

# Best Practices to Enforce Executed Arbitration Agreements in Skilled Nursing Facilities

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# Overview

- What is Arbitration?
- How to Ensure an Enforceable Arbitration Agreement
- CMS Surveys & Critical Element Pathways (CEPs) - Arbitration

# What is Arbitration? - A Win-Win For Everyone

- If a dispute arises, the parties do not go to Court.
- The case is presented to the arbitrator instead of a judge and jury.
- The Arbitrator makes the decision.
- The parties select an arbitrator who knows this area of the law. The location of Arbitration will be that which is most convenient for the parties.
- Arbitration is less expensive and faster.
- Claims are not limited; damages are not limited.
- Arbitration is different from mediation.
- Arbitration is the best “risk management” non-care related tool.

# How to Ensure an Enforceable Arbitration Agreement

- Make sure the correct person is signing the agreement
- Make sure all necessary documentation is provided & received (DPOA, Advanced Directive, etc.)
- Make sure the Arbitration Agreement is separate from the Admission Agreement
- Use a proper Arbitration Agreement
- Make sure all sections of the agreement are appropriately filled out
- Retain executed color copy in the patient's file



# Who Should Sign the Arbitration Agreement?

- FIRST: If the Resident is alert and oriented, the Resident is the first choice for a signature;
- SECOND CHOICE: a family member with a Durable Power of Attorney for Healthcare or an appointed conservator;
- THIRD CHOICE: a spouse;
- FOURTH CHOICE: a son or daughter;
- FIFTH CHOICE: a grandson or granddaughter;
- LAST: the person who identifies as the Responsible Party or “friend”, etc.

# What if the Resident is alert and oriented, yet wants someone else to sign the arbitration agreement for them?

- The Admissions Coordinator must ensure that he/she hears Resident say that they want the other person to sign the Arbitration Agreement.
- The Admissions Coordinator documents the conversation on the Admissions Coordinator Declaration so there is a contemporaneous record which proves the Resident gave someone else authority to sign the Arbitration Agreement for them.
- **Why is this important?**
  - A declaration made under penalty of perjury at the time of the signing which accurately documents the conversation between the Admissions Coordinator, the Resident and the person signing on behalf of the Resident is the best evidence that the person signing had express authority to sign on behalf of the Resident.
  - A court will give this document great weight in determining if the Arbitration Agreement is valid and enforceable.
  - A Petition to Compel Arbitration is generally filed with the Court several months to several years after the fact. Without an accurate Declaration, it is nearly impossible for people to remember what actually occurred at the time of the signing.

# What if the Resident or Responsible Party says there is a Power of Attorney document, but they do not have a copy of it at the time the Arbitration Agreement is presented?

- Ideally, the signatures should not be obtained until a copy of the POA document is received and reviewed, but get signatures and follow up later.
- It is best to obtain the signatures with the POA document that is reviewed to ensure the proper party is signing.
- Review POA to determine if the agent's authority to act begins when the Resident is incapacitated or if it begins at the time the POA was signed.

# Make sure all necessary documentation is provided & received

- Resident's Advance Directive; or
- Power of Attorney for Health Care; or
- Order Appointing Conservator; or
- Signed form from Patient granting authority to agent
- Admissions Coordinator Declaration



# Presenting the Arbitration Agreement

- Present the Arbitration Agreement at the same time the Admission Agreement is presented.
- Arbitration should be explained and all questions should be addressed.
- Explain that the Arbitration Agreement is not a condition of admission.
- Explain that the agreement can be rescinded for up to 30 days.
- If the patient is not signing the agreement, ensure the signatory is authorized to sign for the resident (i.e., POA, verbal consent).
- What if they ask a question, and you do not know the answer?
  - Advise them that you will follow up regarding their question as soon as possible and then consult with the Administrator.
- **Provide the patient and/or their representative with a copy of the signed agreement.**

# CMS Surveys & Critical Element Pathways (CEPs) - Arbitration

- The Critical Element Pathways (CEPs) are guidelines and standards established by the Centers for Medicare and Medicaid Services (CMS) to evaluate the quality of care provided in healthcare facilities, including nursing homes and long-term care facilities.
- CMS recently released their CEP for the use of Arbitration Agreements.
- Facilities must:
  - Maintain copies of all executed Arbitration Agreements
  - A list of residents in the facility that have entered into a binding arbitration agreement on or after September 16, 2019.
  - A list of the residents who have had resolved disputes through the arbitration process that occurred on or after September 16, 2019.

