

# Don't Abandon Nursing Home Residents

Since January 2017, the health and safety of nursing home residents has become increasingly imperiled. Lobbyists for nursing homes have urged the Centers for Medicare & Medicaid Services (CMS) to eliminate or delay regulations and dramatically reduce enforcement of violations. This series of policy alerts shows how lobbyists have been successful in influencing CMS.

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## Eviction Protections in Jeopardy

### Nursing Home Residents Are at Risk of Improper Eviction

[“Nursing Homes Pushing Out More Poor and Disabled Patients,”](#) states a December 2017 article from Kaiser Health News. According to the article, complaints about illegal evictions are on the rise in California, Illinois, and other states.

A [lawsuit from the Maryland Attorney General](#) alleges that a chain of nursing homes systemically and improperly evicts nursing home residents. According to the lawsuit, the chain keeps residents when their stay is paid for by Medicare (which pays more than Medicaid), but dumps them when their Medicare runs out, generally after a few weeks or months. The residents allegedly are sent to inappropriate settings such as homeless shelters and “sham assisted living facilities.” Residents who are kicked out like this can experience harm and may never recover.

The same type of prejudice against Medicaid-eligible persons is reported in a New York Times article entitled, [“Complaints about Nursing Home Evictions Rise, and Regulators Take Note.”](#) The article highlights evictions occurring when nursing homes attempt to rely on a constant but short-term flow of Medicare-reimbursed residents, and evict residents when their Medicare reimbursement ends.

Residents also face evictions for other inappropriate reasons such as complaining too much, needing extensive care, or behaving in ways that the nursing home finds challenging. Improper eviction is the most common complaint made against a nursing home - almost 9,500 such complaints were made in 2016 alone.

### Current Administration on Verge of Eliminating an Important Protection

Initially, the federal government identified a need for stronger standards. Beginning in 2016, to better protect residents from improper evictions, the Centers for Medicare & Medicaid Services (CMS) – the part of the federal government that is responsible for oversight of nursing homes - has required nursing homes to notify local ombudsman programs whenever a nursing home moves to evict a resident. Long-term care ombudsmen are advocates for nursing home residents. When ombudsmen are notified, they can counsel the resident on his or her options, including the ability to appeal any proposed eviction.

The current administration, however has suggested eliminating or limiting the notice-to-ombudsman requirement. If this requirement is eliminated, nursing home residents would be much more susceptible to improper eviction, because residents without assistance often feel intimidated by a nursing home that threatens or proposes eviction.

*This policy alert is part of a series that highlights how the current administration in Washington is weakening protections for nursing home residents, at great risk to their health and well-being. This series is produced by Justice in Aging, The National Consumer Voice for Long-Term Care, The Center for Medicare Advocacy, California Advocates for Nursing Home Reform, and the Long Term Care Community Coalition.*

## Arbitration Agreements Threaten Residents' Legal Rights

### Arbitration Agreements Harm Consumers

In a nursing home arbitration agreement, a resident waives the right to sue the nursing home in court, and instead agrees to have any future disputes handled by a private arbitrator. Arbitration agreements are generally considered bad for nursing home residents and other consumers. Arbitration can be expensive, and arbitrators are likely to favor the nursing home over the resident, since the nursing home may have ongoing business with the arbitrator. Also, the resident generally has no appeal rights, even if the arbitrator's decision is clearly wrong.

In 2016, under the previous presidential administration, the federal Centers for Medicare & Medicaid Services (CMS) released [regulations](#) that prevented a nursing home from obtaining arbitration agreements from residents at the time of admission. CMS noted that arbitration is generally not a good option for residents, and that residents and their families cannot make reasoned decisions about arbitration in the chaos that often accompanies a resident's admission to a nursing home. Also, residents during admission do not know what type of dispute may arise in the future. Disputes can be extremely serious and include lawsuits against abuse and neglect.

### Administration Proposes Reversing the Ban on Arbitration Agreements

Under the current administration, CMS has proposed [new regulations](#) that would reverse the ban on arbitration agreements. Worse, the proposed regulation would, for the first time, authorize a nursing home to require arbitration as a condition of admitting a person. Up until now, mandatory arbitration agreements have generally been considered improper under state consumer protection laws.

