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INFORMATION MEMO
HEALTH CARE

OCTOBER 2016

CMS Final Rule Prohibits Pre-Dispute Arbitration Agreements at Long Term Care Facilities

In final regulations issued on September 28, 2016, the Centers for Medicare & Medicaid Services (CMS), an agency within the Health and Human Services Department, banned the use of binding pre-dispute arbitration agreements by long term care facilities. Beginning November 28, 2016, nursing homes and other covered facilities can no longer require or even ask their residents to sign such agreements. Post-dispute arbitration agreements – that is, agreements entered into *after* a dispute has arisen between a long term care facility and a resident – will still be permissible, subject to certain new conditions, and agreements entered into before November 28, 2016 (whether pre– or post-dispute agreements) are grandfathered from the new rule.

The new prohibition on binding pre-dispute arbitration agreements was included in CMS' final rules on long term care facilities' conditions of participation in the Medicare and Medicaid programs. These rules represent the most significant revision to U.S. nursing home regulations since 1991.

The American Health Care Association, the nation's largest association of long term care providers, issued a statement claiming that the ban on pre-dispute arbitration agreements "clearly exceeds CMS's statutory authority and is wholly unnecessary to protect residents' health and safety." It is possible that AHCA, or another organization or entity, could challenge the validity of the new rule in court.

One possible argument against the rule's validity would be that it conflicts with the Federal Arbitration Act (FAA). The FAA provides that agreements to arbitrate are generally "valid, irrevocable, and enforceable", except in circumstances – such as fraud or "unconscionability" – that would permit revocation of a contract under applicable state or federal law. In its 2012 *Marmet Health Care* decision (*Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530 (2012)), the U.S. Supreme Court ruled that binding arbitration agreements entered into between nursing homes and residents could not be held generally unenforceable under a state (in this case, West Virginia) public policy, because the FAA makes such agreements presumptively enforceable. The Supreme Court reversed a West Virginia state appeals court decision which had invalidated three different nursing home arbitration agreements on the ground that they conflicted with the state's public policy.

In the preamble to the new final regulations, CMS stated that the *Marmet* decision did not preclude it from banning *future* pre-dispute arbitration agreements, as opposed to invalidating existing agreements, as the West Virginia court tried to do in that case.

Several aspects of the new rule are uncertain. For example, although the new rule applies to agreements entered into on and after November 28, 2016, and not to agreements entered into before that date, it is not clear whether amending a pre-effective date contract would affect its grandfathered status. In addition, it is not entirely clear when a dispute will be considered to have "arisen" for purposes of the new prohibition. (Only pre-dispute arbitration agreements are flatly prohibited.)

The new rule will have far-reaching effects on nursing home administration and litigation, assuming that it survives any legal challenges. Since the new rule takes effect in less than 60 days, long term care facilities should immediately review their admission procedures and any existing arbitration agreements that residents are asked to sign. Covered facilities should also consider whether to use post-dispute agreements in the future, and if so how to ensure compliance with the new requirements for this type of arbitration agreement.

If you have any questions about this Information Memo, please contact Robert W. Patterson, any of the attorneys in our Health Care Practice, or the attorney in the firm with whom you are regularly in contact.

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