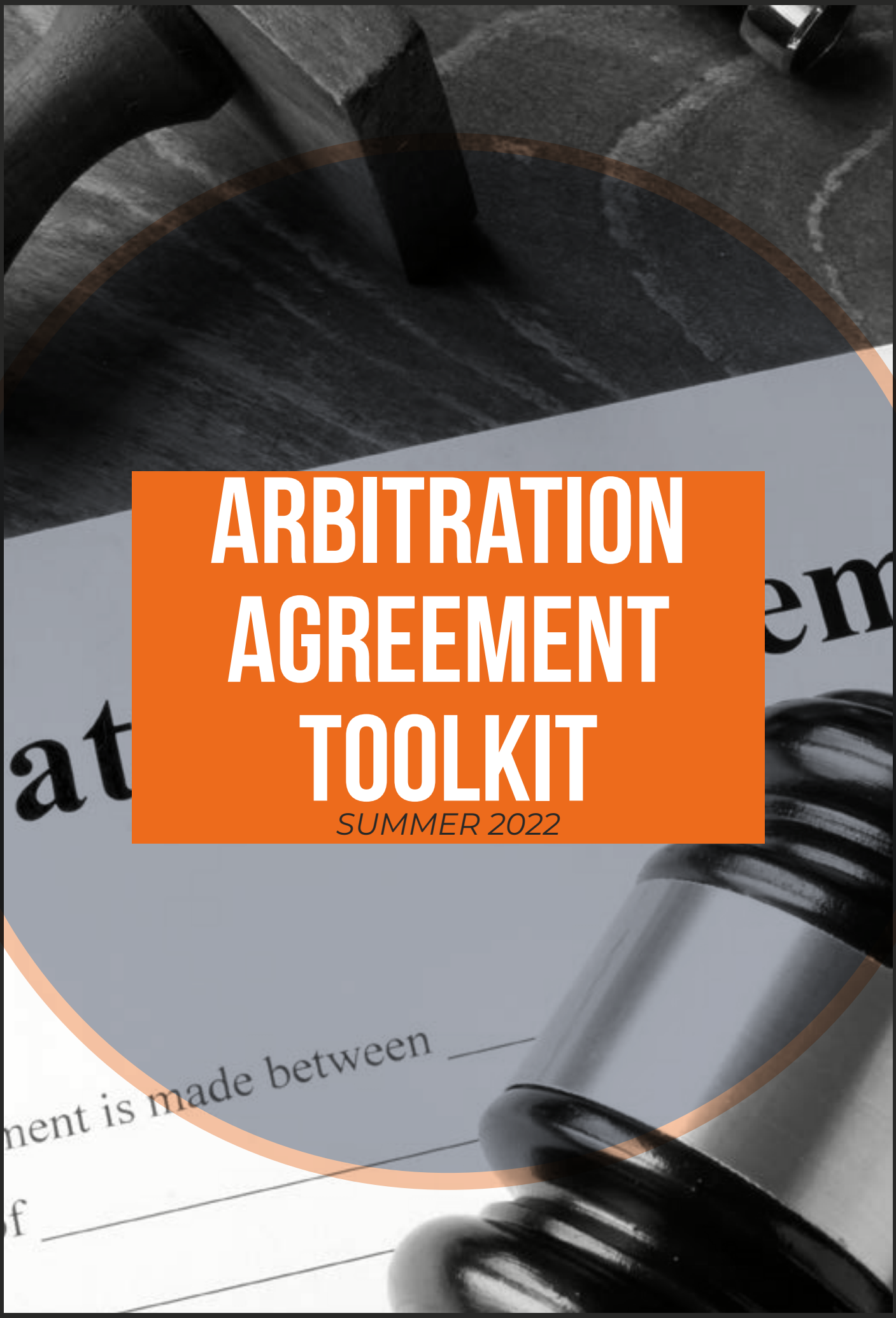

ARBITRATION AGREEMENT TOOLKIT

SUMMER 2022

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VOLUNTARY BINDING ARBITRATION AGREEMENT POLICY

It is the policy of FACILITY NAME ("Facility") to present the Voluntary Binding Arbitration Agreement ("VBAA") to Resident / Resident's Legally Authorized Representative ("Representative") after the admission paperwork is completed.

