



NASW Practice Alert

The Use of Arbitration Agreements within Long-Term Care Facilities: Changes to Federal Requirements and Implications for Social Workers

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The Centers for Medicare & Medicaid Services (CMS) recently published a final rule that affects beneficiaries who seek or receive care in long-term care (LTC) facilities—defined by CMS as nursing facilities and skilled nursing facilities that participate in Medicaid and Medicare, respectively. The rule, which took effect in most LTC facilities on September 16, 2019,¹ addresses the controversial use of predispute binding arbitration agreements between LTC facilities and residents. Knowledge of this rule is essential not only for social workers employed by LTC facilities, but also for social workers who serve LTC facility residents, potential residents, and family caregivers in other capacities.

What is a predispute binding arbitration agreement? How have such agreements been used between LTC facilities and residents?

Arbitration is a method of alternative dispute resolution that does not involve litigation. By signing an arbitration agreement, an individual (for purposes of this Practice Alert, a consumer) agrees to resolve a particular difference with a business outside of the judicial system. In many instances, a consumer signs a predispute arbitration agreement at the time service begins. In so doing, the consumer agrees not to sue the service provider for any dispute that might emerge during the course of service. Numerous entities require predispute arbitration agreements as a condition of service. This practice is known as *forced arbitration* or *mandatory arbitration* (American Association for Justice, 2019).

¹ Two Arkansas LTC facilities, Northport Health Services and NWA Nursing Center (which operate under the names Springdale Health and Rehabilitation Center and The Maples, respectively), along with more than 80 other LTC facilities or their parent companies, are involved in a lawsuit opposing the 2019 final rule's ban on mandatory arbitration in LTC facilities (Northport Health Services of Arkansas LLC et al v. U.S. Department of Health & Human Services et al, 2019). For these select facilities, enforcement of the final rule is delayed until December 31, 2019 (Brown, 2016a, 2016b).

The use of binding arbitration agreements has increased dramatically in recent years, including in LTC facilities (Silver-Greenberg & Corkery, 2015; Silver-Greenberg & Gebeloff, 2015). Numerous facilities invite potential residents (or their representatives)² to sign predispute binding arbitration agreements upon admission. Many have required residents to sign such agreements as a condition of admission. Similarly, many LTC facilities have offered predispute binding arbitration agreements to current residents, and some have required residents to sign such agreements as a condition of continued service. This use of predispute binding arbitration agreements—especially mandatory agreements—in LTC facilities has generated significant concern among beneficiary and consumer advocates, including NASW.

What has CMS done to address the use of predispute binding arbitration between LTC facilities and residents? How has NASW responded?

In 2015, CMS (then part of the Obama Administration) issued a proposed rule to amend the requirements that LTC facilities must meet to participate in Medicaid and Medicare (Medicare and Medicaid Programs, 2015). The proposed rule included a prohibition on the use of a predispute binding arbitration agreement as a condition of admission to any LTC facility. CMS also proposed the following requirements that would apply if a facility were to offer an arbitration option after a dispute developed between the facility and a resident:

- criteria to enhance the resident’s informed, voluntary consent to arbitration agreements
- specification that arbitration agreements could neither discourage nor prohibit the resident or others from communicating with federal, state, or local health care or health-related officials, including representatives of the office of the state LTC ombudsman
- condition that arbitration sessions be conducted by a neutral arbitrator in a location that is convenient for both parties.

In its response to the proposed rule, NASW urged CMS to adopt regulatory language that would prohibit LTC facilities from entering into predispute binding arbitration agreements with residents (ACCSES et al., 2015; McClain, 2015).

CMS received almost 10,000 comments on its 2015 proposed rule, including nearly 1,000 comments on the arbitration issue alone. The final rule, issued in October 2016, included a ban on *all* predispute arbitration agreements, whether as a condition of admission or of remaining in the facility. The rule also finalized the aforementioned proposals for the use of postdispute arbitration agreements (Medicare and Medicaid Programs, 2016a).

The regulation prohibiting facilities from entering into predispute binding arbitration agreements with residents has never been implemented. Within two weeks of publishing the final rule, an industry-led group filed a complaint in court to delay implementation of the regulation; within another month, the court had approved the delay (*American Health Care Association v. Burwell*, 2016). Before the end of 2016, CMS instructed its State Survey Agency Directors not to enforce

² The resident representative is a person who has been designated by the resident to communicate with the LTC facility and make decisions related to LTC facility care if the resident is unable to do so. For the purpose of this Practice Alert, the term *resident* will be used to refer to the resident or the resident representative, as applicable in any given situation.

the ban on predispute arbitration agreements while the court-ordered injunction was in effect (CMS, 2016).

