

BEST PRACTICES FOR DRAFTING ARBITRATION AGREEMENTS

General issues to address:

- How to provide notice
- What claims/disputes must be arbitrated or fall under the clause
 - o Should be as broad as possible and addresses disputes about agreement itself
 - o Sample language: "All matters concerning the arbitrability of disputes must be submitted to the arbitrator and may not be decided in any other forum."
- Which state law governs
- How to select an arbitrator(s) and a backup (be cautious of entities that have refused to arbitrate based upon pre-dispute agreements); arbitrator must be agreed upon by both parties
- Which venue will govern the dispute
- What rules will govern the arbitration process (be cautious of entities that have refused to arbitrate based upon pre-dispute agreements)
- Where the arbitration will be held; do not pick a specific location, it should be mutually agreeable and convenient for both parties
 - o In CMS' final rule there is recommended language
 - o "The venue of the arbitration hearing shall be in a location that is convenient to the parties, and the arbitrator is authorized to specify a venue that accounts for the travel costs and burdens of the parties and witnesses, the health needs of the resident, the location of the facility, and the proximity of events giving rise to the dispute."
- Ensure both the resident (or resident representative) and facility representative sign

Best practices for drafting a clause (state law specific requirements overrule these recommendations):

- Ensure that font is a font type that is easy to read
- Use language that is easy to understand (i.e., no legalese) as well as use language that the resident understands
- Increase font size from surrounding paragraphs if need to emphasize a particular provision
- Bold the font to draw attention to particular words or phrases
- Have a place for the resident and the resident's representative to initial next to the clause
- Ensure that any representative signing has the authority to sign and include a copy of the Durable Power of Attorney with the rest of the admission paperwork
- Include a 30-day revocation period
- Explicitly state that admission or treatment is never contingent upon signing the agreement
- State that the resident must arbitrate claims against the facility, its employees, agents, and any other person under its control (helps reduce possibility of piecemealing allegations)
- Ensure resident and signing party understand that waiving right to jury trial/trial by having them initial understanding

Notes regarding the above:

- Some courts across the nation have found arbitration agreements unenforceable if the arbitration forum no longer handles the type of dispute at issue, particularly if there is no provision in the agreement on how to select an alternative forum
- The actual location of the arbitration must be held in a neutral location; it is not recommended that the facility be the location, even if the facility is the "default" location if the parties cannot agree might be problematic