- For residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and

- For residents with mental illness, the mailing address and telephone number of the agency responsible for the protection and advocacy of individuals with mental illness established under the Protection and Advocacy for Mentally Ill Individuals Act.

In addition, the notice should include contact information for the primary facility contact(s) responsible for the daily operation and management of the facility during the facility's closure process.

KEY ELEMENTS OF NONCOMPLIANCE

To cite deficient practice at F845, the surveyor's investigation will generally show that the facility failed to do any one of the following:

- Provide prior notice of an impending closure to the appropriate parties as required; **or**

- Ensure no new residents continued to be admitted to the facility on or after the date of the notice of impending closure was submitted; **or**

- Ensure residents were transferred, discharged or relocated to the most appropriate and available facility or other setting in terms of quality, services, and location, taking into consideration the needs, choice, and best interests of each resident.

F846

(Rev. 229; Issued: 04-25-25; Effective: 04-25-25; Implementation: 04-28-25)

§483.70(l) Facility closure.

The facility must have in place policies and procedures to ensure that the administrator's duties and responsibilities involve providing the appropriate notices in the event of a facility closure, as required at paragraph (l) of this section.

GUIDANCE §483.70(l)

Policies and procedures must be in place at all times in order to be used in the case of a facility closure or in case of termination of a facility's Medicare and/or Medicaid Provider Agreement, in order to meet the requirements of §483.70(*k*) The policies and procedures must address:

- The administrator's duties and responsibilities as required per §483.70(*k*) for submitting a closure plan and providing timely written notice to the State Survey Agency, the State LTC Ombudsman, residents of the facility, and the legal representatives of residents or other responsible parties, including the CMS *Location,* the State Medicaid Agency, and staff responsible for providing care and services to residents;

- How facility staff will identify available settings in terms of quality, services, and location, by taking into consideration each resident's individual needs, choices, and best interests. The facility may not close until all residents are transferred, relocated or discharged in a safe and orderly manner to the most appropriate setting; and

- Assurance that no new residents will be admitted to the facility on or after the date that the written notice of impending closure was provided to the State Survey Agency;

To ensure resident safety during a facility closure or termination of a facility's Medicare and/or Medicaid Provider Agreement, the policies and procedures should also address:

- How facility staff will ensure that all pertinent information about each resident is communicated to the receiving provider in accordance with §483.15(c)(2)(iii), and each resident's complete medical record information including archived files, Minimum Data Set (MDS) assessments, and all orders, recommendations or guidelines from the resident's attending physician;

- In addition to the administrator, the primary contact(s) responsible for the daily operation and management of the facility during the facility's closure process;

- The roles and responsibilities of the facility's owners, administrator, or their replacement(s) or temporary managers/monitors during the closure process, and their contact information;

- Provisions for ongoing operations and management of the facility and its residents and staff during the closure process that include:

    - Payment of salaries and expenses to staff, vendors, contractors, etc.;

    - Continuation of appropriate staffing and resources to meet the needs of each resident, including the provision of medications, services, supplies, and treatments as ordered by the resident's physician/practitioner;

    - Ongoing accounting, maintenance, and reporting of resident personal funds; and

    - Labeling, safekeeping and appropriate transfer of resident's personal belongings, such as clothing, medications, furnishings, etc. at the time of

transfer or relocation, including contact information for missing items after the facility has closed.

The facility's policies and procedures should also consider certain provisions to prepare residents to ensure a safe and orderly transfer from the facility. These provisions include, but are not limited to:

- Interviewing residents and their legal or other responsible parties, to determine each resident's goals, preferences, and needs in planning for the services, location, and setting to which they will be moved;

- Offering each resident (in a manner and language understood by the resident) the opportunity to obtain information regarding their community options, including setting and location;

- Providing residents with information or access to information pertaining to the quality of the providers and/or services they are considering; psychological preparation or counseling of each resident as necessary; and
- Making every reasonable effort to accommodate each resident's goals, preferences and needs regarding receipt of services, location, and setting.

PROCEDURES §483.70(l)

Once notified of a facility's impending closure, if a copy of the facility's plan for the transfer and relocation of the residents was not included with the notice, the State Survey Agency should immediately request a copy of the facility's closure plan for their review and approval. In addition, the State Survey Agency should request the facility's admissions records to verify that no new residents have been admitted on or after the date that the notice of closure was provided.

A resident who had been temporarily transferred to an acute care setting, is on bed hold, or is on a temporary leave would not be considered to be a new admission upon return to the facility. However, each of these situations may need to be evaluated on a case by case basis in order to determine if the clinical care or social needs of the resident may continue to be met by the facility if transferred back to the facility in closure. If it is determined that the clinical care or social needs of the resident cannot be met by the closing facility and the resident is not transferred back to the closing facility, the same notice requirements specified above apply to the resident and the resident's legal representatives, other responsible parties, and other parties as if the resident was still living in the facility.

