

Binding Arbitration Agreement Review

Binding Arbitration Agreement: Complete the review of the facility's binding arbitration agreement, including a review of residents who have entered into a binding arbitration agreement and/or resolved a dispute.

For Risk-Based Surveys (RBS) only: Investigate this task during the RBS if there are related Ombudsman concerns, active intakes, or onsite concerns.

Entrance Conference Worksheet: The following information was requested during the Entrance Conference *or once the task is triggered for an RBS:*

- The facility's binding arbitration agreement.
- A list of residents who are currently residing 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.

Review Three Residents:

- Select three residents from the lists, as available. We recommend selecting up to two residents who signed the binding arbitration agreement and one resident who had a resolved dispute. If there aren't any residents who have resolved a dispute, select three residents who signed the binding arbitration agreement, as available. Attempt to select residents that are already in the finalized sample, when possible.
- Add the name of the selected residents in the resident box on the Arbitration screen and identify the reason the resident is being selected.
- If there aren't any residents who entered into a binding arbitration agreement, review the facility's binding arbitration agreement.

INTERVIEWS:

Resident and/or Resident Representative/Family Member:

- What is your understanding of the arbitration process when a dispute arises?
- Do you understand that you are giving up your right to litigation in a court proceeding?
- Were you told that the facility could not require you to enter into an arbitration agreement in order to be admitted, or to remain in the facility?
- Were you told that you had the right to terminate or withdraw from the agreement within 30 days of signing? If yes, were you told how to do so?
- Did you feel you were obligated, required, forced or pressured to sign the binding arbitration agreement? If yes, how so?
- Were you discouraged in any way from contacting federal, state, or local officials, such as the state survey agency or ombudsman about an arbitration agreement? If yes, how so?
- Have you filed any complaint(s) or grievance(s) with the facility and/or state survey agency about an arbitration agreement? If so, did the facility respond and provide a rationale for the response?
- Is there anything you would have liked to have known prior to signing the arbitration agreement?
- Was the arbitration agreement explained in a way that you understood?

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- If the arbitration agreement was included within another document, were you told first that you had the right to decline the agreement; and second, how to exercise this right (crossing out, etc.)?

NOTE: If several residents don't recall being advised of their rights related to arbitration agreements, conduct further investigation.

Resident and/or Resident Representative/Family Member who resolved a dispute or are in the process of resolving a dispute through the arbitration process (if the resident is discharged, attempt to contact the resident or his/her representative):

- How were you included in the selection of the arbitrator and venue?
- Were you given a choice of an arbitrator?
- Were you given an opportunity to suggest an arbitrator?
- Did you agree with the arbitrator that was selected?
- Was more than one arbitrator suggested?
- Were you provided a list of arbitrators to select from or alternatively were you made aware of how to search for arbitration companies?
- What did the facility tell you about the arbitrator or arbitration services company?
- Are you aware of any relationship or association between the facility and the arbitrator?
- Were you told how often the arbitrator or arbitration service ruled for or against the facility?
- Were you given a choice of the venue?
- Was the agreed upon venue convenient to you and/or your representative?
- When was the arbitrator and venue selected? Under what circumstances?
- Did you reject any of the facility's preferred arbitrator or venue? If so, why?
- Are you aware whether or not the facility used the same arbitrator or company in the past?

State Long Term Care Ombudsman (if available):

- Are you aware if the facility uses binding arbitration agreements?
- Did any resident or his/her representative report that he/she felt forced or pressured into signing the binding arbitration agreement as a condition of admission or as a requirement to continue receiving care at the facility?
- Are you aware of any resident who the facility may have refused admission to, or who was discharged because they refused to sign a binding arbitration agreement?
- Are you aware of any issues being raised regarding binding arbitration agreements?
- Are you aware of any residents or representatives who sought to rescind a binding arbitration agreement? If yes, how did the facility respond to the rescission request?
- Did any resident or representative ask for your assistance to select an arbitrator or venue?
- Did any resident or their representative complain to you that he/she was forced or pressured to select a particular arbitrator/arbitration company or venue?

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- Did any resident or representative report that an arbitrator and/or venue was pre-selected?
- Did any resident or his or her representative complain the venue was inconvenient to them?

Facility Staff who are responsible for explaining the binding arbitration agreement to the resident or his/her representative:

- 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?
- Do you know any resident(s) who your facility refused admission to, or discharged due to refusal to sign a binding arbitration agreement?
- Are you aware if any residents have filed a complaint or grievance with the facility regarding the use of an arbitration agreement?
- 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?