It is further the Facility's policy to:

- Not require any resident or his/her representative to sign the VBAA as a condition of admission to, or as a requirement to continue to receive care at the facility.
- Explain and explicitly state in the VBAA that the resident or his/her representative has a right not to sign the agreement.
- Explain the VBAA in a form, manner, and language that the resident and his/her representative understands.
- Obtain the resident or his/her representative's acknowledgment the VBAA was explained in a manner and form they understand, and that he/she/they understand the VBAA.
- Provide for the selection of a neutral arbitrator, agreed upon by both parties, and a venue convenient for both parties.
- Provide the resident or his/her representative a 30-day rescission period.
- Not contain any language in the agreement prohibiting or discouraging a resident or anyone else from communicating with federal, state, or local officials, including employees of federal and state health departments or representatives of the Office of the State Long-Term Care Ombudsman.
- Retain copies of the signed agreement and the arbitrator's final decision for 5 years after the dispute resolution and make these documents available for inspection by CMS or its designee.

There will be at least one "Binding Arbitration Agreement Educator" at the facility, who is responsible for explaining the Binding Arbitration Agreement to Residents and/or their Representatives after being trained on the facility's process.

The Binding Arbitration Agreement Educator or his/her designee will utilize the "*Facility's Process for Introducing, Discussing, and Signing Binding Arbitration Agreements*" as the procedure for providing the Residents/Representatives with information about arbitration, explaining the VBAA, and if the Residents/Representatives agree, obtaining signatures on the VBAA. As provided for in the *Process for Introducing, Discussing, and Signing Binding Arbitration Agreements*, the Arbitration Agreement Educator or his/her designee will follow the *Facility's Binding Arbitration Agreement Checklist* to educate the Residents/Representatives on the content of the VBAA prior to requesting the Residents/Representatives execute the VBAA.

Released 8/9/2022

DOs and DON'Ts for Drafting Binding Arbitration Agreements

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Consult local attorney

It is important to ensure compliance with nuanced and changing state laws and regulations.

Use easy to understand language

CMS guidelines require this and avoiding legalese increases likelihood of resident understanding terms.

Use at least 12-point font and bold or italicize important provisions

This aides the readability of the agreement and draws attention to provisions.

Include 30-day revocation period

Include within the agreement and verbally explain that there is a revocation period and revoking does not impact care, treatment, etc.

Specify process for selecting arbitrator

Ensure that the selection allows Parties to agree and that arbitrator is neutral.

Designate an area to initial understanding

Require signing as condition of admission or treatment

Language should clearly state that the agreement is voluntary and not condition of treatment or admission.

Hide the Agreement within admission paperwork

The arbitration agreement must be its own document separate from other paperwork.

Miss specifying types of disputes covered

Be clear on the scope and types of disputes covered--include any disputes about the arbitration agreement itself.

Ignore state and local law, statutes, or regulations relating to arbitration

States may have statutes/regulations specifying certain phrases to include and typeface needed.

Prevent communication with federal, state, local officials

Residents or representatives can communicate with federal, state or local officials, including health department representatives/Ombudsman.

Dictate location of the arbitration

Should be mutual decision of Parties and convenient to both.

FACILITY'S PROCESS FOR INTRODUCING, DISCUSSING, AND SIGNING BINDING ARBITRATION AGREEMENTS

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Meet New Resident

- Introduce the voluntary Binding Arbitration Agreement to Resident/Legally Authorized Representative ("Representative")
- The Binding Arbitration Agreement must be a separate document (not included in the Admission Agreement)
- If the Resident chooses, allow the Resident's family/representatives to participate in discussion
- If the Resident is not his/her own responsible party, reschedule for when the Representative is able to be involved

Educate & Discuss

- Have a pleasant demeanor and take your time with Resident and/or Representative
- Explain the agreement in a form and manner that he/she understands, including in a language he/she understands
- Make it clear to Resident and/or Representative that signing is NOT a condition of admission to the facility or a requirement to continue to receive care
- Do not hand the Binding Arbitration Agreement to Resident or Representative without oral explanation and conversation
- You MUST follow the attached checklist in educating the Resident and/or Representative on arbitration and fully explain the Binding Arbitration Agreement
- Answer all of the Resident and/or Representative's questions

Sign Agreement

- Ensure Resident or his/her Representative acknowledges understanding Agreement
- If the Resident elects to sign the agreement and is his/her own responsible party, obtain his/her signature
- If the Resident is not his/her own responsible party, obtain the Representative's signature Request and retain the Representative's legal authority such as Letters of Appointment or Durable Power of Attorney in the Resident's file
- Explain the opportunity to rescind the Agreement within 30 days of signing
- Provide a copy of the signed Agreement to the Resident and/or Representative