Interview the administrator and other individual(s) responsible for managing, overseeing, coordinating and implementing the plan to evaluate how each component of the plan is being operationalized.

NOTE: The review of certain components such as an evaluation of the facility's closure plan, policies and procedures may be conducted off-site by the State Survey Agency and may include assistance from the State LTC Ombudsman as the State Survey Agency deems suitable and necessary.

When conducting an onsite survey prior to the impending closure, tour the facility and interview staff including the medical director, residents, and family. Determine their involvement in and/or knowledge of the facility closure plans and the resident transfer procedures. Determine through observation, interview, and record review, as applicable:

- That the delivery of resident care and services are continuing to be provided, monitored and supervised based upon the assessed needs and choices of each resident. If problems are noted it may be necessary to further investigate and review other quality of care regulations as appropriate. Do not cite quality of care issues under the Facility Closure regulations;

- Whether written notices were provided timely and that the notice included the expected date of the resident's transfer to another facility or other setting; and

- How the facility involved the resident, his/her legal representative or other responsible party, and the resident's primary physician to determine the resident's goals, preferences and needs in planning for the services, location and setting to which they will be moved.

NOTE: Refer to §483.15 for guidance for the post-discharge plan of care for an anticipated discharge which applies to a resident whom the facility discharges to a private residence or other home and community based setting, to another nursing home, or to another type of residential facility such as a board and care home or an intermediate care facility for individuals with intellectual disabilities or mental illness.

NOTE: §488.426(a)(1) and(2) - Transfer of residents, or closure of the facility and transfer of residents, gives authority to the State for temporary facility closure in emergency situations. If the State Survey Agency approves a facility's temporary relocation of residents during an emergency with the expectation that the residents will return to the facility, this would not be regarded as a facility closure under these requirements and the notification requirements would not be applicable. However, if a facility ultimately closes permanently due to an emergency, the administrator is required to provide proper notifications and follow the procedures outlined in this guidance.

F847 Entering Into Binding Arbitration Agreements

(Rev. 229; Issued: 04-25-25; Effective: 04-25-25; Implementation: 04-28-25)

§483.70(m) Binding Arbitration Agreements

If a facility chooses to ask a resident or his or her representative to enter into an agreement for binding arbitration, the facility must comply with all of the requirements in this section.

§483.70(m)(1) The facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility and must explicitly inform the resident or his or her representative of his or her right not to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility.

§483.70(m)(2) The facility must ensure that:

> **(i) The agreement is explained to the resident and his or her representative in a form and manner that he or she understands, including in a language the resident and his or her representative understands;**
>
> **(ii) The resident or his or her representative acknowledges that he or she understands the agreement…**

§483.70(m)(3) The agreement must explicitly grant the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it.

§483.70(m)(4) The agreement must explicitly state that neither the resident nor his or her representative is required to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility.

§483.70(m)(5) The agreement may not contain any language that prohibits or discourages the resident 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 representative of the Office of the State Long-Term Care Ombudsman, in accordance with §483.10(k). . .

NOTE: The requirements at 483.70(m) went into effect on September 16, 2019. This guidance is intended for the review of arbitration agreements entered into on or after September 16, 2019.

INTENT
To ensure that long-term care facilities inform residents or their representatives of the nature and implications of any proposed binding arbitration agreement, to inform their decision on whether or not to enter into such agreements.

The requirements at F847emphasize the residents' or their representatives' right to make informed decisions and choices about important aspects of residents' health, safety and

welfare. Facilities may present residents or their representatives the opportunity to utilize a binding arbitration agreement to resolve disputes at any time during a resident's stay as long as the agreement complies with the regulations at §483.70(m)(1)-(5).

DEFINITIONS

Arbitration: a private process where disputing parties agree that one or several other individuals can make a decision about the dispute after receiving evidence and hearing arguments. [1]

Binding Arbitration Agreement (Arbitration Agreement or Agreement): a binding agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not. The decision is final, can be enforced by a court, and can only be appealed on very narrow grounds. [2]

Pre-dispute binding arbitration agreement (pre-dispute arbitration agreement or pre-dispute agreement): A binding agreement to resolve a future unknown dispute with an arbitrator prior to any issue or dispute arising.

Post-dispute binding arbitration agreement (post-dispute arbitration agreement, or post-dispute agreement): A binding agreement signed after the circumstances of the dispute have occurred to resolve the dispute with an arbitrator.

Dispute: A disagreement, controversy, or claim amongst parties where one party claims to have been harmed.

Judicial Proceedings: any action by a judge (i.e., trials, hearings, petitions, or other matters) formally before the court.

GUIDANCE §483.70(m)(1)(2)(i)(ii)(3)-(5)

Over the years, long-term care facilities and residents have used arbitration to resolve many disputes. Parties subject to arbitration give up their right to have some or all claims heard in court (The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights, https://www.epi.org/publication/the-arbitration-epidemic/, Accessed 1/6/2021). The results of arbitration decisions are typically not disclosed to the public and arbitrators' decisions are generally final and binding with little or no opportunity to initiate judicial proceedings that challenge unfavorable decisions.

