

A Closer Look at the Revised Nursing Facility Regulations

Admission

Executive Summary

The revised regulations broadly prohibit facilities from using admission agreements or other documents that waive a resident's rights. A resident cannot waive the protections of federal nursing facility law, or protections derived from any state or local nursing facility law. A resident also cannot waive his or her right to Medicare or Medicaid coverage, or any responsibility that the facility may have for the resident's personal property. A facility cannot obligate a family member or friend to become liable for the nursing facility bill, although the facility can require the resident's agent to agree to pay the resident's money for the nursing facility expenses. The revised regulations prohibit pre-dispute arbitration agreements, but this consumer protection currently is blocked by a court order. Prior to admission, a facility must give notice of any special characteristics or service limitations.

Acknowledgements

Justice in Aging, National Consumer Voice for Quality Long-Term Care, and Center for Medicare Advocacy created this issue brief in collaboration. This brief is the fifth of a series explaining important provisions of the revised regulations.

Introduction

On September 28, 2016, the Centers for Medicare & Medicaid Services (CMS) released revised nursing facility regulations. These regulations govern most aspects of nursing facility operations, and apply nationwide to any nursing facility that accepts Medicare and/or Medicaid reimbursement.

Waivers of Rights Not Allowed

Rights Under Licensing and Certification Rules

Under the revised regulations, the following resident rights cannot be waived:

1. Rights under the revised federal regulations themselves, and
2. Rights under licensing or certification laws, whether those laws be federal, state or local.

Notably, these protections apply whether the facility has required or requested the waiver. In the past, such protections applied only when a facility "required" such a waiver, and some facilities tried to circumvent the rules by claiming that a resident had voluntarily agreed to the waiver. Through the addition of the word "request," the revised regulations close off this facility argument, and clearly establish that the specified waivers are not allowed under any circumstances.

These protections apply at admission or at any other time. They are most relevant at admission, however, because they prohibit a facility from

using any rights-waiving language in an admission agreement or similar document.

Rights to Medicare and Medicaid Benefits

A resident also cannot waive his or her rights to coverage under Medicare or Medicaid. Again, this protection applies whether the facility “requires” or “requests” such a waiver.

This issue comes up most frequently in the Medicaid context. Historically, some facilities have had residents agree not to apply for Medicaid until the resident first has paid out-of-pocket for a certain number of months or years. Such “duration of stay” agreements are prohibited by the revised regulations (and were prohibited by the previous federal regulations also).

Responsibility for Resident’s Property

Under a new provision, a facility must not require or request that a resident waive the facility’s responsibility for the resident’s personal property. Thus, a facility’s admission agreement cannot in any way reduce a facility’s responsibility for a resident’s property.

This provision does not mean that a facility is automatically at fault when a resident’s property is lost or stolen. It does mean that a facility cannot arrange for itself to be automatically without responsibility.

Note: Actual responsibility for lost or stolen property will depend on the facts. Residents and their representatives should argue that facility staff should bear considerable responsibility for lost or stolen property, particularly when a resident has dementia and cannot reasonably be expected to keep track of jackets, dentures, and other personal items. A new regulation requires the facility to “exercise reasonable care for the protection of the resident’s property from loss or theft.”¹

¹ 42 C.F.R. § 483.10(i)(1)(ii).

Financial Guarantees Not Allowed

The revised regulations prohibit a nursing facility from requiring or requesting a third-party guarantee of payment. Thus, the facility cannot have a family member take on responsibility for nursing facility expenses.

In past years, many nursing facilities have had family members (often adult children) sign admission agreements as “responsible parties,” without the family member realizing that “responsible party” was defined as someone who was liable for any and all expenses. Such agreements are illegal and unenforceable under both the previous regulations and the revised regulations.

Some nursing facilities in the past have tried to justify these financial responsibility provisions by claiming that the family member has “volunteered” to take on financial liability. Those justifications never were very believable — why would anyone “volunteer” to take a financial obligation of perhaps \$10,000 or more monthly? — but in any case, a supposedly voluntary financial guarantee is foreclosed by new language prohibiting a facility from “requesting” a financial guarantee.

The revised regulations (and the previous regulations) contain an additional provision that applies specifically to a resident’s representative who has legal access to the resident’s money. In that situation, the facility can require or request the representative to sign a contract to pay facility charges *from the resident’s resources*. The provision specifies that the representative does not incur “personal financial liability.”

This provision on its face makes sense — when a resident is personally incapable of signing an admission agreement, the facility should be within its rights to have a representative agree to pay nursing facility charges with the resident’s money. Unfortunately, many facilities have filed lawsuits that attempt to hold a representative personally liable for allegedly unpaid bills, arguing that

although the representative may not be directly liable under the admission agreement, he or she can be liable for failing to perform a duty (paying the bill) established by the contract. Courts have ruled both for and against facilities in cases such as these.² In the release of the revised regulations, CMS noted some commenters' concern about such admission agreements and lawsuits, but concluded that further investigation would be needed before CMS might address this issue.³

Arbitration Agreements Not Allowed, but Enforcement of this Prohibition Blocked by Court Order

Under an arbitration agreement, the parties are required to have their dispute settled by a private arbitrator, rather than a court. For parties of relatively equal bargaining power, mutually-agreed-upon arbitration can be an efficient way to resolve a dispute. If, for example, two businesses have a disagreement, they may choose to have the dispute resolved by an arbitrator.

In consumer-business relationships, however, arbitration agreements almost always benefit the business at the consumer's expense. Usually, these are "pre-dispute" arbitration agreements that commit the consumer to arbitration for whatever dispute might arise in the future between the consumer and business. The consumer waives his or her right to a jury trial, and instead navigates a process that generally is slanted towards the business.