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## Care Plan Requirements Go Unenforced

### Care Plans Necessary After Admission

Nursing home residents have significant care needs, and appropriate care must be provided from the first day. Poor care can have immediate consequences. In recent years, a [federal study](#) found that a third of short-term residents suffered harm, even though their stay in nursing homes averaged less than 16 days. Almost sixty percent of the harm was clearly or likely preventable.

To protect residents during their vulnerable first days in the facility, the federal government in 2016 strengthened care planning regulations. The regulations now require nursing homes to create a baseline care plan for every resident within 48 hours of admission, rather than wait weeks as was previously allowed. This plan, which serves as an interim plan until a comprehensive care plan is completed, must include physician orders, therapy services, and other vital information.

The absence of an accurate care plan can lead to injury or death. A [2017 federal ruling](#) describes how a resident was placed at risk by the poor care planning of a Maryland nursing home. The resident's doctor had ordered certain precautions against wandering, but the order was not in a care plan and not implemented properly. Because the nursing home had not followed the doctor's orders, the woman wandered away from the nursing home. She was later found sitting in the lobby of a building several blocks away.

### Current Administration Fails to Assess Penalties for Violations

Regardless of a nursing home's noncompliance with baseline care planning requirements, it will not have to pay a single penny. The current administration declared that for 18 months it will not impose any fines or other meaningful penalties related to baseline care plan violations. This 18-month period does not expire until May 2019.

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## Infection Safeguards Go Unenforced

### Infections Kill and Injure Nursing Home Residents

[Infection lapses are rampant in nursing homes but punishment is rare](#), declared a Los Angeles Times headline on December 21, 2017. An investigation found that nursing homes routinely ignore basic steps to prevent infections, such as washing hands, isolating contagious patients, and keeping ill nurses and aides from coming to work.

In fact, one to three million nursing home residents annually suffer from infections, and nearly 75 percent of the nation's nursing homes have been cited for infection control violations during the last four years.

The Los Angeles Times article examined the poor care provided to Georgina Morris by a Los Angeles County nursing home. Ms. Morris fell ill to a particularly virulent strain of *Clostridium difficile*, a potentially life-threatening infection. Ms. Morris was hospitalized for 10 days to treat the infection and then underwent multiple re-hospitalizations and medical procedures. An investigation by the Department of Public Health found infection-control lapses throughout the nursing home, as had past inspections.

### The Current Administration Is Weakening Oversight

In 2016, in response to such infection-related problems, the Centers for Medicare & Medicaid Services (CMS) – the part of the federal government responsible for nursing home oversight - [strengthened infection prevention requirements for nursing homes](#). But consistent with the request of nursing home operators, CMS now is weakening those requirements. For 18 months starting November 2017, the administration will not impose any fines or other meaningful penalties related to failure to operate a required antibiotic stewardship program.

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# How CMS Is Rolling Back Nursing Home Protections

DATE	REQUEST BY NURSING HOME OPERATORS OR CONGRESS, AND ACTION TAKEN BY CMS	DATE(S) OF SUBSEQUENT CMS ACTION COMPLYING WITH REQUEST	DOCUMENTATION
December 15, 2016	Nursing home lobbyists request that the Centers for Medicare & Medicaid Services (CMS) repeal and replace nursing home regulations that became effective in November 2016, eliminate fines when the violation occurred prior to an inspection, and repeal CMS S&C Memo 16-31-NH relating to enforcement actions.	July 7, 2017 October 27, 2017 January 18, 2018	American Health Care Ass'n letter to President-Elect Donald Trump (Dec. 15, 2017), <a href="http://theconsumervoicework.org/uploads/files/issues/AHCANCAL-Letter-TrumpAdmin-Attachments.pdf">http://theconsumervoicework.org/uploads/files/issues/AHCANCAL-Letter-TrumpAdmin-Attachments.pdf</a> .
March 9, 2017	<p>Nursing home lobbyists request that CMS:</p> <ul style="list-style-type: none"> <li>• Repeal and replace the nursing home regulations that became effective in November 2016;</li> <li>• Eliminate numerous regulations, including               <ul style="list-style-type: none"> <li>❖ The ban on arbitration agreements during a resident's admission, and</li> <li>❖ The requirement that a facility assess the staffing levels needed to care for residents; and</li> </ul> </li> <li>• Eliminate fines when the violation occurred prior to inspection or no individual resident suffered harm.</li> </ul>	June 8, 2017 July 7, 2017 October 27, 2017 January 18, 2018	American Health Care Ass'n letter to Secretary Thomas Price (March 9, 2017), <a href="http://www.ihca.com/Files/Comm-Pub/AHCA-Final-Price-Ltr-3.9.17.pdf">http://www.ihca.com/Files/Comm-Pub/AHCA-Final-Price-Ltr-3.9.17.pdf</a> .