Concerns have been raised about the fairness and transparency related to both the means by which these agreements are created and the fairness of the arbitration processes themselves in the specific context of long-term care facilities. For example, an individual is often admitted to a long-term care facility directly from the hospital after a decline in their health. These individuals are often quite ill and are not in a position to engage in meaningful negotiations over the terms of an arbitration agreement or to coordinate care at another facility. As a result, this is quite often an extremely stressful situation with limited

time to review documents before signing them. During this time, long-term care facilities have often required individuals to sign pre-dispute arbitration agreements to obtain health care. These factors, among others, impede individuals' ability to obtain care and simultaneously make it extremely difficult for residents or their representatives to make an informed decision about arbitration. Therefore, asking individuals to commit to binding arbitration agreement in these situations may not represent the best option in terms of advancing the health care of residents.

Use of a binding arbitration agreement must be voluntary and must be clearly communicated to the residents or their representatives as optional and not required as a condition of admission or to continue to receive care at the facility. The agreement must be explained so that the resident or his or her representative understands the terms of the agreement. This should include an explanation that the resident may be giving up his or her right to have a dispute decided in a court proceeding. And residents and their representatives must be provided 30 days after signing to fully review and potentially rescind any agreement that was not understood at the time of admission.

Pre- and Post-dispute Arbitration Agreements: Binding arbitration agreements may be offered either before (pre-dispute) or after (post-dispute) a dispute arises. A pre-dispute binding arbitration agreement is an agreement to resolve an unspecified future dispute(s) through arbitration. Disputes may vary from a non-life threatening situation such as a financial disagreement, up to and including significant concerns such as abuse, neglect, and/or wrongful injury or death of a resident. By entering into a pre-dispute binding arbitration agreement, the parties are not settling an existing dispute but deciding, in advance, the forum in which any future disputes would be resolved. For example, if a resident enters into a pre-dispute arbitration agreement when admitted to a facility, and a few months later the facility is alleged to have wrongfully caused a type of harm covered by the agreement, such as abuse, the resident cannot seek legal action through the traditional court system. Rather, they must resolve the dispute through the agreed-upon arbitration proceeding.

Facilities wishing to utilize pre-dispute binding arbitration agreements will generally offer these arrangements prior to, or early in the admission process. Facilities must not require residents or their representatives to enter into a binding pre-dispute arbitration agreement as a condition of being admitted to the facility or as a requirement for continued care.

Post-dispute arbitration agreements involve the use of the arbitration process after a dispute occurs, which would otherwise be resolved in a court proceeding. In such cases, following an issue which gives rise to a dispute, the facility may propose using an arbitrator to resolve the dispute, rather than engage in litigation in court. When the facility wishes to use a post-dispute binding arbitration agreement, existing legal authorities generally provide that the facility must not compel, pressure, or coerce a resident or his or her representative to enter into a binding arbitration agreement, and the regulation provides that the facility must not require arbitration as a condition of receiving continued care at the facility.

Requirements for Arbitration Agreements - Transparency in the Arbitration Process: The requirements at §483.70(m)(2)(i) specify that the arbitration **"agreement is explained to the resident and his or her representative in a form and manner that he or she understands, including in a language the resident and his or her representative understands."** It is important that the arbitration process is transparent. This means that facilities should take every step to meet the resident's needs or special accommodations (e.g. literacy level, font size, format, language, etc.) when explaining the arbitration agreement. When explaining the agreement, facilities must identify and use the resident's or their representative's preferred communication method, including language, to ensure understanding of the arbitration agreement. The terms and conditions of arbitration agreements must be clearly explained to the resident or his or her representative.

The requirement at §483.70(m)(2)(ii) specifies that **"the resident or his or her representative acknowledges that he or she understands the agreement."** After the arbitration agreement is explained in a manner and form the resident or their representative understands, the facility must ensure there is evidence that the resident or their representative has acknowledged understanding of the agreement. In some cases, the binding arbitration agreement may specify that the resident or his or her representative acknowledges understanding by signing the document. When a signature is used to acknowledge understanding, additional evidence may be needed to establish that in fact the resident or their representative understood what he or she was signing. It may not be sufficient that the resident or their representative signed the document. It is also important that facilities clarify when a signature is used to acknowledge understanding, when it indicates consent to enter into an agreement, or is used for both purposes.

Surveyors should determine how the facility ensures residents or their representatives understood the terms of the binding arbitration agreement, and how this understanding is acknowledged. Surveyors must verify through interview and record review, that the resident or their representative understood what they were signing. In situations where the resident may have cognitive impairment, surveyors should refer to the medical record to identify the resident's health care decision-making capacity at the time the agreement was offered, explained, and entered into.

