

Feds under Trump Get Their Way by Regulation

By Alan Wade, CSU Sacramento, CSU-ERFA Legislative Director

This first section of the article appeared in its entirety in The Reporter, September 2017:

President Donald Trump's ham-handed ways with what should be a compliant Republican-led Congress are widely recognized. There is another way a sitting president can effect change in desired directions: through simple changes in regulations. Dozens if not hundreds of these happen every week, but few are judged newsworthy, so they easily escape public awareness.

Among proposed changes to Obama-era rules is the proposal to once again deny long-term care patients their right to judicial relief of disputes over care. In October 2016, the Centers for Medicare and Medicaid Services ("CMS") issued a first-time ban on the frequent nursing home practice of requiring new patients and their advocates to sign a pre-dispute arbitration agreement as a condition of admission. The Trump administration is now proposing a reversal of that decision, effectively ending the applicant's right to seek judicial relief for harm done by the facility.

Until the Obama administration change less than a year ago, the general practice was for nursing homes to take advantage of new residents and their families at a highly vulnerable moment by thrusting before them a take-it-or-leave-it agreement that effectively waived their right to sue the facility. That prospect will resume if the comments of CSU-ERFA and others are by-passed by CMS.

Please see CSU-ERFA's ("our") commentary on the proposed rule reversal at the end of this article. Our statement was prepared by our legislative committee, unanimously approved by the executive committee, and is included in the Federal Register. We were joined by other organizations advocating for retirees.

The California Advocates for Nursing Home Reform (CANHR) referred to the CMS action as "a remarkable about-face, repudiating almost every finding it made just eight months prior." The CANHR stated further: "Having compelled residents to waive their right to seek justice in a court of law, nursing homes are indisputably less accountable for poor care than they would otherwise be and are thus prone to giving worse care."

Meanwhile, if CMS goes on with its proposal, we should all seek comfort from a higher power when, at the end of the road, it becomes our fate to enter one of these modern poor houses. Regulatory relief from the State of California is not likely to come to our aid, as the feds (CMS) may determine that the convenience of the provider is more important than the rights of the consumer.

CSU-ERFA's Comments on the Proposed CMS Rule Change

Only one paragraph from this section appeared in the September 2017 Reporter:

From: The 2,200 members of the California State University Emeritus and Retired Faculty Association – Comment in opposition to the proposed rule change regarding pre-dispute arbitration agreements in long term care facilities participating in Medicare and Medicaid programs.

To: Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS, HHS)

The final (2016) rule prohibited LTC facilities from requiring that an applicant for admission sign a pre-dispute arbitration agreement as a condition for admission to a facility. This rule change afforded long-overdue protection to the public by enabling applicants to retain the right to litigation of disputes.

Changing the rule to once more permit LTC facilities to require arbitration agreements as a condition for admission would effectively preclude a citizen's right to file a lawsuit for redress of grievances. Prominent among your arguments for the rule change is "our approach to eliminating unnecessary burden on providers." We believe the emphasis of the rule change, if any, should be to maximize the protection of residents against abuse and to assure proper care, not, as your proposal suggests, to make life easier or less "burdensome" for

providers. Thus residents of long term care facilities should continue to receive the opportunity, when necessary, to seek judicial relief for provider misfeasance/malfeasance.

We further question the claim of mitigation of the new rule through increased transparency: that the requirement be posted and written in understandable language. Unless there is a requirement to make it clear that the signing of an arbitration agreement means forfeiting the right to litigation, it is hard to accept the “transparency” claim. A less harmful alternative would be simply to remain silent on the matter.

It may be that many disputes can be fairly and expeditiously resolved through arbitration. Still we believe that ultimate access to the courts for redress is a right that should not be denied. The occasional exercise of this basic right by the aggrieved citizen/patient can result in improved nursing home administration, patient services, and strengthened public policy.

Thank you for your attention to our comments.

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