Facility Binding Arbitration Agreement Checklist

ARBITRATION GENERALLY & FAQs

- [ ] Arbitration is defined as: the out-of-court resolution of a dispute between parties which is decided by an impartial third-party called an arbitrator or a panel of arbitrators, instead of a judge or jury
- [ ] The Federal Arbitration Act: was enacted in 1925 to ensure the validity and enforcement of arbitration agreements in any contract involving commerce, which for the Facility means its day-to-day business where it receives federal Medicare funds and purchases items that may be made or sold outside of this state where the Facility is located
- [ ] Arbitrator(s) have the sole authority. The arbitrator/arbitration panel are the only ones who can hear and resolve disputes between the parties, including wrongful death claims, and disputes about the Binding Arbitration Agreement, such as its validity and enforceability.
- [ ] You are waiving your right to a judge, jury and trial. There are no appeals unless allowed by state law. By signing this Agreement you agree that you do not want a judge, jury or trial to hear future disputes, and instead agree that the arbitrators will be the ones to hear the issue. This is called waiving your right to a judge, jury and trial. State law governs whether you have appeal rights of the final binding decision.
- [ ] How do we decide who hears the dispute? You and the Facility will agree upon a neutral arbitrator and venue convenient to both parties. If the parties do not wish to select, or cannot agree, then the American Health Lawyers Association (AHLA) will administer the Arbitration.
- [ ] What comes next? The arbitration process will follow a timeline called a scheduling order that ends with a hearing before the arbitrators. The hearing will held at a mutually agreeable location convenient for both parties.
- [ ] Arbitration outcome: the decision will be confidential and include the arbitrator(s)' findings, conclusions and award any damages. The state where the facility is located will be the law that applies. This means that our state's laws about time limits to bring a claim or limitations on damages will apply to any arbitration.
- [ ] Who pays for arbitration? The expenses will be paid as described in the arbitration decision and award.

Facility Binding Arbitration Agreement Checklist

ARBITRATION PROVISIONS

- [ ] You and the Facility are allowed to have a lawyer or lawyers.
- [ ] The Binding Arbitration Agreement is voluntary. You, the Resident and/or your Representative, are not required to sign this Binding Arbitration Agreement. It is voluntary and not a condition for admission to, or continued treatment, at the Facility, and you will be allowed to live in the Facility and receive care and treatment even if you decide not to sign it.
- [ ] Our respective duties are as follows: If you have a dispute, you need to demand arbitration and give the Facility an idea of the issue and what resolution you would like. The Facility will do the same if it has a dispute against you. If either party accidentally files a case in court, the other party may correct the issue and force the dispute to be moved into arbitration, up until what would be day one of trial in the court system.
- [ ] There are issues, called grievances, that do not fall under this Agreement. These issues include general complaints about the Facility that you can discuss with state or federal agencies, and the person tasked with advocating for residents in nursing homes, the long-term care ombudsman. If the Facility issues you a notice of involuntary discharge or transfer, you can appeal that notice to an administrative law judge as required by state and federal laws and regulations.
- [ ] Everything about this process, from the fact finding between the parties, the arbitration process and the decision and award, is confidential.
- [ ] What happens if an arbitrator decides there's a problem with this agreement? If that happens, that issue will be resolved, but the rest of the agreement will remain as written with no changes.
- [ ] How long is this agreement in effect? This agreement applies to this admission in the Facility, any future admissions, and even if your Admission Agreement with the Facility is terminated for whatever reason.
- [ ] If you sign this agreement, you can change your mind. You can rescind the agreement by sending a written cancellation to the Facility within thirty (30) days of your signature.
- [ ] What happens if I don't sign? You can still live here, and will still receive the same quality care and treatment. The is also true if you rescind the agreement within 30 days.

Facility Binding Arbitration Agreement Checklist

FACILITY PROCESS

- [ ] Ask the Resident/Representative if they have any questions.
- [ ] Confirm that the agreement was explained to Resident/Representative in a manner and form they understand.
- [ ] Confirm the Resident/Representative understand the agreement.
- [ ] Encourage the Resident/Representative to talk with an attorney or a trusted advisor.
- [ ] Explain again that the Resident may revoke the agreement within thirty days of his/her signature, by providing written notice of revocation. Written notice can just be the agreement with the word "cancelled" written on it with the Resident/Representative's signature and sent via certified mail.
- [ ] If the Resident is his/her own responsible party, he/she may sign the agreement, if he/she chooses.
- [ ] If the Resident is not his/her own responsible party, the Legally Authorized Representative may sign the agreement, if they choose. Ask for paperwork to support that person's authority--for guardians this would be called letters of appointment and for other individuals it would be power of attorney paperwork.
- [ ] Make a copy of the Legally Authorized Representative's paperwork.
- [ ] The Facility representative has signed the agreement.
- [ ] Provide a signed copy of the Agreement to the Resident/Representative.
- [ ] Retain a signed copy of the Agreement in the Resident's Business Office file.
- [ ] Explain that if the Facility and Resident resolve a dispute through arbitration, a copy of the signed agreement for binding arbitration and the arbitrator's final decision will be retained by the facility for five (5) years after the resolution and be available for inspection upon request by CMS or its designee.