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May 4, 2017	<p>CMS solicits comments on three possible areas where nursing home standards might be eliminated or reduced:</p> <ul style="list-style-type: none"> <li>• Notice to Long-Term Care Ombudsman Program when nursing home is evicting resident;</li> <li>• Standards for handling resident grievances; and</li> <li>• Requirement that facilities develop quality improvement programs.</li> </ul> <p>CMS also seeks “feedback regarding any additional areas of burden reduction and cost savings in [nursing homes].”</p>		<p>Proposed Rules, 82 Fed. Reg. 21,014, 21,089 (May 4, 2017), <a href="https://www.gpo.gov/fdsys/pkg/FR-2017-05-04/pdf/2017-08521.pdf">https://www.gpo.gov/fdsys/pkg/FR-2017-05-04/pdf/2017-08521.pdf</a>.</p>
June 8, 2017	<p>CMS proposes to eliminate ban of arbitration agreements and instead allow nursing homes to require such agreements as a condition of admission.</p>		<p>Proposed Rules, 82 Fed. Reg. 26,649 (June 8, 2017), <a href="https://www.gpo.gov/fdsys/pkg/FR-2017-06-08/pdf/2017-11883.pdf">https://www.gpo.gov/fdsys/pkg/FR-2017-06-08/pdf/2017-11883.pdf</a>.</p>

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June 26, 2017	<p>Nursing home lobbyists request that CMS</p> <ul style="list-style-type: none"> <li>• Delay regulations;</li> <li>• Eliminate regulation requiring assessment of staffing needs; and</li> <li>• Weaken regulations about               <ul style="list-style-type: none"> <li>❖ Infection control;</li> <li>❖ Abuse reporting;</li> <li>❖ Notice to Long-Term Care Ombudsman Program when facility is evicting resident;</li> <li>❖ Resident grievances; and</li> <li>❖ Quality improvement programs.</li> </ul> </li> </ul>	<p>June 30, 2017</p> <p>November 24, 2017</p> <p>January 18, 2018</p>	<p>LeadingAge comments in response to CMS's solicitation (on May 4, 2017) of ways to eliminate or weaken regulations (June 26, 2017), <a href="http://www.leadingagewi.org/media/46354/la-rops-cms.pdf">http://www.leadingagewi.org/media/46354/la-rops-cms.pdf</a>.</p>
June 30, 2017	<p>CMS announces that for one year it will not impose fines or any other meaningful penalties for violations of certain regulations scheduled to go into effect in November 2017.</p>		<p>CMS Survey and Certification (S&amp;C) Memo 17-36-NH (June 30, 2017), <a href="https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-36.pdf">https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-36.pdf</a>.</p>