Arbitration Agreements Embedded within other Contracts or Agreements: Binding arbitration agreements may not necessarily be a stand-alone document. Facilities may choose to offer pre-dispute arbitration agreements at the time of admission. Some facilities may embed the arbitration agreement within the admission agreement, contract, or other documents. In these cases, all of the requirements related to arbitration agreements still apply. For example, the facility must explain that the admissions agreement includes a binding arbitration agreement, and inform the resident of all of their rights related to this agreement in a form and manner that they understand. Additionally, the facility should clearly distinguish the arbitration agreement from the admission agreement, so that, residents or their representatives have a clear understanding of each agreement, and are able to enter into or decline the arbitration agreement. In other words, residents must be allowed to sign an admissions agreement without consenting to the facility's arbitration agreement. Surveyors should determine how the facility ensures residents or their

representatives are made aware of arbitration agreements which are embedded within another document. Surveyors should also obtain copies of any documents or agreements that include information about arbitration. For example, if a facility's admission agreement has a paragraph referencing arbitration, but also has a separate arbitration agreement, the surveyor will need to examine both documents to ensure compliance.

Requirements for Arbitration Agreements – Language: The requirements at §483.70(m)(1), (3)-(5) identify specific terms and conditions which must be "explicitly" stated in any arbitration agreement between a resident or their representative, and a Medicare and/or Medicaid certified facility. Explicitly means clearly and without any vagueness or ambiguity. Thus, these terms and conditions must be disclosed in the agreement in a clear and detailed manner, leaving no room for confusion. For further arbitration agreement language to be included, refer to F848, specifically §483.70(m)(2)(iii), (iv).

§483.70(m)(1): The arbitration agreement **"…must explicitly inform the resident or his or her representative of his or her right not to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility."** This means that the agreement must clearly explain that the resident or their representative has the right to refuse to enter into the arbitration agreement without fear of:

- Not being admitted; or

- Being transferred or discharged as a result of refusing to enter into an arbitration agreement.

Facilities cannot refuse to admit any resident who has, or whose representative has, declined to enter into an arbitration agreement. Additionally, facilities must not discharge any resident for failure to use arbitration to settle a dispute.

NOTE: Surveyors should thoroughly investigate the basis for transfer or discharge for any resident who has refused to enter into a binding arbitration agreement, and has been, or will be subsequently transferred or discharged. For additional information, refer to the guidance at §483.15(c) - F627, Transfer and Discharge Requirements.

§483.70(m)(3): The arbitration **"agreement must explicitly grant the resident or his or her representative the right to rescind this agreement within 30 calendar days of signing it.**" This means the agreement must clearly explain that the resident or his or her representative has 30 calendar days to withdraw from or terminate the agreement, should he or she change their mind. This ensures that residents or their representatives have time to reconsider the decision to use arbitration to settle a dispute with the facility. This also allows time for them to seek legal advice, if he or she chooses to do so.

Facilities should have a process, that is also explained to the resident or their representative, which ensures timely communication to the appropriate facility staff of a resident's or resident representative's desire to withdraw from, or terminate the arbitration agreement.

Otherwise, miscommunications or delays could deny the resident or representative the right to withdraw from the agreement within the 30-day period.

§483.70(m)(4): The arbitration agreement "**must explicitly state neither the resident nor his or her representative is required to sign this agreement as a condition of admission to, or as a requirement to continue to receive care at the facility.**" This means the agreement itself must contain clear language that neither the resident nor the representative are required to enter into the agreement as a condition of admission or to continue to reside at the facility. As stated above at §483.70(m)(1), this must be clearly conveyed without any ambiguity, thereby ensuring that no resident or his or her representative will have to choose between signing an arbitration agreement and receiving care at the facility.

§483.70(m)(5): The arbitration **"agreement may not contain any language that prohibits or discourages the resident 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 representative of the Office of the State Long-Term Care Ombudsman, in accordance with §483.10(k).**" Residents or their representatives have the right to unrestricted communication with officials from federal agencies, as well as with state and local officials, including representatives from the State Survey Agency, State Health department, and representatives from the Office of the State Long-Term Care Ombudsman. In addition to prohibition of language in the agreement which discourages such contact or communication, this also means that there should be no attempt by facility staff to discourage this communication verbally.

Surveyors should verify through interview that the resident or his or her representative were not discouraged in any way from contacting federal, state, or local officials, which includes and is not limited to surveyors and ombudsmen, when entering into a binding arbitration agreement. For additional information, refer to the guidance at §483.10(k) - F586, Contact with External Entities.

PROCEDURES AND PROBES §483.70(m)(1)(2)(i)(ii)(3)-(5)

Surveyors should verify with the facility whether arbitration agreements are used to resolve disputes. If so, determine compliance with F847 through interview of sampled residents, resident representatives, resident council/family council (if one exists), Long-Term Care Ombudsman, facility staff; and record review, which includes reviewing the agreement and other relevant documentation. For facilities that offer arbitration agreements, the following are interview questions that may assist Surveyors in their investigation. Surveyors are not required to ask all of the below interview questions, but instead use these example questions as a guide during interviews.