In June 2017, CMS (now part of the Trump Administration) issued a proposed rule regarding the arbitration provision (Medicare and Medicaid Programs, 2017). In this document, CMS proposed allowing LTC facilities to (a) enter into predispute binding arbitration agreements with residents and (b) require residents to sign such agreements as a condition of admission. Moreover, CMS's proposal eliminated language ensuring the right of residents to participate in selection of both the arbitrator and the arbitration venue. The proposed rule also eliminated the Obama Administration's 2016 language protecting the right of current residents who do not sign arbitration agreements to remain in the facility.

NASW and numerous other beneficiary and consumer advocates urged CMS to withdraw the proposed rule. In its comments to CMS, NASW submitted the following assertions:

- The use of predispute binding arbitration agreements is incompatible with informed decision making by residents.
- Predispute binding arbitration agreements exacerbate power differentials between LTC facilities and residents.
- Predispute binding arbitration agreements have a negative effect on the health, safety, and well-being of residents.
- The use of predispute binding arbitration agreements conflicts with reliable evidence. (McClain, 2017)

CMS received more than 1,000 public comments on the 2017 proposed rule. Two years later, in July 2019, the administration issued a final rule on the issue of arbitration agreements between LTC facilities and residents (Medicare and Medicaid Programs, 2019). The rule took effect on September 16, 2019.

What does the 2019 final rule on arbitration in LTC facilities stipulate?

The final rule retains two critical provisions of the 2016 reformed requirements for LTC facilities:

- A facility may not require a potential resident to sign a predispute binding arbitration agreement as a condition of admission to the facility.
- A facility may not require a current resident to sign a predispute binding arbitration agreement as a requirement to continue receiving care.

Furthermore, facilities must inform potential residents and current residents of these rights.

Despite these prohibitions, the final rule allows LTC facilities to continue using predispute binding arbitration agreements with residents on a voluntary basis. CMS has delineated additional requirements for this practice, including stipulating that an arbitration agreement must grant the resident the right to rescind the agreement within 30 calendar days of signature.

The full text of the current regulation governing binding arbitration agreements between LTC facilities and residents follows.

U.S. Code of Federal Regulations
Title 42: Public Health
Part 483: Requirements for States and Long-Term Care Facilities
Subpart B: Long-Term Care Facilities
§ 483.70 Administration

(n) Binding arbitration agreements. If a facility chooses to ask a resident or his or her representative to enter into an agreement for binding arbitration, the facility must comply with all of the requirements in this section.

(1) The facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility and must explicitly inform the resident or his or her representative of his or her right not to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility.

(2) The facility must ensure that:

(i) The agreement is explained to the resident and his or her representative in a form and manner that he or she understands, including in a language the resident and his or her representative understands;

(ii) The resident or his or her representative acknowledges that he or she understands the agreement;

(iii) The agreement provides for the selection of a neutral arbitrator agreed upon by both parties; and

(iv) The agreement provides for the selection of a venue that is convenient to both parties.

(3) The agreement must explicitly grant the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it.

(4) The agreement must explicitly state that neither the resident nor his or her representative is required to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility.

(5) The agreement may not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials, including but not limited to, federal and state surveyors, other federal or state health department employees, and representatives of the Office of the State Long-Term Care Ombudsman, in accordance with §483.10(k).

(6) When the facility and a resident resolve a dispute through arbitration, a copy of the signed agreement for binding arbitration and the arbitrator's final decision must be retained by the facility for 5 years after the resolution of that dispute on and be available for inspection upon request by CMS or its designee.

Retrieved from https://ecfr.io/Title-42/se42.5.483_170

What is NASW's position on the 2019 final rule?

LTC facilities are an essential component of the continuum of long-term services and supports (LTSS), and many LTC facilities provide excellent care. However, numerous Medicare and Medicaid beneficiaries experience substandard care and other problems within LTC facilities; some even die as a result of actions taken—or not taken—by facilities. Such concerns recently generated two federal reports regarding abuse of residents (U.S. Department of Health and Human Services, 2019; U.S. Government Accountability Office, 2019); these reports were the primary focus of a high-profile Senate Finance Committee hearing in July (U.S. Senate Committee on Finance, 2019). Given these circumstances, NASW believes that revisions to the 2016 LTC facility requirements should be made only if such changes improve protections for LTC facility residents.

