

CMS Issues Revised Long Term Care Surveyor Guidance on Arbitration Agreement Requirements

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On October 24, 2022, surveyors began using updated Centers for Medicare & Medicaid Services (CMS) guidance to identify noncompliance associated with skilled nursing facilities' use of arbitration agreements. In September 2019, under 42 C.F.R. § 483.70(n) - Administration, CMS added the requirements for skilled nursing facility binding arbitration agreements to F847 and F848.

Under F847, there are five key components that a skilled nursing facility must comply with if it elects to offer arbitration agreements. First, the facility cannot require residents to sign arbitration agreements as a condition of admission, or as a requirement to continue to receive care at that facility. Second, the facility must ensure the agreement is explained in a form and manner, including language, that the resident or representative understands, and the resident or representative must acknowledge he or she understands the agreement. Third, the arbitration agreement must provide the resident or representative with a 30-day right to rescind after signing it. Fourth, the agreement must be voluntary and optional; it must explicitly state that the resident and representative are not required to sign as a condition of admission or to continue to receive care. Lastly, the agreement must not contain language that prohibits or discourages the resident from communicating with federal, state, or local officials.

Under F848, the arbitration agreement must provide for the mutual selection of a neutral arbitrator and a convenient venue to hold the arbitration. Additionally, when the facility and resident resolve a dispute in arbitration, the facility must retain a copy of the signed arbitration agreement and the arbitrator's decision for five years after the dispute is resolved, making it available for inspection by CMS or its designee.

The State Operations Manual (SOM), Appendix PP – Guidance to Surveyors for Long Term Care Facilities has been updated to provide guidance as to how to survey facilities under F847 and F848 regarding their use of arbitration agreements. Some key points of surveyor guidance include:

- When a resident or representative signs an arbitration agreement to acknowledge understanding, the surveyor is advised “additional evidence may be needed to establish that in fact the resident or their representative understood what he or she was signing. It may not be sufficient that the resident or their representative signed the document.”
 - Surveyors should determine how the facility ensures residents or their representatives understood the terms of the binding arbitration agreement and how this understanding is
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acknowledged.

- Surveyors are told to verify through interview and record review that the resident or their representative understood what they were signing. This may include reviewing the medical record to identify the resident’s health care decision-making capacity at the time the agreement was offered, explained, and entered into.
- Surveyors are told to thoroughly investigate the basis for a transfer or discharge for a resident who has refused to enter an arbitration agreement.

Surveyors will investigate compliance with F847 through interview of sampled residents, resident representatives, resident council/family council (if one exists), Long Term Care Ombudsman, facility staff, and record review. Surveyors are provided specific interview questions for residents and their representatives, such as:

- What is your understanding of the arbitration process when a dispute arises?
- Do you understand that you are giving up your right to litigation in a court proceeding?
- Is there anything you would have liked to have known before signing the arbitration agreement?

Facility staff should expect to be asked questions about arbitration agreements, including but not limited to:

- When, and under what circumstances, do you request that a resident or his or her representative agree to an arbitration agreement?
- How do you ensure the resident or representative understands the terms of the arbitration agreement?
- How do you ensure the arbitration agreement is explained in a form and manner that accommodates the resident or his or her representative’s needs?
- How do you make sure the resident understands their rights with regard to the arbitration agreement, such as their right to refuse to enter into it and their right to rescind it within 30 days?
- What is the process in your facility for allowing residents or their representatives to terminate or withdraw from an arbitration agreement in the first 30 days?
- Do you know any resident(s) whom your facility refused admission to or discharged due to refusal to sign a binding arbitration agreement?
- How do you determine if the resident’s physical condition and his or her cognitive status may be contributing factors in understanding the binding arbitration agreement, including their ability to make an informed and appropriate decision?

According to the surveyor guidance in the SOM Appendix PP, surveyors are advised that in some cases, a resident or representative may not recall the specifics of a conversation explaining an arbitration agreement. “If a resident or their representative cannot recall the conversation explaining arbitration agreements, or details of the terms of the agreement, this alone may not necessarily indicate noncompliance. However, if several residents do

not recall being advised of their rights related to arbitration agreements, the surveyor should conduct further investigation. Conversely, if a resident or his or her representative actively asserts or complains that they remember the admissions conversation and can affirm that the facility staff member did not inform them of their rights related to arbitration, this may indicate noncompliance.” Either way, further investigation is warranted.

If surveyors find noncompliance, they will determine the scope and severity by determining if there has been actual psychosocial harm.

A skilled nursing facility offering arbitration agreements should not only ensure that its agreement meets the explicit requirements set forth in 42 C.F.R. § 483.70(n), but also educate and train its staff on why an arbitration agreement is offered, the key elements that should be explained to and acknowledged by residents, key definitions, and how the arbitration process works including the role of a neutral arbitrator. Ensure that staff feel comfortable with the agreement that they are offering and explaining, including the pros and cons of arbitration so that staff can explain the agreement in a manner that residents and representatives understand. Training staff on presenting and explaining arbitration agreements is critically important so they are prepared not only to answer resident questions and ensure understanding, but to be prepared for investigation by surveyors.