# CMS Surveys & Critical Element Pathways (CEPs) - Arbitration

- Admissions Staff should be prepared to Answer the following:
  - When and under what circumstances do you request that resident or his/her representative agree to an arbitration agreement?
  - How do you ensure the resident or representative understands the terms of the arbitration agreement?
  - How do you ensure the arbitration agreement is explained in a form and manner that accommodates the resident or his/her representative's needs?
  - How do you ensure the resident understands their rights with regard to the arbitration agreement, such as their right to refuse to enter into it, and their right to rescind it within 30 days?
  - What is the process for allowing residents or their representatives to terminate, or withdraw from an arbitration agreement in the first 30 days?
  - How do you determine if the resident's physical condition and his/her cognitive status may be contributing factors in understanding of the binding arbitration agreement, including his/her ability to make an informed and appropriate decision?

# Thank You

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**ARBITRATION AGREEMENT**  
(READ CAREFULLY – Not Part of Admission Agreement)

**Residents shall not be required to sign this arbitration agreement as a condition of admission to this facility or to continue to receive care at the facility.**

By executing this Arbitration Agreement ("Agreement"), the parties acknowledge and represent that they prefer to utilize the arbitration process rather than a judicial forum for the adjudication of disputes. The parties recognize that applicable law favors the use of arbitration and desire that the resolution of any claims covered by the Agreement be handled more efficiently and economically using arbitration rather than decided by a court of law before a jury.

Resident Name: \_\_\_\_\_ ("Resident")

**ARTICLE I**  
(Medical Malpractice Claims)

1.1 It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

**ARTICLE II**  
(Other Claims)

2.1 It is further understood that any dispute between Resident, including Resident's heirs and/or agents, and \_\_\_\_\_ ("Facility"), and their owners, investors, operators, officers, directors, administrators, staff, employees, agents, and any management and administrative services company and all related entities and individuals, their staff, personnel, employees, owners, officers, directors, members, and agents that provide services to the Facility that relates to the provision of care, treatment and services the Facility provides to the Resident, (collectively referred to herein as "Facility"), including any action for injury or death arising from negligence, torts, intentional tort and/or statutory causes of action (including all California Welfare and Institutions Code sections, all California Business and Professions Code sections, Health and Safety Code section 1430), and all other statutory claims under any applicable California code, will be determined by submission to binding arbitration and not by lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings.

2.2 All parties to this Agreement are giving up their Constitutional right to have all disputes decided in a court of law before a jury, and instead are accepting the use of binding arbitration.

2.3 By signing this Agreement, the parties waive their right to commence and/or be a party to any class or collective action in any court against the other party relating in any manner whatsoever to the Resident's residency at the Facility. Further, the parties waive their right to commence or be a party to any group, class, or collective action claim in arbitration or any other forum.

2.4 Nothing in this Agreement prohibits or discourages you 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.

**ARTICLE III**  
(Scope of Agreement)

3.1 This Agreement shall be binding for any dispute, except for disputes pertaining to collections or evictions. This Agreement is binding on all parties, including the Resident's representatives, executors, family members, and heirs who bring any claims individually or in a representative capacity. The Resident's representatives, agents, executors, family members, successors in interest and heirs who execute this Agreement below on the signature line are doing so not only in their representative capacity for the Resident, but also in their individual capacity and thus agree that any claims brought individually by any such representatives, agents, executors, family members, representatives, successors in interest and heirs are subject to binding arbitration.