Consequently, NASW applauds CMS for reinstating the ban on mandatory predispute arbitration agreements between LTC facilities and residents. However, the association is distressed that the final rule allows facilities to use predispute arbitration agreements in other circumstances.

When CMS released the LTC facilities final rule in October 2016, it noted that the arbitration provisions therein were “minimum requirements for ensuring fairness for LTC facility residents. . . . The requirements will provide residents with the minimum protections they need and we intend that these rules will allow residents to make an informed and voluntary choice” (Medicare and Medicaid Programs, 2016b, p. 68799). NASW concurred with this characterization but noted that the 2016 final rule constituted an important step forward for Medicare and Medicaid beneficiaries (McClain, 2017).

NASW disagreed strongly with CMS's 2017 claim that the proposed rule “would support the resident's right to make informed choices about important aspects of his or her health care” (Medicare and Medicaid Programs, 2016b, p. 26649). As the association asserted in 2017 and now reaffirms, predispute arbitration agreements *decrease* the right and ability of residents and potential residents to make informed decisions. When signing a predispute arbitration agreement, a resident or potential resident cannot anticipate problems that could occur during the facility stay. NASW's position coheres with CMS's statement in the 2016 final rule:

Requiring residents to sign pre-dispute arbitration agreements is fundamentally unfair because, among other things, it is almost impossible for residents or their decision-makers to give fully informed and voluntary consent to arbitration before a dispute has arisen. We believe that LTC residents should have a right to access the court system if a dispute with a facility arises, and that any agreement to arbitrate a claim should be knowing and voluntary. (Medicare and Medicaid Programs, 2016b, p. 68792)

NASW also finds compelling this statement from CMS in the 2016 final rule:

Many of the articles we reviewed [in preparing the final rule] provided evidence that pre-dispute arbitration agreements were detrimental to the health and safety of LTC facility residents. . . . These articles discuss, among other things, the unequal bargaining power between the resident and the LTC facilities; inadequate explanations of the arbitration

agreement; the inappropriateness of presenting the agreement upon admission, an extremely stressful time for the residents and their families; negative incentives on staffing and care as a result of not having the threat of a substantial jury verdict for sub-standard care; and the unfairness of the arbitration process for the resident. (Medicare and Medicaid Programs, 2016b, p. 68793)

Thus, NASW believes that the most significant factor in ensuring that arbitration is voluntary is that the resident agrees to arbitration occurs *after* the dispute has occurred. Accordingly, the association opposes any use of predispute binding arbitration agreements between LTC facilities and residents.

The association is pleased that the 2019 final rule added or reinstated certain provisions to promote self-determination and protect resident rights in relation to binding arbitration agreements. Nonetheless, NASW remains concerned that any use of binding arbitration agreements in LTC facilities might not be in the best interest of residents. Although the 2019 final rule retains the resident’s right to communicate with specified government officials regarding the dispute, arbitration is a closed-door process as compared to litigation. As CMS noted in the 2016 final rule, “We are also concerned that the arbitration process, especially the secrecy it involves, could result in some facilities evading responsibility for substandard care” (Medicare and Medicaid Programs, 2015, pp. 68797–68798).

In addition to commenting on the 2015 and 2017 proposed rules, NASW is attuned to potential legislative solutions to the problem of predispute binding arbitration agreements in LTC facilities. For example, the association recently supported the Forced Arbitration Injustice Repeal Act (H.R. 1423, 2019), which includes a section on LTC facilities. The bill was passed by the U.S. House of Representatives in September 2019 and, as of this writing, awaits action by the Senate Judiciary Committee. Moreover, NASW anticipates the reintroduction of the Fairness in Nursing Home Arbitration Act this autumn. In collaboration with other beneficiary and consumer advocacy organizations, the association will continue to advocate on the LTC arbitration issue.

How can social workers help Medicare and Medicaid beneficiaries who might be affected by the final rule?