EXECUTION

Signature of Arbitration Agreement Educator _____ Date _____

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VOLUNTARY BINDING ARBITRATION AGREEMENT

VOLUNTARY BINDING ARBITRATION AGREEMENT

This is a voluntary agreement. You are not required to sign this agreement as a condition for admission to this Facility or to continue to receive care at this Facility. You may receive care and treatment even if you do not sign this agreement.

This voluntary Binding Arbitration Agreement ("Agreement") is entered into by FACILITY NAME ("Facility") and between _____ ("Resident") and, if applicable, _____ ("Resident's Legally Authorized Representative" / "Representative"), collectively referred to as the "Parties." This Agreement is an addendum to the admission agreement between the parties, for which consideration has been given and received by the parties. In further consideration for this Agreement, the Parties acknowledge they will receive mutual benefits from resolution of any dispute/controversy through efficient arbitration and other good and valuable consideration, the receipt and sufficiency of which is acknowledged by all parties.

1. **Not a Pre-Condition to Admission.** Resident and/or Resident's Legally Authorized Representative is not required to sign this Agreement as a condition of admission to, or as a requirement to continue to receive care at, the Facility.

   _____ *Resident's Initials* _____ *Representative's Initials*

2. **Agreement to Arbitrate All Disputes**. This is a voluntary Agreement by the Parties to have all disputes resolved through binding arbitration. Arbitration is an out-of-court alternate form of dispute resolution, decided by an impartial third party. Arbitration is different from traditional litigation in the court system, which has a judge, sometimes a jury, and trial. In the event of any dispute or controversy between the Parties, including those arising out of the diagnosis, treatment, or care of the Resident by the Facility, the dispute or controversy shall be submitted to binding arbitration.

3. **Parties Defined.** The *Facility* includes, but is not limited to, the operator, governing body, officers, directors, members, shareholders, administrator, employees, managers, agents, and any parent company, subsidiary, or affiliates, and any person or entity alleged to be responsibility for the acts or omissions of the Facility. The *Resident* includes, but is not limited to, the Resident, the Resident's Representative, guardian, conservator, attorney-in-fact, agent, sponsor, or any other person whose claim is derived through or on behalf of the Resident, including his/her spouse, child, parent, executor, administrator, personal representative, heir, survivor, and anyone entitled to bring a wrongful death claim relating to the Resident.

4. **Rescission Rights**. The Resident or his/her Representative has a right to rescind this agreement this Agreement within thirty (30) calendar days of signature by providing written notice of rescission. This Agreement will apply to any disputes that may arise prior to any rescission pursuant to this provision.

_____ *Resident's Initials* _____ *Representative's Initials*

5. **Application of Federal Arbitration Act**. The parties agree that the underlying Admission Agreement involves interstate commerce, through the Facility's Medicare participation and because the Facility may purchase items from out-of-state. Accordingly, the Federal Arbitration Act applies to this Agreement.

6. **Duty to Demand Arbitration**. It is the responsibility of the person/entity making the claim to demand arbitration, by giving written notice to the other party or parties. The demand for arbitration will describe the nature of the controversy and the remedy sought. If a party overlooks its obligation to arbitrate all disputes and participates in litigating a matter in the court system, that party will not be deemed to have waived the right to compel arbitration, as long as the motion to compel arbitration is served before the first day of trial.

7. **The Arbitrator Has Sole Jurisdiction**. The arbitrators will be the only ones with the authority and jurisdiction to resolve all party disputes, including wrongful death claims and all disputes about the validity, enforceability,

scope, interpretation, severability and waiver of this Agreement, as well as the competency of the Parties.

8. **Waiver of Judge, Jury, and Trial. No Appeal**. By signing this binding arbitration agreement, you are waiving the right to have all disputes decided by a judge, jury, or by trial. The arbitrator's decision is final and binding. There is no right to an appeal unless permitted by state statute.

9. **Arbitration Panel.** Within thirty (30) days after a party to this Agreement has given written notice to the other of demand for arbitration of a dispute or controversy, the Parties to the dispute or controversy the parties will select a neutral arbitrator agreed upon by both parties and a venue that is convenient to both parties. If the parties do not wish to select an arbitrator, then the American Health Lawyers Association (AHLA) will administer the Arbitration. The arbitrator shall hold a hearing within a reasonable time from the date of notice of selection of the neutral arbitrator.

