

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.

When the surveyor's investigation shows systemic noncompliance with F848, indicating a complete disregard or unawareness of the requirements, such as agreements, which make no provision for the selection of a neutral arbitrator or convenient venue, CMS has the following expectations (in addition to the requirements for POCs listed above) with regard to the accepted POC:

- The POC must ensure that all arbitration agreements allow for the selection of a neutral arbitrator and convenient venue; and
- There must be a process to ensure records are retained for 5 years.