Social workers who are employed by LTC facilities provide medically related social services “to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident,” as specified in section 483.40 of the current regulations (Medicare and Medicaid Programs, 2016a, p. 68863). One component of this role is to strengthen communication between facility staff and residents (NASW, 2003). Hence, LTC facility social workers can fulfill a critical role in helping residents and potential residents understand both their rights in relation to arbitration agreements—whether before or following a dispute—and the implications of signing such agreements. Social workers can also educate their LTC facility colleagues about beneficiaries’ arbitration rights and help hold facilities accountable for upholding those rights.

Social workers who are not employed by LTC facilities can also support Medicare and Medicaid beneficiaries (and their families, however defined) in understanding arbitration agreements and

in making informed decisions regarding such agreements. For example, many social workers refer clients to LTC facilities and provide support during the transition of care. These social workers can support beneficiaries in making informed decisions about predispute arbitration agreements before admission.

Many social workers, such as those who work in hospice, care management, or LTC ombudsman programs, serve LTC facility residents on an intermittent basis. Other social workers interact with family caregivers (also known as “care partners”) in a variety of programs and settings. All of these social workers encounter clients who have concerns about facility care and are uncertain about how to resolve these concerns—including whether to sign a binding arbitration agreement before or following a dispute. In such circumstances, social workers can help residents and families understand the full range of options and access the option of their choice.

Notwithstanding these vital roles, all social workers must be careful to function within their scope of practice. If a client needs legal advice, the social worker should refer the person to appropriate legal resources. The resource list at the end of this Practice Alert includes examples of such resources.

Conclusion

The July 2019 final rule on arbitration agreements in Medicaid- and Medicare-certified LTC facilities has weakened protections for residents by allowing facilities to enter into predispute binding arbitration agreements with residents. NASW has worked steadily to dismantle this practice and will continue to do so. The association encourages all social workers who interact with LTC facility residents and potential residents to familiarize themselves with the 2019 final rule. Whether they are employed by an LTC facility or another organization, social workers can play a fundamental role in helping Medicaid and Medicare beneficiaries to understand and exercise their rights in relation to arbitration agreements. This role is essential to maximizing the health and well-being of LTC facility residents.

Resources

Administration for Community Living (ACL)

<https://acl.gov>

Operating division within the U.S. Department of Health and Human Services; includes the Administration on Aging (AoA)

American Bar Association (ABA) Commission on Law and Aging

https://www.americanbar.org/groups/law_aging

Entity that works to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of older adults; opposes predispute binding arbitration agreements in LTC facilities

Center for Medicare Advocacy

<https://www.medicareadvocacy.org>

National nonprofit, nonpartisan organization that advances access to comprehensive Medicare coverage and quality health care for people with disabilities and older adults through legal analysis, education, and advocacy; opposes predispute binding arbitration agreements in LTC facilities

Consumer Financial Protection Bureau

<https://www.consumerfinance.gov>

Federal government agency; offers information and resources addressing arbitration

Eldercare Locator

<https://eldercare.acl.gov> or 1-800-677-1116

Public service of ACL–AoA, administered by the National Association of Area Agencies on Aging; provides referrals to local and state resources, including legal assistance

Justice in Aging

<https://www.justiceinaging.org>

National nonprofit organization that advocates to secure access to affordable health care, economic security, and the courts for older adults with limited resources; opposes predispute binding arbitration agreements in LTC facilities and offers free information for advocates

National Academy of Elder Law Attorneys (NAELA)

<https://www.naela.org>

Nonprofit organization that works to improve the quality of legal services provided to people with disabilities and older adults; opposes predispute binding arbitration agreements in LTC facilities and offers a free database of NAELA members

National Center on Law and Elder Rights

<https://acl.gov/programs/legal-help/national-center-law-and-elder-rights>

<https://ncler.acl.gov>

National resource center funded by ACL–AoA and administered by Justice in Aging in partnership with the National Consumer Law Center, the ABA Commission on Law & Aging, and the Center for Social Gerontology; provides free training and case consultations on legal issues to professionals who serve older adults

National Consumer Voice for Quality Long-Term Care

https://theconsumervoice.org/issues/issue_details/arbitration

Nonprofit organization that advocates on behalf of people who use LTSS; opposes predispute binding arbitration agreements in LTC facilities and provides a dedicated Web page and multiple resources on the issue

State Protection and Advocacy Systems

<https://acl.gov/programs/aging-and-disability-networks/state-protection-advocacy-systems>

Federally funded programs that provide information and referral, education, advocacy, and legal services for people living with disabilities

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