10. **Scheduling Order, Hearing, and Location**. The Parties will agree to a scheduling order, or the arbitrator will enter a scheduling order with the Parties input. The scheduling order will set forth the rules for the exchange of pre-arbitration discovery, including the exchange of medical records, photographs, witness statements, or other evidence the parties intend to introduce at arbitration. Unless otherwise ordered upon good cause, the hearing will occur within 180 days after selection of the arbitrators, which is in the best interest of the Parties for an efficient process and quick resolution. The location of the hearing will be in a location agreed upon by the Parties, and that is convenient to both Parties.

11. **Confidential Decision & Document Retention**. The arbitrators will make written findings on each matter in dispute. The decision, which includes findings of fact, conclusions of law, and signatures, is required to be marked "Confidential" and kept confidential by all Parties and arbitrators. The arbitrators will apply federal law or the substantive law of the state where the Facility is located, and that would have applied had the claim(s) been brought in the court system, including any limitation periods, and any caps on damages, unless otherwise preempted by the Federal Arbitration Act. If any damages are awarded, the decision must specify an amount for each type of

damages awarded. The Facility will retain copies of the signed agreement for binding arbitration and the arbitrator's final decision for 5 years after the resolution of any dispute resolved through arbitration, and will make these documents available for inspection by CMS.

12. **Expenses**. The arbitration expenses will be paid as provided in the award, consistent with state law.

13. **Representation by Lawyer(s).** The Parties may be represented by a lawyer prior to, during, and after arbitration.

14. **Grievances and Discharge/Transfers**. Despite this Agreement, the Resident may file its grievances directly with the Facility, with a representative of the Office of the State Long Term Care Ombudsman, with federal, state, or local officials, including federal or state surveyors, or other federal or state health department employees, or with any applicable regulatory agency. Appeals of involuntary discharges or transfers will be heard by an administrative law judge as required by state/federal laws and regulations.

_____ *Resident's Initials* _____ *Representative's Initials*

15. **Confidentiality**. The discovery, arbitration, and arbitration award are confidential.

16. **Severability**. If any term, phrase, or provision in this Agreement is held to be invalid or unenforceable by law, the Agreement will be deemed amended to conform with such law and will otherwise remain in full force and effect, as it is the parties' intent to ensure that any dispute is resolved solely by arbitration.

17. **Survival**. This Agreement applies to the Resident's readmissions to this Facility and survives any termination of the Admission Agreement.

_____ *Resident's Initials* _____ *Representative's Initials*

18. **Care Will Be Provided Regardless**. Care, diagnosis, or treatment will be provided whether or not the Resident signs this Agreement to arbitrate.

19. **Agreement to Arbitrate Fully Explained**. The Resident or his/her Representative acknowledge this Binding Arbitration Agreement has been explained to them in a form and manner that he/she understands and that he/she has been given an opportunity to review the Agreement with an attorney before signing it.

20. **Understand the Binding Agreement to Arbitrate**. The Resident or his/her Representative acknowledges that they fully understand this Binding Arbitration Agreement.

    _____ *Resident's Initials* _____ *Representative's Initials*

21. **Record Retention**. If the Facility and a Resident resolve a dispute through Arbitration, a copy of the signed Agreement for Binding Arbitration and the Arbitrator's final decision will be retained by the Facility for five (5) years after the resolution of that dispute, and will be available for inspection upon request by CMS or its designee.

You are strongly encouraged to consult with an attorney or a trusted advisor before signing this agreement.
You have the opportunity to ask questions before signing this document.
Please do not hesitate to ask any questions that you may have.

The Resident/Resident's Legally Authorized Representative, by signing this agreement, also acknowledges that he/she has been informed and understands the entire agreement including that:

a. Care, diagnosis, or treatment will be provided whether or not the Resident signs the agreement to arbitrate;
b. The agreement may not be submitted to a Resident for approval when the Resident has been deemed incompetent by two physicians;
c. The decision whether or not to sign the agreement is solely a matter for the Resident's (or the Resident's legally authorized representative) determination without any influence;

d. The agreement waives the Resident's right to a trial in court for any future malpractice claim the Resident may have against the healthcare provider, absent revocation of the agreement consistent with state law.

THE RESIDENT:

_____

Signature of Resident Date

FOR THE RESIDENT, BY A LEGALLY AUTHORIZED REPRESENTATIVE: By signing below, I, Resident's Legally Authorized Representative, certify that the Resident has vested in me the authority to sign this Agreement on his/her behalf.

_____

Signature of Resident's Legally Authorized Representative (if applicable) Date

FOR THE FACILITY:

_____

Signature of Facility Representative Date

(Provision of services by the Facility will constitute acceptance in absence of Facility Signature)

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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
    - Should be as broad as possible and addresses disputes about agreement itself
    - 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
    - In CMS’ final rule there is recommended language
    - "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

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COLORADO LAW

Arbitration agreements involving healthcare providers are governed by Colorado Revised Statute § 13-64-403; referred to as the Colorado Health Care Availability Act. There are specific requirements that must be followed under this statute that are outlined below in addition to general best practices regarding arbitration agreements.

