Benefits BULLETIN

Gag Clause Prohibition Compliance Attestation Due December 31

• **August 21, 2023** •

The Consolidated Appropriations Act of 2021 (CAA) contains a variety of measures focused on improving transparency and enhancing consumer protection in health coverage. One of the many transparency-related components of the CAA is the prohibition of group health plans entering into any agreement or contract that contains a "gag clause." As part of guidance issued by the U.S. Departments of Labor, Health and Human Services, and Treasury (the "Departments") on February 23, 2023, group health plans and insurers must attest that they are in compliance with the gag clause prohibition.

The first attestation is due by December 31, 2023, and covers the period from December 27, 2020, through the date of attestation. **Thereafter, the attestation is due annually by December 31**.

What is the Gag Clause Prohibition?

A "gag clause" is a contractual term that directly or indirectly restricts certain data and information that a plan or issuer can make available to another party. Specifically, group health plans and insurers cannot enter into agreements which contain language that restricts the disclosure of provider-specific cost or quality of care information to certain third parties. Language that restricts electronic access to de-identified claims and encounter information for individuals upon request is also prohibited (consistent with privacy rules under HIPAA, GINA and the ADA). Additionally, agreements cannot have language that restricts the sharing of the information described above.

Who Must File?

The attestation requirement applies to health insurance carriers and group health plans, including ERISA plans, non-federal governmental plans, church plans, and grandfathered

plans – whether insured or self-insured. Excepted benefits (such as standalone dental and vision plans, Health FSAs and EAPs), HRAs, and other account-based plans are not required to submit an attestation.

Group health plans subject to this requirement can delegate the attestation requirement to their insurance carrier or TPA.

- **For fully insured group health plans**, most carriers will complete the attestation on behalf of the plan. An employer should nonetheless confirm with the carrier that they will submit the attestation because some carriers, to date, have indicated that they will not be fulfilling this obligation on behalf of the plan.
- **Self-insured group health plans** can enter into a written agreement with their TPA to complete the attestation on their behalf (though the legal responsibility for compliance ultimately resides with the employer). Many TPAs, however, are not willing or able to fulfill this requirement on behalf of the group health plan. As a result, most employer-sponsors of self-insured group health plans will need to complete the attestation for their plan.

How is the Attestation Completed?

Employers can complete the attestation through the Centers for Medicaid and Medicare Service's (CMS's) **Health Insurance Oversight System** (HIOS) which provides links to instructions for completing the attestation, a user manual for submission, and a link to the application.

There is also a link to an Excel file to capture and upload data to CMS, but this is only required of entities reporting on behalf of multiple parties, such as an insurance carrier reporting on behalf of multiple health plans. **Most employers will not use the Excel file and will instead enter their data directly within the HIOS platform**.

After confirming with insurance carriers, TPAs and other service providers that any agreements do not contain gag clauses, below are steps an employer should take to complete attestation (which are also detailed in **the CMS instruction manual** under Option A on p.8):

Step 1. Enter information in the system on the Submitter and the Attester. The Submitter is the individual who is filling in the information in the system. The Attester is someone with the legal authority to act on behalf of the employer and can be, but is not required to be, the same individual as the Submitter.

Step 2. Enter information about the Reporting Entity, which is the group health plan (or GHP). Information to be reported includes the employer's name and

EIN, ERISA plan number, contact information, and information about the type of provider agreement to which the attestation relates.

Step 3. If the Attester is a different individual than the Submitter, the Attester will need to access the system in order to electronically sign the attestation.

Step 4. Submit the attestation **here**. The **user manual**, in step-by-step directions, details how to gain access to the system in order to submit the attestation.

Employer Next Steps

Employers must ensure their agreements with insurers and TPAs do not contain provisions that violate the CAA's prohibition of gag clauses and if they do, the agreements should be amended. Furthermore, employers should reach out to their carriers or TPA to confirm whether the attestation will be completed on the plan's behalf. If not, the employer will need to complete the attestation directly by following the steps above.

ADDITIONAL RESOURCES

FAQs About Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 57

Consolidated Appropriations Act, 2021 (CAA)

Instructions for submitting the GCPCA

User Manual for Submitting the GCPCA

Enter Webform Now for a GCPCA