NOTE: These provisions are not intended to, "supersede or interfere with state laws or other state contract and consumer protection laws . . . except to the extent any such laws are actually in conflict with this regulation." 84 Fed. Reg. 34718, 34721 (July 18, 2019).

Interviews

a. **Resident and/or his or her Representative:** For residents who have arbitration agreements, determine the extent to which the arbitration agreement was explained to the resident or representative by asking:

- 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 in order 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?
- Have you filed any complaint(s) or grievance(s) with the facility and/or state survey agency about the arbitration agreement?
- Is there anything you would have liked to have known before signing the arbitration agreement?
- Was the arbitration agreement explained in a way that you understood?
- 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.)?

b. **Resident Council/ Family Council:** For facilities having resident and/or family councils, and that have elected to utilize arbitration agreements, determine if there are general concerns with arbitration agreements. If concerns are identified, surveyors should arrange to meet individually with the resident to discuss their personal/private concerns related to arbitration agreements (for individual interview probes, see resident/representative interview questions above). Ask the following:

- Has the Resident's Council ever voiced any concerns to the facility about arbitration agreements, such as the way they are explained, pressure or being forced into signing them, or concerns with the process for withdrawing or terminating an agreement?

- Do you know if residents feel forced (coerced) to sign the arbitration agreement? If yes, how so?

- Whom from the facility discusses or reviews the binding arbitration agreement with residents or their representatives?

c. Facility staff: Interview facility staff responsible for explaining the arbitration agreement to residents or their representatives. Determine how the facility staff ensure the resident or his or her representative understands the agreement by asking:

When, and under what circumstances, do you request that a resident or his or 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 or her representative's needs?

- How do you make sure 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 in your facility 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) whom your facility refused admission to, or discharged due to refusal to sign a binding arbitration agreement?

- Have any residents filed a complaint or grievances 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 their ability to make an informed and appropriate decision?

d. State Long-Term Care Ombudsman (if available):

- Did any resident or his or her representative report that he/she felt forced or pressured into signing the binding arbitration agreements as a condition of admission or as a requirement to continue receiving care at the facility?

- Do you know any resident whom the facility may have refused admission to, or who was discharged, due to refusal to sign a binding arbitration agreement?

- Are you aware of any issues that have been 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?

Record Review: Review the resident record, as well as the arbitration agreement to ensure: The binding arbitration agreement clearly states that the resident or his or 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.

- The binding arbitration agreement does not include language, which prohibits or discourages the resident or representative from communicating with federal, state, or local officials.

- There is evidence the binding arbitration agreement was explained in a form, manner and language that the resident or his or her representative understands.

- There is evidence that the resident had the cognitive ability to understand the terms of the agreement, and evidence the resident acknowledged this understanding.

- The binding arbitration agreement gives the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it.

- For residents who have a representative, there is evidence the representative has the legal authority to sign the binding arbitration agreement.

POTENTIAL TAGS FOR ADDITIONAL CONSIDERATION

If there are concerns regarding communication with external entities 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, surveyors should further investigate and review regulatory requirements at §483.10(k), F586, Contact with External Entities.

If there are concerns regarding admission agreement, surveyors should further investigate and review regulatory requirement at §483.15(a), F620, Admissions Policy.

If there are concerns regarding the basis for transfer and discharge for any resident who has refused to enter into a binding arbitration agreement and has been, or will be subsequently transferred or discharged, surveyors should further investigate and review regulatory requirements at §483.15(c), F627 Transfer and Discharge.

KEY ELEMENTS OF NONCOMPLIANCE

To cite deficient practice at F847, the surveyors' investigation will generally show:
The facility failed to:

- Explain the terms of the agreement to the resident or his or her representative in a form and manner (including language) that he or she understands; and/or

- Inform the resident or his or her representative they are not required to enter into a binding arbitration agreement as a condition of admission, or as a condition to continue to receive care at the facility; or

- Inform the resident or representative they have the right to rescind or terminate the agreement within 30 calendar days of signing.

The agreement itself:

- Contains language that prohibits or discourages the resident or his or her representative from communicating with federal, state, or local officials, including:

    - Federal and state surveyors, and/or

    - Other federal or state health department employees, and/or

    - Representative of the Office of the State Long-Term Care Ombudsman; or

- Fails to contain language which clearly informs the resident or their representative they are not required to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at the facility.

Guidance on Identifying Noncompliance at F847: In some cases, a resident or his or her representative may not be able to recall the specifics of a conversation explaining arbitration agreements held during admission or at some point previous to the survey. It is not uncommon for an individual to not remember all the technical details of something they signed in the past (e.g., six months ago). If a resident or their representative cannot recall the conversation explaining arbitration agreements, or details of the terms of the agreement, this alone may not necessarily indicate noncompliance. However, if several residents do not recall being advised of their rights related to arbitration agreements, the surveyor should conduct further investigation.

