

## CMS Restricts Arbitration Clauses in Nursing Homes

By Sarah Maneval, J.D. Candidate 2019 | October 26, 2016

On October 4, 2016, the Centers for Medicare and Medicaid Services (CMS), an agency within the U.S. Department of Health and Human Services (HHS), issued new regulations, providing the [first major reform](#) to nursing homes since 1991. The regulations include a ban on pre-dispute arbitration clauses in resident contracts. The regulations, which apply to long-term care facilities that accept Medicare and Medicaid, may affect as many as [1.5 million residents](#) in over 15,000 long-term care facilities.

Nursing home arbitration clauses have been widely criticized in the wake of press coverage showing the frequency of elder abuse and the insufficient damages residents and their families receive through arbitration. A [study](#) conducted by the American Health Care Association (AHCA) found that average indemnity awards from such alternative dispute resolution mechanisms are 35% lower than those afforded through litigation. CMS received 10,000 comments on the proposed rule, including a [letter](#) from twenty-seven members of Congress, thirty-four U.S. Senators and Attorney Generals, and more than fifty labor, legal and medical consumer organizations urging a ban on such contract provisions.

CMS is only one of many government agencies attempting to rein in arbitration agreements, since legislative attempts have been unsuccessful. The Department of Education and the [Consumer Financial Protection Bureau](#) have also proposed rules to limit forced arbitration clauses in student loans and bar credit card companies from using such clauses to restrict class-action lawsuits. Despite criticism that CMS overstepped its authority, the ban on nursing home arbitration clauses may serve as template for other agencies to prohibit similar provisions.

The nursing home industry, however, has strongly opposed the rule. On October 17, 2016, the AHCA, an industry group representing numerous nursing homes, along with four long-term care facilities filed a [lawsuit against CMS](#) for violating the Federal Arbitration Act (FAA) and the Supreme Court rulings upholding long-term care arbitration agreements. AHCA is seeking a declaratory judgment that the rule is unlawful and is asking the federal court to delay the ban until the court rules on the challenge. The AHCA claims that the rule exceeds the regulatory authority of the CMS and HHS.

In addition to the arbitration restrictions, the regulations impose requirements for long-term care facilities to provide “nourishing, palatable” dietary options, create infection prevention programs and develop a personal care program for new admissions. The estimated cost to each provider is approximately \$63,000 for the first year and \$55,000 annually in subsequent years.

These regulations are scheduled to go into effect on November 28, 2016.