Colorado Case Law on Arbitration Agreements

Colorado courts are enforcing strict compliance of particular provisions of the arbitration provisions under the Colorado Health Care Availability Act ("HCAA").

In *Johnson v. Rowan, Inc.*, 488 P.3d 1174 (Colo. App. 6th Div. 2021), plaintiffs sought to invalidate an arbitration agreement by arguing noncompliance HCAA. Specifically, plaintiffs raised that a written copy of the agreement was not provided, and the facility representative failed to sign the agreement. The court agreed with plaintiff's arguments as the statute specifically required signatures and that the resident be provided a copy.

Excerpts from Colorado Statute on Arbitration Agreements

Section 13-64-403(3):

(3) Any such agreement shall have the following statement set forth as part of the agreement: "It is understood that any claim of medical malpractice, including any claim that medical services were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered or omitted, will be determined by submission to binding arbitration in accordance with the provisions of part 2 of article 22 of this title, and not by a lawsuit or resort to court process except as Colorado law provides for judicial review of arbitration proceedings. The patient has the right to seek legal counsel concerning this agreement, and has the right to rescind this agreement by written notice to the physician within ninety days after the agreement has been signed and executed by both parties unless said agreement was signed in contemplation of the patient being hospitalized, in which case the agreement may be rescinded by written notice to the physician within ninety days after release or discharge from the hospital or other health care institution. Both parties to this agreement, by entering into it, have agreed to the use of binding arbitration in lieu of having any such dispute decided in a court of law before a jury."

Section 13-64-403(4):

(4) Immediately preceding the signature lines for such an agreement, the following notice shall be printed in at least ten-point, bold-faced type:

NOTE: BY SIGNING THIS AGREEMENT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL BINDING ARBITRATION RATHER THAN BY A JURY OR COURT TRIAL. YOU HAVE THE RIGHT TO SEEK LEGAL COUNSEL AND YOU HAVE THE RIGHT TO RESCIND THIS AGREEMENT WITHIN NINETY DAYS FROM THE DATE OF SIGNATURE BY BOTH PARTIES UNLESS THE AGREEMENT WAS SIGNED IN CONTEMPLATION OF HOSPITALIZATION IN WHICH CASE YOU HAVE NINETY DAYS AFTER DISCHARGE OR RELEASE FROM THE HOSPITAL TO RESCIND THE AGREEMENT.

NO HEALTH CARE PROVIDER SHALL WITHHOLD THE PROVISION OF EMERGENCY MEDICAL SERVICES TO ANY PERSON BECAUSE OF THAT PERSON'S FAILURE OR REFUSAL TO SIGN AN AGREEMENT CONTAINING A PROVISION FOR BINDING ARBITRATION OF ANY DISPUTE ARISING AS TO PROFESSIONAL NEGLIGENCE OF THE PROVIDER.

NO HEALTH CARE PROVIDER SHALL REFUSE TO PROVIDE MEDICAL CARE SERVICES TO ANY PATIENT SOLELY BECAUSE SUCH PATIENT REFUSED TO SIGN SUCH AN AGREEMENT OR EXERCISED THE NINETY-DAY RIGHT OF RESCISSION.

Section 13-64-403(6):

(6) The patient shall be provided with a written copy of any agreement subject to the provisions of this section at the time that it is signed by the parties.

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NORTH CAROLINA LAW

North Carolina Case Law on Arbitration Agreements

North Carolina courts have held that arbitration is favored in North Carolina so efforts will be made to enforce an arbitration provision. Arbitration agreements are viewed as contracts, so any standard defenses to enforcement of contracts under North Carolina law can also be used to defeat an arbitration agreement.

In 2017 the North Carolina Supreme Court addressed the enforcement of a healthcare arbitration agreement in *King v. Bryant*. While the case involved an agreement between a physician and a patient, there are important items to note for the LTC environment. The Supreme Court declined to enforce the agreement because:

- The arbitration agreement was not clear that the right to a jury trial was being waived
- The term arbitration was not defined (note: the NC Uniform Arbitration Act does not have a definition, but one could look to the American Arbitration Association for a definition; another option could be Black's Law Dictionary)
- There was no language allowing for or recommending that the signer consult with an attorney
- The agreement had multiple incomplete clauses
- The agreement used complex, lengthy or nonsensical sentences
- The agreement contained multiple typographical errors
- The agreement required that one arbitrator be a physician and allowed that all three could be physicians (note: the court viewed this as "a benefit to Defendants and [a] detriment to Plaintiffs")
- The physician or his staff did not make any attempt to explain the agreement or draw attention to the agreement (note: the court implied that by not pointing out the provision that the physician was in essence hiding it amongst all of the other new patient paperwork)

In addition to the above, the court frequently mentioned the education level of the patient and cited to his inability to understand the language being used or the "consequences" of signing the document (e.g., giving up right to a trial).