In the revised regulations, a new provision prohibits a facility from obtaining a "pre-dispute" arbitration agreement. Thus, a facility's admission agreement cannot be used to bind the resident to arbitration for future disputes.

This is an important consumer protection. At the time of admission, residents and representatives

are in no position to decide how future, unknown disputes should be resolved. As a practical matter, arbitration agreements are signed by residents and representatives because they feel obligated to sign everything put in front of them, and don't have the time or knowledge to question the page(s) related to arbitration.

Unfortunately for residents, the ban on pre-dispute nursing facility arbitration has been blocked by a federal court in Mississippi.⁴ The underlying lawsuit was brought by the American Health Care Association and several Mississippi nursing facilities, claiming that the arbitration prohibition exceeds CMS's authority and conflicts with the Federal Arbitration Act. The court's ruling is preliminary, pending an appeal by the federal government to the federal appeals court. It is unclear, however, how aggressive the federal government will be in defending this provision in court. The revised regulations were released by the Obama administration, and the Trump administration may have significantly different views. As this issue brief is written (early March 2017), the Trump administration has not announced a position on either the lawsuit or the pre-dispute arbitration prohibition.

Facility Required to Disclose Special Characteristics or Service Limitations

Prior to admission, a facility must provide a resident or potential resident with a "notice of special characteristics or service limitations."⁵ This notice could be useful to consumers, in two ways. First, of course, notice of "special characteristics or service limitations" would be important information in deciding whether or not to choose a facility.

Second, the notice could be used by a resident to defend against an involuntary transfer or discharge

2 See, e.g., Eric Carlson, Long-Term Care Advocacy § 3.06[2][1] (Lexis Publishing 2016).

3 81 Fed. Reg. 68,688, 68,732 (2016).

4 Order Granting Preliminary Injunction, Am. Health Care Ass'n v. Burwell, Civ. No. 3:16-CV-00233 (Nov. 7, 2016 N.D. Miss.).

5 42 C.F.R. § 483.15(a)(6).

based on a facility's claim that the facility cannot meet the resident's needs. The resident might defend against that claim by pointing out he or she never received pre-admission notice of this purported "service limitation." This would be in addition to the resident's other arguments that the facility is obligated to provide necessary services under the Nursing Home Reform Law and/or the Americans with Disabilities Act.

Residents and their representatives should be vigilant to ensure that claimed "service limitations" do not disclaim a mandatory service or level of service. Under federal law, a nursing facility has a broad obligation to provide the services necessary "to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being."⁶ In the release of the revised regulations, CMS emphasized that a notice of service limitations cannot alter a facility's obligation to provide required services.⁷

Admission Agreement Cannot Contradict Federal Law

In a new provision, the regulations specify that an admission agreement's terms cannot conflict with the revised regulations. Thus, for example, an admission agreement must not claim improper reasons for involuntary transfer/discharge, or inaccurately limit the facility's responsibility to provide needed care.

This is an important step in addressing a longstanding problem. For years, nursing facility admission agreements commonly have included statements that misrepresent the law, with the evident intent to convince residents that they had fewer rights than they actually did. Unfortunately, government surveyors often refused to act on admission agreement misstatements, saying that the regulations did not cover admission agreement terms, except for the no-financial guarantee rule.

⁶ 42 C.F.R. § 483.21(b)(1)(i).

⁷ 81 Fed. Reg. 68,688, 68,731 (2016).

Now, however, the regulations explicitly address admission agreement terms, and surveyors should be well within their rights to cite facilities for admission agreement provisions in conflict with federal law.

Effective Dates

All admission provisions became effective on November 28, 2016. As discussed above, however, implementation of the pre-dispute arbitration ban has been blocked by a federal court.

Finding the Regulations

The admissions provisions primarily are found at section 483.15(a) of Title 42 of the Code of Federal Regulations. The arbitration provision is found at section 483.70(n).

Tips for Residents and Advocates

Review Admission Agreements Carefully. Residents and their representatives should take time to read the agreement and understand the provisions. Because admission is a stressful time, they should consider asking for a copy of the agreement and reviewing it prior to admission. If an improper provision is found in an admission agreement, it is advisable to delete that provision before signing the agreement. Ideally, residents and their representatives or advocates will be prepared to explain to the facility staff how the particular provision violates federal or state law. If help is needed to challenge a provision, an elder law attorney or other knowledgeable person may be able to provide assistance. A related option is to follow the next tip.

Delay Signing an Admission Agreement Until after the Resident Is Residing in the Facility. Until a resident is residing in a facility, challenging the language of an admission agreement carries some risk, because the facility might reverse course and refuse to admit the resident. This risk disappears after the resident has moved into the facility, since at that point the facility can only force the resident to leave under one of the six reasons specified by federal law, and only after giving the resident an opportunity to appeal in an administrative hearing.⁸

Challenge Improper Provisions. A resident or representative has options even if he or she does not identify an improper provision until the agreement is signed. An improper provision generally will be unenforceable to the extent that it conflicts with relevant law. The resident or representative may be in a particularly strong position in instances where he or she can take the initiative. For example, a resident/representative can file a Medicaid application without regard to a purported waiver of Medicaid coverage.

Obtain Legal Representation. Tens of thousands of dollars (or more) may be at stake in disputes involving financial guarantees or arbitration agreements. This issue brief can only give a brief introduction to these important issues. Residents and their representatives should consult with a lawyer to discuss the law and the facts in more depth.

⁸ Transfer/discharge issues are discussed in detail in the second issue brief of this series.