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Prohibition on Gag Clauses and the Attestation Requirement

On February 23, 2023, the Departments of Labor, Health and Human Services, and Treasury (collectively referred to as the “Departments” in this Alert) prepared [Frequently Asked Questions](#) (FAQs) related to the prohibition on gag clauses, including guidance and methods for submitting annual attestations of compliance with the anti-gag clause requirements. The first “Gag Clause Prohibition Compliance Attestation” is due no later than **December 31, 2023**, which covers the period beginning December 27, 2020 (or the effective date of the group health plan or health insurance coverage, if later), through the attestation date.

This Alert summarizes the prohibition on gag clauses and the annual Gag Clause Prohibition Compliance Attestation, including how to comply with the attestation requirements, who can complete the attestation, and next steps for plan sponsors to ensure compliance with these requirements.

Overview of the prohibition on gag clauses

Multiple federal laws prohibit group health plans and health insurance issuers (“Covered Parties”) from entering into agreements restricting the plan from accessing and sharing certain information.¹ This is effectively a prohibition on “gag clauses”² for price and quality information in provider agreements.

As described in the FAQs,³ the Consolidated Appropriations Act, 2021 (CAA 2021) prohibits Covered Parties from entering into agreements with health care providers, networks or associations of providers, third-party administrators (TPAs), or other service providers offering access to a network of providers that restrict the Covered Party from doing any of the following:

- (1) providing specific cost or quality of care information or data (through a consumer engagement tool or any other means) to referring providers, the plan sponsor, participants, beneficiaries, or enrollees, or individuals eligible to become participants, beneficiaries, or enrollees of the plan or coverage;
- (2) electronically accessing de-identified claims and encounter data for each participant, beneficiary, or enrollee upon request and consistent with the privacy regulations consistent with section 264(c) of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Genetic Information Nondiscrimination Act of 2008 (GINA), and the Americans with Disabilities Act of 1990 (ADA); and
- (3) sharing such information as outlined in (1) and (2), consistent with applicable privacy regulations pursuant to HIPAA, GINA, and the ADA.⁴

The intent of the prohibition on the gag clause is to increase transparency in pricing and quality information for plan sponsors and health care consumers.

¹ Internal Revenue Code section 9824, ERISA section 724, and PHS Act Section 2799A-9 (a)(1).

² Q1 of the recent [FAQs](#) defines a “gag clause” as a contractual term that restricts the data and information that a group health plan and health insurance issuer can share with another party.

³ The prohibition against gag clauses has been outlined in previous [FAQs](#) and again in the most recent [FAQs](#).

⁴ [FAQs About Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation part 57](#).

Attestation requirement

The CAA 2021 includes provisions requiring Covered Parties to submit an annual attestation to the Departments regarding compliance with the anti-gag clause requirements. While the provisions technically became effective on December 27, 2020, the Departments indicated Covered Parties could use a good faith, reasonable interpretation of the statute and its gag clause prohibition until the Departments issued further guidance.⁵

This additional guidance appeared in the form of the recent FAQs, which included guidance for the gag clause attestation requirement. The first Gag Clause Prohibition Compliance Attestation is due no later than December 31, 2023. The attestation should cover the period from December 27, 2020⁶ through the date the attestation is submitted. Subsequent attestations will be due by December 31st of each year.

The following entities are required to comply with the Gag Clause Prohibition Compliance Attestation:

- fully insured and self-insured group health plans (including ERISA plans, church plans, and non-Federal governmental plans);⁷
- health insurance issuers offering group health insurance coverage or individual health insurance coverage, including student health insurance coverage and individual health insurance coverage issued through an association.

Note: The Departments will not enforce the attestation requirement for health reimbursement arrangements (HRAs) or other account-based group health plans, such as health care flexible spending accounts. The prohibition on gag clauses does not apply to them, because they do not require agreements with network providers. In addition, HRAs and other account-based group health plans are typically integrated with other coverage that is subject to the gag clause requirements.

How to comply with the attestation requirements

Covered Parties should submit the annual Gag Clause Prohibition Compliance Attestation through the [CMS HIOS portal](#).⁸ Once a user is in the system, the Covered Party completing the Gag Clause Prohibition Compliance Attestation will be asked to provide basic information regarding the entity and plan. In addition, the user completing the attestation will be required to download and complete the Reporting Entity Excel Template. The [instructions](#) and [user manual](#) outline the specific steps to complete the attestation and provide screenshots for reference.

Who can attest on behalf of a Covered Party

Covered Parties can submit the Gag Clause Prohibition Compliance Attestation directly.

Self-funded group health plans (including level-funded plans) can also delegate the attestation requirement through the use of a Third-Party Administrator (TPA), if the TPA agrees in writing to attest on behalf of the plan. If more than one TPA is utilized for different benefits, each can complete the attestation on the plan's behalf for the applicable benefits. In the event the TPA fails to complete the attestation, the plan sponsor remains responsible for its submission. The plan sponsor may have indemnification rights against the TPA.

⁵ Q7 of these [FAQs](#) outlined the self-implementation attestation until further guidance was issued.

⁶ Or the effective date of the group health plan or health insurance coverage, if later.

⁷ These requirements apply regardless of whether a plan is grandfathered or non-grandfathered but will not apply to any coverage that is offered as an excepted benefit.

⁸ Instructions, a system user manual, and a Reporting Entity Excel Template for Covered Entities to submit the Gag Clause Prohibition Compliance Attestation can be found [here](#).

For fully insured group health plans, the obligation belongs to both the group health plan and the insurer. However, the Departments will consider the obligation satisfied if the insurer submits the attestation on behalf of the plan.

Next steps

Covered Parties that do not timely comply with the annual attestation requirement may be subject to enforcement action. Plan sponsors should review their current plans and agreements with service providers and TPAs and ensure the following:

- If any contracts for group health plans entered into on or after December 27, 2020 include impermissible gag clauses, these should be removed.
- Plan sponsors should confirm with insurers and/or TPAs that there are no impermissible gag clauses in new contracts.
- For employers sponsoring fully insured group health plans, the employers should ensure the insurance carrier is submitting the attestation on behalf of the plan.
- For employers with self-insured group health plans, plan sponsors will need to either directly submit the attestation or enter into an agreement with a TPA or service provider to submit the attestation on behalf of the plan sponsor.
- Plan sponsors should confirm the initial required attestation is completed by December 31, 2023 and annually thereafter.

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