**ARTICLE IV**  
(Delegation of Authority)

4.1 The arbitrator, and not any federal, state, or local court or agency, shall resolve all disputes, including without limitation, any disputes regarding the making, execution, enforceability, voidability, revocability, unconscionability, severability, scope, arbitrability, interpretation, waiver, duress, preemption or any other defense to the validity or enforceability of this Arbitration Agreement, as well as resolve the Parties' underlying disputes, as it is the Parties' intent to completely avoid the court system and resolve disputes without any judge or jury.

**ARTICLE V**  
(Retroactive Effect)

5.1 It is agreed by and between the parties hereto that this Agreement covers services rendered before the date this Arbitration Agreement is signed, thus making it effective as of the date of the Resident's first admission to the Facility.

**ARTICLE VI**  
**(Right to Rescind)**

6.1 This Agreement may be rescinded by written notice within thirty (30) days of signature.

**ARTICLE VII**  
**(Applicable Law)**

7.1 As this Agreement relates to the Resident's admission to the Facility, and the Facility, among other things, participates in the Medicare and/or Medi-Cal programs and/or procures supplies from out of state vendors, the parties agree that the underlying admission to the Facility involves interstate commerce.

7.2 As a result, the parties agree that this Agreement is to be governed by the Federal Arbitration Act (9 U.S.C. §§1-16) and the procedural rules set forth in the Federal Arbitration Act shall govern any and all arbitration proceedings, including any petition to compel arbitration.

7.3 The parties agree that California Code of Civil Procedure §1281.2(c) is excluded from this Agreement as the parties mutually desire to have any and all disputes submitted to binding arbitration. The parties do not want any claims or related lawsuits not subject to arbitration to impede any and all other claims from being ordered to binding arbitration.

**ARTICLE VIII**  
**(Selection of Arbitrator)**

8.1 The parties shall mutually agree upon the appointment of a single neutral arbitrator. If the parties are unable to agree, a single neutral arbitrator shall be appointed using the rules of the Federal Arbitration Act (9 U.S.C. §§1-16).

**ARTICLE IX**  
**(Convenient Venue)**

9.1 The arbitration shall be venued in a location convenient for all parties. The parties agree that this should normally be in the county where Facility is located.

**ARTICLE X**  
**(Costs of Arbitration)**

10.1 The expenses and fees of the arbitrator(s) shall be apportioned equally among all parties except as otherwise permitted or required by law.

**ARTICLE XI**  
**(Severability)**

11.1 If any provision in this Agreement is held invalid, such holding shall not impact the validity of the remaining provisions of this Agreement.

**ARTICLE XII**  
**(Understanding of Agreement and Authority)**

12.1 The Resident and/or the person executing this Agreement certifies that he/she has read this Agreement, understands this Agreement, has been given a copy of this Agreement, and affirmatively represents that he/she is duly authorized, by virtue of the Resident's consent, instruction and/or durable power of attorney or other legally binding document, to execute this Agreement and accept its terms on behalf of the Resident and acknowledges that the Facility is relying on the aforementioned certification.

12.2 The Resident and/or the person executing this Agreement certifies that he/she understands that its execution is not a precondition to receiving medical treatment, care, services and/or for admission to the Facility and is not a requirement to continue to receive medical treatment, care and services at the Facility.

**NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.**

Date: \_\_\_\_\_  
Resident

By virtue of Resident's consent, instruction and/or durable power of attorney, I hereby certify that I am authorized to act as Resident's agent in executing and delivering of this arbitration agreement. I acknowledge that the Facility is relying on this representation. I also acknowledge that pursuant to the terms of this agreement, any claims that I may assert in my individual capacity and/or as a successor in interest that arise out of or relate to the provision of or failure to provide any services (medical or otherwise) or goods by the Facility to the Resident or the admission agreement are governed by this arbitration agreement.

Date: \_\_\_\_\_  
Legal Representative/Agent of Resident and  
Individually

Date: \_\_\_\_\_  
Facility Representative



NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ALL CLAIMS, INCLUDING CLAIMS OTHER THAN A CLAIM FOR MEDICAL MALPRACTICE, DECIDED BY ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL AND YOU AGREE THAT NO PARTY SHALL ADJUDICATE ANY CLAIM ON A CLASS ACTION BASIS.