Conversely, if a resident or his or her representative actively asserts or complains that they remember the admissions conversation, and can affirm that the facility staff member did not inform them of their rights related to arbitration, this **may** indicate noncompliance. In either case, surveyors are expected to verify noncompliance through further investigation with the resident or representative, as well as other residents, staff members, and resident council.

Guidance on Determining Severity of Noncompliance at F847: When determining the severity of noncompliance at F847, surveyors must always consider what impact the identified noncompliance had on the affected resident(s). However, unlike noncompliance

at other tags, such as Abuse or Quality of Care, which may result in physical, mental, and/or psychosocial outcomes, noncompliance at F847 will almost exclusively have a psychosocial impact or outcome. Surveyors must gather sufficient evidence through interviews, record review and observation to demonstrate what the psychosocial impact was to the resident. In some cases, the surveyor may have to use the reasonable person concept to determine severity. Refer to the Psychosocial Severity Outcome Guide for further information.

The failure of the facility to meet the requirements at F847 is more than minimal harm. Therefore, Severity Level 1 does not apply for this regulatory requirement.

Absent evidence of actual harm, noncompliance at F847 would likely be cited at severity level 2, No Actual Harm with Potential for More than Minimal Harm that is not Immediate Jeopardy.

However, if the surveyor identifies that noncompliance at F847 has caused psychosocial **harm** to the resident (per the Psychosocial Severity Outcome Guide), this should be cited at severity level 3, Actual Harm that is not Immediate Jeopardy.

In order to cite Immediate Jeopardy, the surveyor's investigation would have to show that noncompliance resulted in the likelihood for serious psychosocial injury or harm, or caused actual serious psychosocial injury or harm, and required immediate action to prevent further serious psychosocial injury or harm from occurring or recurring. Refer to Appendix Q for further information.

Guidance on Correcting Noncompliance at F847: When noncompliance exists at F847, the Plan of Correction (POC) is expected to include the required elements as identified at State Operations Manual, Chapter 7, §7317 – Acceptable Plan of Correction. These include:

- Address how corrective action will be accomplished for those residents found to have been affected by the deficient practice;

- Address how the facility will identify other residents having the potential to be affected by the same deficient practice;

- Address what measures will be put into place or systemic changes made to ensure that the deficient practice will not recur;

- Indicate how the facility plans to monitor its performance to make sure that solutions are sustained; and

- Include dates when corrective action will be completed.

When the surveyor's investigation shows systemic noncompliance, indicating a complete disregard or unawareness of the requirements, such as the standard use of arbitration agreements containing language which violates the requirements at

F847, evidence that the facility has made no attempt to explain arbitration agreements, or evidence of overt attempts to conceal arbitration agreements within other documents, in addition to the requirements for POCs listed above, CMS has the following expectations with regard to the accepted POC:

- The POC must ensure that any new or revised arbitration agreements in use in the facility complies with the requirements at F847 – Surveyors must review the revised agreements and confirm that they comply with F847;

- If a resident or their representative has signed a non-compliant agreement, the facility must ensure that the resident or their representative is promptly notified that the agreement does not comply with §483.70(m), and it must promptly offer the resident or their representative a compliant agreement;

- The facility must explain the terms of the new agreement to the residents or their representatives, and do so in terms the residents or their representatives can understand; and

- All other requirements at F847 are met.

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[1] Adapted from American Bar Association. "Dispute Resolution Processes: Arbitration." Americanbar.org, Accessed 1/6/2021)

[2] Adapted from American Bar Association. "Dispute Resolution Processes: Arbitration." Americanbar.org, Accessed 1/6/2021)

F848 Arbitrator/Venue Selection and Retention of Agreements

(Rev. 225; Issued: 08-08-24; Effective: 08-08-24; Implementation: 08-08-24)

§483.70(m) Binding Arbitration Agreements.
If a facility chooses to ask a resident or his or her representative to enter into an agreement for binding arbitration, the facility must comply with all of the requirements in this section. . .

§483.70(m)(2) The facility must ensure that . . .

(iii) The agreement provides for the selection of a neutral arbitrator agreed upon by both parties; and

(iv)The agreement provides for the selection of a venue that is convenient to both parties. . .

§483.70(m)(6) When 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 must be retained by the facility for 5 years after the resolution of that dispute on and be available for inspection upon request by CMS or its designee.

NOTE: The requirements at 483.70(m) went into effect on September 16, 2019. This guidance is intended for the review of arbitration agreements entered into on or after September 16, 2019.

INTENT

To provide a neutral and fair arbitration process by ensuring both the resident or his or her representative, and the facility agree on the selection of a neutral arbitrator, and that the venue is convenient to both parties. In addition, the requirement to retain a copy of the signed agreement for binding arbitration and the arbitrator's final decision enables CMS to ensure that CMS can fully evaluate quality of care complaints that are addressed in arbitration and assess the overall impact of these agreements on the safety and quality of care provided in long-term care facilities.