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VIRGINIA LAW

In Virginia, there are two options of the choice of law for the arbitration agreement: the Virginia Uniform Arbitration Act (state law) or the Federal Arbitration Act (federal law). Arbitration agreements should clearly state which law applies. While Virginia generally favors arbitration provisions, there is more case precedent for enforcing arbitration under the FAA.

Even if FAA is selected as the choice of law, it might be beneficial to address within the arbitration agreement key aspects from Virginia law, particularly those on conditions precedent and fees associated with arbitration. Generally, to prevent a fee provision from being found void, the parties should at least split the cost of the arbitrator and let the arbitrator decide if each party bears their own remaining costs or if the "losing" party needs to pay some or all of "winning" party's other costs (e.g., attorney fees).

Excerpts from Virginia Statute on Arbitration Agreements

§ 8.01-577. Submission of controversy; agreement to arbitrate; condition precedent to action.

A. Persons desiring to end any controversy, whether there is a suit pending therefor or not, may submit the same to arbitration, and agree that such submission may be entered of record in any circuit court or entered by order of any general district court. Upon proof of such agreement out of court, or by consent of the parties given in court in person or by counsel, it shall be entered in the proceedings of such court. Thereupon a rule shall be made that the parties shall submit to the award which shall be made in accordance with such agreement and the provisions of this chapter.

B. Neither party shall have the right to revoke an agreement to arbitrate except on a ground which would be good for revoking or annulling other agreements. Submission of any claim or controversy to arbitration pursuant to such agreement shall be a condition precedent to institution of suit or action thereon, and the agreement to arbitrate shall be enforceable, unless the agreement also provides that submission to arbitration shall not be a condition precedent to suit or action.

§ 8.01-581.01. Validity of arbitration agreement.
A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract....

§ 8.01-581.07. Award; fees and expenses to be fixed.
The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.
An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him. Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees incurred in the conduct of the arbitration, and all other expenses, not including counsel fees, shall be paid as provided in the award.

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NEBRASKA LAW

Nebraska Case Law on Arbitration Agreements

The Nebraska Supreme Court in *Cullinane v. Beverly Enterprises—Nebraska, Inc.*, 300 Neb. 210, 912 N.W.2d 774 (2018) handed down an opinion that serves as a cautionary tale for implementing arbitration agreements in the nursing home setting. The case centered on whether the nursing home engaged in fraud in the inducement or fraud in the execution of the arbitration agreement and whether that fraud rendered the agreement invalid. The court agreed with the plaintiff that the facility committed fraud when it did not explain that the admission paperwork included an arbitration agreement, did not explain that the agreement was optional, and did not explain that by signing the arbitration agreement that the right to a trial was waived.

The *Cullinane* Court also held that unless the arbitration agreement specifically states that the enforceability of the agreement itself should be decided via arbitration, then that issue is for the courts to decide and cannot be in arbitration. The Court emphasized that "[a]rbitration in Nebraska is governed by the UAA [Uniform Arbitration Act] as enacted in Nebraska, but if arbitration arises from a contract involving interstate commerce, it is governed by the FAA."

While reaffirming the principle that "[g]enerally…one who signs an instrument without reading it, when one can read and has had the opportunity to do so, cannot avoid the effect of one's signature merely because one was not informed of the contents of the instrument" the Court stated that this rule only applied in the absence of fraud.

It is important to follow all applicable requirements pertaining to arbitration. In *Kramer v. Eagle Eye Home Inspections*, 14 Neb. App. 691 (2006), the court held that failing to strictly comply with Section 25-2602.02 rendered the arbitration clause voidable and unenforceable.

Excerpts from Nebraska Uniform Arbitration Act

25-2602.01. Validity of arbitration agreement.

(a) A written agreement to submit any existing controversy to arbitration is valid, enforceable, and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract.

(b) A provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract, if the provision is entered into voluntarily and willingly…

(f) Subsection (b) of this section does not apply to:

(1) A claim arising out of personal injury based on tort…

25-2602.02. Contract; statement required.

