



WEB EXCLUSIVE - Still in Limbo – An Update On The Arbitration Ban For Nursing Home Residents

Insights

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Pre-dispute arbitration agreements are commonly found in customer contracts and employment contracts, including in many nursing home agreements. For those unfamiliar, arbitration is an alternative dispute resolution method to filing a case in court, where the parties state their case in front of and then receive binding decisions from a neutral arbitrator or panel of arbitrators.

As they relate to nursing homes, the supporters of pre-dispute arbitration provisions argue that they benefit both the residents and the facilities by providing a confidential, less expensive, and more efficient means for resolving a dispute. Opponents call for more transparency, citing the confidential nature of the process as shielding abuse and neglect cases from the light of day.

Federal Government Seeks To Ban Arbitration

In 2016, the Obama administration sought to reform arbitration agreements in nursing homes and long-term care facilities. Through Centers for Medicare & Medicaid Services (CMS), the administration proposed a rule that would prevent pre-dispute arbitration agreements and restrict post-dispute arbitration agreements. The rule was scheduled to take effect on November 28, 2016, and compliance with the rule would have been a requirement for those facilities that wanted to continue participating in the Medicare and Medicaid programs.

However, just weeks before it was to take effect, [a federal court in Mississippi blocked the rule](#). The leading opponent, the American Health Care Association (AHCA), along with several nursing homes, challenged the rule's prohibition against pre-dispute arbitration agreements. The court agreed and blocked the rule because it found that the plaintiffs proved they were likely to prevail on two grounds: that the rule is preempted by the Federal Arbitration Act (FAA), and that CMS does not have the authority to ban arbitration agreements under its generalized statutory mandate to promote resident "health, safety, and welfare."

Where Are We Now?

In June 2017, a federal judge agreed to press pause on the matter in order to allow CMS to propose revisions to the original rule. CMS proposed amendments that wouldn't outlaw pre-dispute arbitration agreements, but instead would impose restrictions and add requirements to the arbitration provisions at issue.

The amendments would require nursing homes to write the arbitration agreements in plain language, would oblige them to explain the agreement to the prospective resident or the resident's representative, and have the residents acknowledge they understand the agreement. Moreover, the proposal would require facilities to comply with certain posting requirements describing the arbitration policies.

In February 2019, the White House Office of Management and Budget (OMB) began its final review of the proposed regulation, and is expected to reach a decision sometime this summer.

What Should You Do?

In the meantime, pre-dispute arbitration agreements are still valid, as long as the arbitration agreement meets the requirements of procedural and substantive fairness. We'll continue to monitor the status of the proposed rule, so [make sure you are signed up](#) to receive alerts and newsletters from our firm. As these new laws continue to be introduced and revised, our [Healthcare Practice Group](#) will continue to provide you with updates as the legal landscape evolves.

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