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U.S. Government Bans Use of Mandatory Arbitration Agreements between Nursing Homes and Residents, Effective November 28, 2016

On September 28, 2016, the Centers for Medicare and Medicaid Services (“CMS”), which is part of the U.S. Department of Health and Human Services, issued a new rule that bans federal funding to any nursing home that requires its residents to enter mandatory pre-dispute arbitration agreements upon admission. The rule prevents nursing homes from forcing residents to submit any disputes concerning care, payment for services, etc., to mandatory binding arbitration rather than to a court.

Mandatory arbitration agreements are frequently used in many types of industries and have been for decades. However, recent efforts by several consumer advocate groups have sought to curtail the use of mandatory arbitration clauses in industries where the individuals who executed such agreements have little to no bargaining power. According to these groups, nursing home residents are potentially more vulnerable than most to being unwittingly bound by such agreements because of the nature of the admissions process. The new rule is set to take effect on November 28, 2016, and will only apply to agreements entered into after that date.

Nursing home operators should check their current standard agreements with residents to ensure that such clauses are removed starting November 28, 2016. Those nursing homes that still wish to utilize arbitration as a means to avoid typically lengthy and expensive litigation may still do so under the new rule so long as they obtain the voluntary, informed consent of the resident or his/her caretaker. Facilities are now required, among other things, to explain the arbitration clause to the resident in a form, manner and language he/she understands.

However, before doing so, it is recommended that any such facility operator engage competent legal counsel to ensure that such agreements are drafted and utilized in accordance with the governing law. A nursing home that violates the new rule by requiring consent to arbitration as a condition to admission risks losing federal funding.

A link to the final rule is posted here: <https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-23503.pdf>

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