Healthcare Section Update

CMS ISSUES NEW RULES FOR LONG TERM CARE FACILITIES

On October 4, 2016, the Centers for Medicare and Medicaid Services (CMS) published its final rule titled “Reform of Requirements for Long Term Care Facilities.” This final rule significantly revises the requirements long term care facilities (hereinafter, “facilities”) must meet to participate in the Medicaid and Medicare programs. The revisions are “designed to improve the quality of health care and patient safety while simultaneously reducing procedural burdens on providers.” CMS estimates that facilities will spend an average of $62,900 to implement the changes in the first year alone. This is the first major overhaul of the regulations that apply to federally-funded long term care facilities since 1991.

One of the most notable changes brought about by the final rule is a ban on the use of pre-dispute arbitration agreements. See 42 CFR 483.70(n). Facilities will no longer be able to enter into an agreement for binding arbitration with a resident or their representative until after a dispute arises between the parties. Further, facilities can no longer require residents to enter into arbitration agreements as a condition of the resident receiving care. This requirement does not affect the enforceability of arbitration agreements entered into before November 28, 2016.

Despite the ban on pre-dispute arbitration agreements, facilities may ask a resident or her representative to enter into an agreement for binding arbitration after a dispute arises. §483.70(n)(2). If a facility decides to ask that the resident enter into such a “post-dispute” arbitration agreement, the facility must ensure that (1) the agreement is explained to the resident and their representative in a form and manner that he or she understands, including in a language the resident and their representative understands; and (2) the resident acknowledges that he or she understands the agreement. § 483.70(n)(2)(i). Further, any such post-dispute arbitration agreements must be (1) entered into by the resident voluntarily; (2) provide for the selection of a neutral arbitrator agreed upon by both parties; and (3) provide for selection of a venue convenient to both parties. § 483.70(n)(ii). Post-dispute arbitration agreements cannot contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials. § 483.70(n)(iv). Of particular importance is the requirement that facilities cannot make a resident’s continuing right to remain in the facility contingent on the resident entering into a post-dispute arbitration agreement. § 483.70(n)(iii). Finally, any time a facility and resident resolve a dispute with arbitration, a copy of the signed arbitration agreement and the “arbitrator’s final decision” must be retained by the facility for 5 years and be available for inspection upon request by CMS or its designee. § 48370(n)(vi).