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July 7, 2017	CMS changes its policies to reduce amount and frequency of nursing home fines. Fines will be assessed on a per day basis, rather than a per instance basis, when the violation occurred prior to inspection. In addition, per-instance fines will be used even for an ongoing violation considered a “single isolated incident.”		CMS S&C Memo, 17-37-NH (July 7, 2017), <a href="https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-37.pdf">https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-37.pdf</a> .
October 11, 2017	120 Members of the U.S. House of Representatives request that CMS revise the nursing home regulations and give nursing home operators more time to comply.	November 24, 2017 January 18, 2018	Letter to CMS from 120 Members of the U.S. House of Representatives (Oct. 11, 2017), <a href="http://renacci.house.gov/cache/files/8ad42967-7fd9-4d12-abaa-f65dda6e0426/renacci-rop-final-letter-10.11.17.pdf">http://renacci.house.gov/cache/files/8ad42967-7fd9-4d12-abaa-f65dda6e0426/renacci-rop-final-letter-10.11.17.pdf</a> .
October 26, 2017	24 Members of the U.S. Senate request that CMS delay by one year the effective date of certain regulations.	November 24, 2017 January 18, 2018	Letter to CMS from 24 Members of the U.S. Senate (Oct. 26, 2017), <a href="http://theconsumervoice.org/uploads/files/issues/Senate_ROP_letter_10.26.17_FINAL.pdf">http://theconsumervoice.org/uploads/files/issues/Senate_ROP_letter_10.26.17_FINAL.pdf</a> .
October 27, 2017	CMS proposes to repeal previous S&C Memo 16-31-NH and reduce imposition of fines against nursing homes. Proposed changes include giving nursing homes more opportunities to delay or potentially avoid fines and, even in “immediate jeopardy” situations, allowing fines only in cases of serious injury or death.		CMS S&C Memo 18-01-NH (Oct. 27, 2017), <a href="https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-18-01.pdf">https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-18-01.pdf</a> .

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October 30, 2017	CMS launches Patients Over Paperwork initiative to eliminate or weaken regulations governing health care providers.		CMS press release (Oct. 30, 2017), <a href="https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2017-Fact-Sheet-items/2017-10-30.html">https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2017-Fact-Sheet-items/2017-10-30.html</a> .
November 24, 2017	<p>Following up on memo of June 30, 2017, CMS announces that for 18 months it will not impose fines or any other meaningful penalties for violations certain regulations scheduled to go into effect in November 2017. These regulations address topics including:</p> <ul style="list-style-type: none"> <li>• Caring for residents with dementia;</li> <li>• Developing a care plan within 48 hours after a resident’s admission;</li> <li>• Developing quality improvement programs; and</li> <li>• Assessing staffing levels needed to care for residents.</li> </ul>		CMS S&C Memo 18-04-NH (Nov. 24, 2017), <a href="https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-18-04.pdf">https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-18-04.pdf</a> .
Fall 2017	CMS indicates intent by June 2018 to issue proposed nursing home regulations that would eliminate or revise regulations that allegedly are excessively burdensome, unnecessary, or obsolete.		Unified Agenda of Regulatory and Deregulatory Actions, RIN 0938-AT36 (Fall 2017), <a href="https://goo.gl/xXKGMC">https://goo.gl/xXKGMC</a>

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December 15, 2017	CMS holds closed listening session to hear from nursing home operators only about supposed regulatory burdens.		
January 18, 2018	<p>CMS’s “Patients Over Paperwork” newsletter explicitly states that CMS heard and responded to the requests of nursing home operators in</p> <ul style="list-style-type: none"> <li>• Delaying use of fines and other enforcement mechanisms for violations of regulations that became effective in November 2017, and</li> <li>• Reducing the size of fines by imposing per-instance fines rather than per-day fines for violations that occurred prior to any inspection.</li> </ul>		CMS, Patients Over Paperwork newsletter (Jan. 2018), <a href="https://www.cms.gov/Outreach-and-Education/Outreach/Partnerships/Downloads/JanuaryPoPNewsletter011818.pdf">https://www.cms.gov/Outreach-and-Education/Outreach/Partnerships/Downloads/JanuaryPoPNewsletter011818.pdf</a> .
February 12, 2018	Nursing home lobbyist states intent to seek weakening of regulations to compensate for decrease in Medicare payment rates in federal budget.		Kimberly Marselas, <i>\$1.96 Billion Nursing Homes Cut Will Force Hard Look at Regulation, Payment, Experts Say</i> , McKnight’s Long-Term Care News, February 12, 2018, <a href="https://www.mcknights.com/news/196-billion-nursing-homes-cut-will-force-hard-look-at-regulation-payment-experts-say/article/743611/">https://www.mcknights.com/news/196-billion-nursing-homes-cut-will-force-hard-look-at-regulation-payment-experts-say/article/743611/</a> .