed revisions to its rules. Under these proposed revisions, arbitration agreements would not be banned, but specific standards would need to be followed, i.e. the arbitration agreement must be in plain writing and explained to the resident and/or representative in an understandable language, the resident and/or representative must acknowledge they understand it, and the facility must visibly post notice of its use of binding arbitration.

Follow this link for more details.