Availability of Adding Arbitration to Admission Agreements

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Admission agreements are integral to defining the rights and obligations of both health care facilities and the patients they serve. For skilled nursing facilities ("SNF"), the use of arbitration provisions in those agreements has been uncertain in the recent past. However, the Centers for Medicare & Medicaid Services ("CMS") recently issued a final rule removing this regulatory prohibition but, in doing so, also made changes to the proposed rule which has allowed these provisions since 2017. Below is a description of pre-dispute arbitration provisions, the effects of CMS's new rule, and some issues SNFs should consider in light of this new rule.

Overview of Pre-Dispute Arbitration Provisions
Arbitration provisions require parties to a contract to submit any disputes that arise under the contract to a third party arbitrator. This arbitration process is "binding" and tends to be the exclusive means of challenging the contract's provisions. This means that an aggrieved party may not bring a claim in court and cannot appeal the final decision of the arbitrator absent rare circumstances which are beyond the scope of this legal update.

While arbitration is not without its critics, arbitration is generally considered a more efficient method of resolving disputes than court-based litigation. Many consumer product and service contracts contain arbitration provisions as standard practice. For instance, most credit cards require cardholders to enter a "Cardholder Agreement" which provides that the parties will submit to binding arbitration in the event of any dispute. Large companies tend to prefer arbitration to traditional lawsuits for a variety of reasons including the ability to maintain privacy regarding the outcome, the ability to control costs by preventing appeals, and the advantage of picking an arbitration company with a trusted reputation.

Regulated residential care facilities often use "Admission Agreements" or "Service Agreements" to define the mutual rights and obligations of the facility and its residents. While SNFs, have until recently faced a complete federal prohibition on these provisions, other residential care facilities have not but have been hesitant to incorporate arbitration provisions into admission agreements.

Because of the general acceptance of the use of arbitration in many businesses, residential care facilities began to utilize similar provisions in their admission agreements. Then, in 2016, CMS banned their use by skilled nursing facilities. After a lawsuit by the American Health Care Association challenging the provision, CMS issued a proposed rule in 2017 that again allowed the use of arbitration provisions by skilled nursing facilities in their admission agreement but with certain restrictions. Now, CMS has published a final rule allowing the use of arbitration provisions but has modified slightly the regulatory requirements.

The Final Rule
The final rule allows facilities to utilize arbitration provisions but prohibit them from requiring a resident to sign an arbitration agreement, as a condition of admission to the facility. The agreement must explicitly state that signing the arbitration provision is not a condition of admission. If a facility does ask a resident or a resident representative to enter into an agreement for binding arbitration, the facility must comply with additional requirements including, among others:

1. Explain the agreement in language the resident/representative understands;
2. Ensure the agreement is entered voluntarily and that both the resident and facility agree on the arbitrator; and
3. Avoid making the resident's continuing right to remain in the facility contingent upon signing the agreement.

In addition to other record retention requirements which may apply, the facility must retain the arbitration agreement and the arbitrator's final decision for at least five years.

Special Considerations for Admission Agreements
Facilities should regularly consult counsel to check that these agreements maintain compliance with current law and subregulatory guidance. Notably, the "Mega Rule" changed several requirements relating to SNFs which impact the drafting of facilities' admission agreements. Also, facilities should retain counsel before making any substantial revisions to admission agreements. Keep in mind, admissions agreements must not only meet regulatory requirements, they must also protect facilities' rights to collect payment for service they have rendered. From a business perspective, retaining counsel to tighten contractual language can be the difference between a facility collecting for its services or being left holding the bag.