DEFINITIONS

Arbitrator: A third party who resolves a dispute between others by arbitration and pursuant to an arbitration agreement. Arbitrators are decision makers, with procedures set by the arbitration agreement and state law, except they may not be required to follow federal or state rules of evidence and their decisions may not be reviewable by a court absent extraordinary circumstances.

Convenient Venue: A location in which to carry out arbitration proceedings which should be agreed upon and suitable to both parties.

Neutral Arbitrator: An impartial, or unbiased third-party decision maker, contracted with, and agreed to by both parties to resolve their dispute.

GUIDANCE

The requirement at §483.70(m)(2)(iii) states **"the facility must ensure that the agreement provides for the selection of a neutral arbitrator agreed upon by both parties."** Facilities wishing to utilize binding arbitration agreements should make reasonable efforts to ensure that any arbitration agreement entered into with a resident or his or her representative provides for the selection of an arbitrator who is impartial, unbiased, and without the appearance of a conflict of interest. This ensures the integrity of the arbitration process, and also ensures that residents who choose this alternative dispute resolution are treated with the same fairness they would have if they chose to litigate.

Facilities may put forward suggestions for the use of specific arbitrators for residents (or their representatives) to select. The resident or his or her representative is not obligated to use the arbitrator (either an arbitration services company or an individual arbitrator) suggested by the facility, and may suggest an alternative arbitrator of their choosing. Facilities are expected to make a reasonable attempt to come to agreement with the resident or resident's representative on the selection of a neutral arbitrator and provide a fair process for selecting an arbitrator or arbitration services company.

To ensure a neutral arbitrator is selected, the facility should avoid even the appearance of bias, partiality, or a conflict of interest, and should promptly disclose to the resident or his or her representative the extent of any relationship which exists with an arbitrator or arbitration services company, including how often the facility has contracted with the arbitrator or arbitration service, and when the arbitrator or arbitration service has ruled for or against the facility.

The requirement at §483.70(m)(2)(iv) states **"the facility must ensure the agreement provides for the selection of a venue that is convenient to both parties."** The binding arbitration agreement **must** allow for the selection of a venue that is suitable in meeting the needs of both the resident or his or her representative, and the facility. The venue should be agreed upon by both parties. The venue is the geographical location of the arbitration proceeding that may be chosen, in part, on the basis of convenience. Convenience for the resident or resident's representative may be determined by his or her needs in terms of ability to get to the venue.

The requirements at §483.70(m)(6) state that **"when 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 must be retained by the facility for 5 years after the resolution of that dispute on and be available for inspection upon request by CMS or its designee."** When a dispute is resolved through arbitration, facilities are accountable and responsible for retaining a copy of the signed binding arbitration agreement and final decision for a period of 5 years following resolution of the arbitrated dispute. These records must be made available for review to surveyors upon request.

NOTE: It is important for surveyors to focus on the record retention requirement, not the content of the arbitration agreement or final decision(s) in determining compliance with this requirement.

PROCEDURES AND PROBES §483.70(m)(2)(iii) & (iv)

Surveyors should verify with the facility whether arbitration agreements are used to resolve disputes. If so, determine compliance with F848 through interview of sampled residents, resident representatives, resident council/family council (if one exists), Long-Term Care Ombudsman, facility staff; and record review, which includes reviewing the agreement and other relevant documentation. For facilities that offer arbitration agreements, the following are interview questions that may assist Surveyors in their investigation. Surveyors are not required to ask all of the below interview questions, but instead use these example questions as a guide during interviews.

Note: These provisions are not intended to, "supersede or interfere with state laws or other state contract and consumer protection laws . . . except to the extent any such laws are actually in conflict with this regulation." 84 Fed. Reg. 34718, 34721 (July 18, 2019).

Interviews

a. Resident or Representative(s): Interview the resident or their representative to determine the process for selecting a neutral arbitrator and convenient venue. Ask:

- How were you included in selecting the arbitrator?
- Were you given a choice in arbitrator?
- Were you given an opportunity to suggest an arbitrator?
- Do you agree with the arbitrator that was selected?
- Was more than one arbitrator suggested?
- Was a list of arbitrators to select from provided 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?
- How were you included in selecting the venue?
- Were you given a choice in venue?
- Was the agreed upon venue convenient to you and/or your representative?
- When were the arbitrator and venue selected? Under what circumstances?
- Did the facility reject any of your preferred arbitrators or venues? Why?
- Are you aware whether or not the facility used the same arbitrator or company in the past?

b. Resident Council/Family Council: For facilities having resident and/or family councils and have elected to utilize arbitration agreements, determine if there are general concerns with arbitration agreements. If concerns are identified, surveyors should arrange to meet individually with the resident to discuss their personal/private concerns related to

arbitration agreements (for individual interview probes, see resident/representative interview questions above). Ask the following:

- Are you aware of any concerns about the selection of a neutral arbitrator and/or the selection of a convenient venue? (Remind residents not to share personal, private information in the group setting.)

c. Facility Staff: Interview the facility staff responsible for facilitating the selection of a neutral arbitrator and convenient venue. Ask:

