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Alert | Health Care & FDA Practice

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Attention Colorado Long-Term Care Facilities: Federal Arbitration Rules Are Changing

Effective Sept. 16, 2019, long-term care facilities participating in Medicare and Medicaid must comply with new federal requirements if they want to enter into pre-dispute binding arbitration agreements with their residents. The new regulation, 42 C.F.R. § 483.70(n), finalized on July 18, 2019, includes provisions proposed by CMS in June 2017 and purports to create stability in an area of law that has been in flux since October 2016.

Section 483.70(n) and the Colorado Health Care Availability Act (HCAA), which applies to arbitration agreements between long-term care facilities and their residents entered into in the state of Colorado, stem from the same underlying premise: the resident must enter into the agreement voluntarily. However, the laws contain different requirements. Because of this, Colorado long-term care facilities face a new threshold question: Which law applies? The answer, in short, is both.

Under current Colorado case law, the HCAA controls even if it is in actual conflict with federal law, as long as the federal law does not specifically relate to the business of insurance.[1] Section 483.70(n) does not specifically relate to the business of insurance, as it was enacted pursuant to CMS's authority to protect the health, safety, welfare, and rights of long-term care residents.[2] Moreover, CMS explicitly stated its

[1] *See Allen v. Pacheco*, 71 P.3d 375, 384 (Colo. 2003).
[2] 84 Fed. Reg. 34718, 34718 (July 18, 2019).

intent for the regulation not to preempt "in any way" state laws providing more protections to residents "except to the extent any such laws are actually in conflict with this regulation."[3]

All of this means Colorado long-term care facilities should be prepared to follow the requirements in the HCAA that actually conflict with Section 483.70(n) (such as the 90-day rescission period) and those requirements in the HCAA that Section 483.70(n) does not address (such as the requirements to include specific language and formatting of the agreement and the requirement to provide the resident with a copy of the executed agreement). Facilities participating in Medicare and Medicaid must also adhere to the remaining federal requirements not addressed by Colorado law. The below table provides a brief summary of the differences between the laws.

Due to the complexities added by the HCAA, Colorado facilities should consult with legal counsel before using the American Health Care Association (AHCA) model agreement or any other "form" agreement. If you have any questions about the below table or need assistance in implementing the new federal requirements into new or existing arbitration agreements, please feel free to contact us.

Summary of Federal Law & Colorado Law

While both laws regulate arbitration agreements between long-term care facilities and their residents, the two laws contain different requirements:

Topic	Federal Law 42 C.F.R. § 483.70(n)	Colorado Health Care Availability Act C.R.S. § 13-64-403
Are arbitration agreements with long-term care residents allowed?	Yes, if all the federal requirements are met.	Yes, if the agreement substantially complies with Colorado law.
Can the facility condition admission or the continuing receipt of care on the execution of an arbitration agreement?	No.	No.
Is the facility required to inform the resident[4] that the agreement is not a condition of admission to, or requirement to continue to receive care at, the facility?	Yes. The facility must "explicitly inform" the resident of this.	Partially. The agreement must state that "[n]o health care provider shall refuse to provide medical services to any patient solely because such patient refused to sign [an arbitration] agreement or exercised the ninety-day right of rescission."
Is the facility required to inform the resident that he/she may choose not to sign the agreement?	Yes.	Not specifically addressed.

[3] 84 Fed. Reg. at 34721.
[4] The term "resident" includes the resident or his/her representative.

Is the facility required to explain the agreement to the resident?	Yes. The agreement must be explained to the resident in a form and manner he/she understands, which includes a language he/she understands.	Not specifically addressed.
Is the facility required to retain a copy of the signed arbitration agreement?	Yes, if the facility and a resident resolve a dispute through arbitration. The copy must be kept for five years after the resolution of the dispute.	Not specifically addressed.
Is the facility required to retain an arbitrator's final decision?	Yes, for five years after the resolution of the dispute.	Not specifically addressed.
Is the facility required to make available to regulators the signed arbitration agreement and/or an arbitrator's final decision?	Yes, upon request by CMS or its designee.	Not specifically addressed.
Is the facility required to give the resident a copy of the signed agreement at the time it is signed by the parties?	No.	Yes.
Is the resident required to acknowledge that he/she understands the agreement?	Yes.	Not specifically addressed.
Must the agreement contain a provision regarding the selection of an arbitrator?	Yes. The agreement must provide for the selection of a neutral arbitrator agreed upon by the parties.	Not specifically addressed.
Must the agreement contain a provision regarding venue?	Yes. The agreement must provide for the selection of a venue that is convenient for both parties.	Not specifically addressed.
Must the agreement give the resident the right to rescind?	Yes. The agreement must explicitly grant the resident the right to rescind the agreement within 30 calendar days of signing it.	Yes. The agreement must grant the resident the right to rescind the agreement within 90 days of signing it.
Must the agreement state that neither the resident nor his/her representative is required to sign an agreement for binding arbitration as a condition of	Yes.	Not specifically addressed.

admission to, or as a requirement to continue to receive care at, the facility?		
Can the agreement 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?	No.	Not specifically addressed.
Is the agreement required to contain language and formatting?	No.	Yes. The law sets forth specific sentences that must be contained in the arbitration agreement.

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