Facility staff who facilitate the selection of arbitrators and venue:

- How do you ensure that the resident or his/her representative has an equal role in selecting a neutral arbitrator?
- What is your process for selecting a neutral arbitrator?
- How do you ensure that the resident or his/her representative has an equal role in selecting a convenient venue?
- What is your process for selecting a convenient venue?
- When a resident or his/her representative do not agree with the arbitrator and/or venue, what are the next steps?
- How do you ensure the resident or his/her representative is provided an opportunity to select the arbitrator and venue agreed upon by both parties?
- What is the facility's policy on retention of the signed binding arbitration agreements and the final dispute documentation?
- When, and under what circumstances, do you approach residents or their representatives about selecting an arbitrator or venue?
- Are there any active complaints or grievances regarding the selection of an arbitrator or venue? How are you addressing these concerns?
- What information do you provide residents or their representatives regarding specific arbitrators or arbitration services companies?
- Have you used more than one arbitrator/arbitration services company in the past few years? How many times have you contracted with the same company?
- How often has the arbitrator or arbitration service ruled for or against the facility?

DOCUMENTATION REVIEWS:

Arbitration Agreement:

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Review to ensure the binding arbitration agreement:

- Clearly states that the resident or his/her representative is not required to enter into the agreement as a condition of admission to the facility or as a requirement to continue to receive care.
- Does not include language which prohibits or discourages the resident or representative from communicating with federal, state, or local officials.
- Is written in a form, manner and language that the resident or his/her representative understands.
- Gives the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it.
- Clarifies when a signature indicates consent to enter into an agreement, acknowledges understanding, or is used for both.

Final arbitration decision document including the signed arbitration agreement:

Review the resident's signed arbitration agreement and the final decision documents to ensure there is evidence that:

- The resident or his/her representative was provided an opportunity to select a neutral arbitrator.
- The resident or his/her representative was provided an opportunity to select a convenient venue.
- The facility retained a copy of the signed agreement for binding arbitration and the arbitrator's final decision, after the resolution of a dispute through arbitration for five (5) years.

Resident Record:

- For sampled residents who have entered the arbitration agreement himself/herself, is there evidence that the resident has the cognitive ability to understand the terms of the agreement and acknowledge this understanding?
 - When a signature is used to acknowledge understanding, is there additional evidence to establish that the resident or representative understood what he/she was signing?
- Is there evidence the binding arbitration agreement was explained in a form, manner and language that the resident or representative understands (e.g., literacy level, font size, format, language, preferred communication method)?
- For sampled residents who have a representative, is there evidence the representative has the legal authority to sign the binding arbitration agreement?
 - **Note:** A health care power of attorney, or designation as a health care proxy, may not be the legal authority to sign an arbitration agreement.

Facility Documentation:

- If concerns are identified, review the facility's policy and procedure regarding binding arbitration agreements, the facility's process, and the responsibility of individual staff.

1. The facility must not require any resident or his/her representative to sign a binding arbitration agreement as a condition of admission to, or as a requirement to continue to receive care at the facility. Is the facility in compliance? ☐ Yes ☐ No **F847** ☐ N/A

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2. Was the binding arbitration agreement explained in a form and manner including a language that the resident or his/her representative understood? ☐ Yes ☐ No F847 ☐ N/A
3. Was there evidence that the resident or his/her representative acknowledged that he/she understood the binding arbitration agreement? ☐ Yes ☐ No F847 ☐ N/A
4. Does the binding arbitration agreement explicitly grant the resident or his/her representative the right to rescind the agreement within 30 calendar day of signing it? ☐ Yes ☐ No F847
5. Does the arbitration agreement state that neither the resident or his/her representative is required to sign the binding arbitration agreement as a condition of admission to, or as a requirement to continue to, receive care at the facility? ☐ Yes ☐ No F847
6. Does the binding arbitration agreement allow the resident or anyone else (e.g., resident's representative) to communicate with federal, state, or local officials such as federal and state surveyors, other federal or state health department employees and representative of the Office of the State Long Term Care Ombudsman? ☐ Yes ☐ No F847
7. Does the binding arbitration agreement provide for the selection of a neutral arbitrator agreed upon by both parties? ☐ Yes ☐ No F848
8. Does the binding arbitration agreement provide for the selection of a venue that is convenient to both parties? ☐ Yes ☐ No F848
9. Upon request, did the facility retain the copy of the signed binding arbitration agreement and the arbitrator's final decision that occurred on or after September 16, 2019? ☐ Yes ☐ No F848 ☐ N/A

Other Tags, Care Areas (CA) and Tasks to Consider: Rights Exercised by Representatives F551, Resident Council – Grievances (Task), Resident Contact with External Entities F586, Admission Policy F620, and Discharge (CA).