- How do you ensure that the resident or his or 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 or 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 or her representative do not agree with the arbitrator and/or venue, what are the next steps?
- How does the agreement provide for the selection of the arbitrator is 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 (i.e., regarding parent corporation/owners using specific arbitration company)?
- 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?

d. State Long Term Care Ombudsmen (if available): Interview the representative of the State Long-Term Care Ombudsman who serves resident of the facility. Ask:

- Did any resident or his or her representative ask your assistance to select an arbitrator or venue?
- Did any resident or his or her representative complain to you that he/she was forced or pressured to select a particular arbitrator/arbitration company or venue?
- Did any resident or his or her representative report that an arbitrator and/or venue was pre-selected (i.e., the resident or his or her representative did not have an opportunity to agree to an arbitrator and/or venue)?
- Did any resident or his or her representative complain the venue was inconvenient to them?

Record Review: Review the binding arbitration agreement, any other pertinent information relevant to the selection of the arbitrator and venue as well as the arbitrator's final decision after resolution of a dispute (if applicable) to identify the following:

- Is there evidence that the resident or his or her representative were provided with the opportunity to select a neutral arbitrator?
- Is there evidence that the resident or his or her representative were provided with the opportunity to select a convenient venue?
- Is there evidence 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?

KEY ELEMENTS OF NON-COMPLIANCE

To cite deficient practice at F848, the surveyor's investigation will generally show that the facility failed to do **any one or more** of the following:

- Ensure that the arbitration agreement specifically provides for the selection of a neutral arbitrator; or
- Ensure that the arbitration agreement specifically provides for the selection of a venue that is convenient; or

For disputes resolved by arbitration, the facility failed to:

- Retain a copy of the signed agreement for binding arbitration and the arbitrator's final decision (for disputes resolved by arbitration) after the facility and a resident or their representative resolve a dispute through arbitration for five (5) years; or
- Refuse to make the signed agreement or final decision available for inspections upon request by CMS or its designee.

Guidance on Identifying Noncompliance at F848: In some cases, a resident or his or her representative may not be able to recall all the specifics about the selection of a neutral arbitrator or convenient venue. If a resident or their representative cannot recall the details of the selection of a neutral arbitrator or a convenient venue, this alone may not necessarily indicate noncompliance. However, if several residents do not recall the process of selecting a neutral arbitrator, or a convenient venue, the surveyor should conduct further investigation.

Conversely, if a resident or his or her representative actively asserts or complains that there is no process for the selection of a neutral arbitrator or a convenient venue to both parties, this **likely** constitutes noncompliance.

In either case, surveyors are expected to verify noncompliance through further investigation with the resident or representative, as well as other residents, staff members, and resident council.

Guidance on Determining Severity of Noncompliance at F848: When determining the severity of noncompliance at F848, surveyors must always consider what impact the identified noncompliance had on the affected resident(s). However, unlike noncompliance at other tags, such as Abuse or Quality of Care, which may result in physical, mental, and/or psychosocial outcomes, noncompliance at F848 will almost exclusively have a psychosocial impact or outcome. Surveyors must gather sufficient evidence through interviews, record review and observation to demonstrate what the psychosocial impact was to the resident. In some cases, the surveyor may have to use the reasonable person concept to determine severity. Refer to the Psychosocial Severity Outcome Guide for further information.

If the surveyor identifies noncompliance at F848 for the failure to retain signed arbitration agreements and/or the arbitrator's final decision for residents that have resolved a dispute through arbitration for 5 years, Severity Level 1 may be the appropriate severity level for this regulatory requirement.

In other cases, noncompliance at the other requirements at F848 (failure for the agreement to provide for the selection of a neutral arbitrator or convenient location) would likely be cited at severity level 2, No Actual Harm with Potential for More than Minimal Harm that is not Immediate Jeopardy.

If the surveyor identifies that noncompliance at F848 has caused psychosocial **harm** to the resident (per the Psychosocial Severity Outcome Guide), this should be cited at severity level 3, Actual Harm that is not Immediate Jeopardy.

In order to cite Immediate Jeopardy, the surveyor's investigation would have to show that noncompliance resulted in the likelihood for serious psychosocial injury or harm, or caused actual serious psychosocial injury or harm, and required immediate action to prevent further serious psychosocial injury or harm from occurring or recurring. Refer to State Operations Manual (SOM) Appendix Q for further information.

Guidance on Correcting Noncompliance at F848: When noncompliance exists at F848, the Plan of Correction (POC) is expected to include the required elements as identified in the SOM, Chapter 7, at 7317 – Acceptable Plan of Correction. These include:

- Address how corrective action will be accomplished for those residents found to have been affected by the deficient practice;
- Address how the facility will identify other residents having the potential to be affected by the same deficient practice;
- Address what measures will be put into place or systemic changes made to ensure that the deficient practice will not recur;
- Indicate how the facility plans to monitor its performance to make sure that solutions are sustained; and
- Include dates when corrective action will be completed.