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The following statement shall appear in capitalized, underlined type adjoining the signature block of any standardized agreement in which binding arbitration is the sole remedy for dispute resolution: THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

25-2604. Appointment of arbitrators by court.
If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and a successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators, except that the court shall always appoint an odd number of arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement. Upon appointment an arbitrator shall disclose his or her hourly or daily rate for arbitration services.

25-2605. Majority action by arbitrators.
The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by the Uniform Arbitration Act.

25-2607. Representation by attorney.
A party has the right to be represented by an attorney at any proceeding or hearing under the Uniform Arbitration Act. A waiver thereof prior to the proceeding or hearing is ineffective.

25-2609. Award.

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered or certified mail or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party but not more than thirty days after the hearing. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he or she notifies the arbitrators of his or her objection prior to the delivery of the award to him or her.

25-2611. Fees and expenses of arbitration.
Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees together with other expenses, not including counsel fees, incurred in the conduct of the arbitration shall be paid as provided in the award.

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MISSOURI LAW

Missouri Case Law on Arbitration Agreements

Missouri courts have generally been hostile towards arbitration agreements in the past, despite the state adopting the Uniform Arbitration Act back in 1980. Recently, there has been some positive development with the courts enforcing arbitration agreements in the employment context. With a recent court opinions in 2019, it appears that trend is also emerging for agreements in long-term care.

The Missouri Supreme Court changed the landscape and strategy regarding disputes over the existence of a valid arbitration agreement in *Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432, 436 (Mo. banc 2020). The court held that when a party challenges the existence of or disputes signing an arbitration provision, then it is a matter for the court to decide whether an agreement to arbitrate exists. The court further held that it retained this authority despite a delegation clause stating that an arbitrator would decide any disagreement or disputes relating to the existence of or enforceability of the arbitration agreement.

In *Ingram v. Brook Chateau*, 586 S.W.3d 772 (Mo. 2019), the court held that the resident was bound by the arbitration agreement signed by his durable power of attorney ("DPOA") during a time of incapacitation. The court focused on and emphasized the specific authority that the DPOA had to determine if the DPOA was authorized to enter into an arbitration agreement. Ultimately, it was held that because the DPOA held the power to admit Mr. Ingram into a nursing home and the arbitration agreement was presented as part of the admission process that Mr. Ingram was bound by the agreement.

However, it is important to remember that in *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 527 (Mo. Banc 2009), the court affirmed that even though the daughter was authorized as the POA to sign the arbitration agreement on behalf of her mother, that did not also bind the daughter for her independent claim of wrongful death.

Excerpts from Missouri Statute on Arbitration Agreements

MO Rev. State §435 *et seq.* governs arbitration agreements. Many of the provisions focus on the actual process such as the hearing process, representation by attorney, etc. There is little guidance on what needs to be contained within an agreement or how that agreement should be presented other than the section identified below.

435.460. Notice of arbitration provisions required.
Each contract subject to the provisions of sections 435.350 to 435.470 shall include adjacent to, or above, the space provided for signatures a statement, in ten point capital letters, which read substantially as follows:

"THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."

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IOWA LAW

Iowa Case Law on Arbitration Agreements

The majority of decisions relating to arbitration agreements involve employment claims. There are limited decisions directly applying to the long-term setting. In 2018, the Iowa Court of Appeals found that an assisted living facility had waived its right to enforce its arbitration agreement because it untimely raised the issue after participating in litigation. *McCullough v. Emeritus Corporation dba Emeritus at Silver Pines*, No. 17-0274 (Iowa App. Jul. 5, 2018).

Excerpts from Iowa Statute on Arbitration Agreements

Iowa Code Title XV Ch. §679A *et seq.* governs arbitration agreements. Many of the provisions focus on the actual process such as the hearing process, representation by attorney, etc. There is little guidance on what needs to be contained within an agreement or how that agreement should be presented other than the sections identified below. The key aspect is that the arbitration agreement must be a separate agreement/contract if the intention is to try and have it apply to future controversies.

679A.1 Validity of arbitration agreement.

1. A written agreement to submit to arbitration an existing controversy is valid, enforceable, and irrevocable unless grounds exist at law or in equity for the revocation of the written agreement.
2. A provision in a written contract to submit to arbitration a future controversy arising between the parties is valid, enforceable, and irrevocable unless grounds exist at law or in equity for the revocation of the contract. This subsection shall not apply to any of the following:
    a. A contract of adhesion.
    b. A contract between employers and employees.
    c. Unless otherwise provided in a separate writing executed by all parties to the contract, any claim sounding in tort whether or not involving a breach of contract

679A.10 Fees and expenses of arbitration.
Unless otherwise provided in the agreement to arbitrate, and except for counsel fees, the arbitrators' expenses and fees and any other expenses incurred in the conduct of the arbitration shall be paid as provided in the award.