Date: \_\_\_\_\_  
Resident

By virtue of Resident's consent, instruction and/or durable power of attorney, I hereby certify that I am authorized to act as Resident's agent in executing and delivering of this arbitration agreement. I acknowledge that the Facility is relying on this representation. I also acknowledge that pursuant to the terms of this agreement, any claims that I may assert in my individual capacity and/or as a successor in interest that arise out of or relate to any the provision of or failure to provide services (medical or otherwise) or goods by the Facility to the Resident or the admission agreement are governed by this arbitration agreement.

Date: \_\_\_\_\_  
Legal Representative/Agent of Resident and  
Individually

Date: \_\_\_\_\_  
Facility Representative

1 DECLARATION OF (Facility Name) ADMISSIONS

2 COORDINATOR (Name)

4 I, \_\_\_\_\_ (Print Name), declare as follows:

5 I am an Admissions Coordinator at \_\_\_\_\_ (Facility Name).

6 I have personal knowledge of the facts set forth herein, which are known by me to be true and correct,  
7 and if called as a witness, I could and would competently testify thereto.

8 1. On or about \_\_\_\_\_ (date) at approximately \_\_\_\_\_ (time)

9 I explained the Arbitration Agreement to \_\_\_\_\_ (Resident's name)  
10 and/or \_\_\_\_\_ (Resident's Agent/Responsible Party).

11 2. I spoke to him or her or them in English. If English was not his, or her, or their native  
12 language the Arbitration Agreement was explained to him, or her, or them in  
13 \_\_\_\_\_ (language) by \_\_\_\_\_ (the person who  
14 spoke to the Resident and/or Agent / Responsible Party in his, or her, or their preferred language.)

15 3. This was explained:

- 16 • Signing the Arbitration Agreement is optional;
- 17 • Signing the Arbitration Agreement is not a condition for admission to the facility;
- 18 • Signing the Arbitration Agreement means that if there is a dispute it will be resolved through  
19 Arbitration, not in Court with a Judge and / or a jury;
- 20 • A signature on the Arbitration Agreement can be revoked in writing within thirty days.

21 **CIRCLE THE FOLLOWING STATEMENT THAT APPLIES:**

22 4. The Resident agreed to and signed the Arbitration Agreement.

23 OR

24 5. The Resident declined to sign the Arbitration Agreement.

25 OR

26 6. The Resident was unable to sign himself, or herself. The Resident authorized

27 \_\_\_\_\_ (name), his or her \_\_\_\_\_  
28 (relationship to Resident) to sign the Arbitration Agreement on his or her behalf.

1 of 2  
DECLARATION OF \_\_\_\_\_ (Facility Name)  
ADMISSIONS COORDINATOR \_\_\_\_\_ (Name)

1 OR

2 7. The Resident instructed me to have \_\_\_\_\_ (name), his or her  
3 \_\_\_\_\_ (relationship to Resident), review the Arbitration Agreement and determine  
4 whether or not to sign the Arbitration Agreement. The Resident also authorized \_\_\_\_\_  
5 (name) to sign the Arbitration Agreement on his or her behalf.

6 OR

7 8. The Resident's Durable Power of Attorney for Healthcare \_\_\_\_\_  
8 (Name) reviewed the Arbitration Agreement and signed / declined to sign (circle one).

9 9. If the Arbitration Agreement was signed by the Resident's Durable Power of Attorney  
10 for Healthcare ("DPOAH"), I (undersigned) certify (check one)

11 a. \_\_\_\_\_ I was presented with the DPOAH documents;

12 OR

13 b. \_\_\_\_\_ the DPOAH represented to me that he/she was the DPOAH for Resident.

14 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
15 true and correct.

16 Executed on \_\_\_\_\_ (date), at \_\_\_\_\_ (city), California.

18 \_\_\_\_\_  
19 Admissions Coordinator Signature

2 of 2  
DECLARATION OF \_\_\_\_\_ (Facility Name)  
ADMISSIONS COORDINATOR \_\_\_\_\_ (Name)