
We're Not Kidding!—Employer Plans Must Attest to “No Gag Clauses” by December 31

February 2023

As President Biden might say: “Not a joke.” By December 31, employers have to tell the government that employer contracts with health care providers don’t contain “gag clauses.”

Under the Consolidated Appropriations Act, 2021 (CAA 2021), group health plans and insurers are prohibited from having “gag clauses” in their contracts with health care providers and other third parties. To ensure compliance with this provision, group health plans must submit an annual attestation of compliance to the Centers for Medicare & Medicaid Services (CMS) beginning December 31, 2023. The Department of Labor, Health and Human Services, and Treasury (the Departments) announced the process group health plans and insurers must use to submit this annual attestation in Affordable Care Act (ACA) and CAA 2021 Frequently Asked Questions (FAQs) Part 57.

This Aon bulletin discusses:

- What are gag clauses and what is prohibited?
- What is the attestation of compliance?
- When is attestation due?
- Who must submit the attestation?
- Delegating the attestation
- How to submit the attestation and reference material
- Next steps for employers

What are gag clauses and what is prohibited?

A “gag clause” is a contractual term that restricts specific data and information that a group health plan or health insurer can make available to another party. The CAA 2021 prohibits group health plans and insurers from entering into agreements with health care providers (or a network of providers), third-party administrators (TPAs), or other related service providers that contain language that could constitute a “gag clause.”

Specifically, the agreement cannot restrict the group health plan or insurer from:

- Disclosing provider-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, or individuals eligible to become participants;

- Electronically accessing de-identified claims and encounter information or data for each participant enrolled in the plan or coverage upon request and consistent with the HIPAA privacy regulations, as well as the Genetic Information Nondiscrimination Act and the Americans with Disabilities Act, including, on a per-claim basis:
 - Financial information, such as the allowed amount, or any other claim-related financial obligations included in the provider contract;
 - Provider information, including name and clinical designation;
 - Service codes; or
 - Any other data element included in claim transactions.

For example, if a contract between a TPA and a plan provides that the plan sponsor's access to provider-specific cost and quality of care information is only at the discretion of the TPA, that provision would be considered a prohibited gag clause. However, a health care provider or other service provider may place reasonable restrictions on the public disclosure of this information.

What is the attestation of compliance?

To ensure compliance with the prohibition on gag clauses, the CAA 2021 requires group health plans and insurers to submit a Gag Clause Prohibition Compliance Attestation. Entities submitting the attestation proclaim to the federal government that their contracts and agreements do not contain gag clauses, and they are otherwise in compliance with the prohibition.

When is the attestation due?

The first attestation is due by December 31, 2023, and covers compliance with the prohibition from December 27, 2020, through the date of attestation. Subsequent attestations are due by December 31 of each year thereafter.

As explained in the Departments FAQs Part 49, the prohibition on gag clauses became effective December 27, 2020. However, at that time, the Departments indicated that plan sponsors were expected to implement a good faith reasonable interpretation of the provision. Now, group health plans—either the employer as plan sponsor or a third party on behalf of the plan—must complete the annual Gag Clause Prohibition Compliance Attestation.

Who must submit the attestation?

Employers who sponsor group health plans are required to comply. Group health plans for this purpose include:

- Insured plans;
- Self-insured plans;
- ERISA-governed plans;



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- Non-federal governmental plans; and
 - Church plans subject to the Internal Revenue Code.

A plan's grandfathered status is irrelevant—both grandfathered and non-grandfathered plans must comply.

The following entities also are required to submit a Gag Clause Prohibition Compliance Attestation:

- Health insurers offering group health coverage; and
- Health insurers offering individual health insurance coverage, including student health insurance coverage and individual health insurance coverage issued through an association.

Entities that are **not** required to attest include:

- Plans or issuers offering only excepted benefits, such as dental and vision plans;
- Health reimbursement arrangements and other account-based plans;
- Issuers offering only short-term, limited duration insurance;
- Medicare and Medicaid plans;
- State Children's Health Insurance Program plans;
- The TRICARE program;
- The Indian Health Service Program; and
- Basic Health Program Plans.

While not specifically listed in the FAQs or other guidance, based on the sections of the Internal Revenue Code, ERISA, and Public Health Services Act that contain this requirement, it's likely that retiree-only plans (i.e., plans with fewer than two current employees on the first day of the plan year and that have a separate plan document and Internal Revenue Service Form 5500) also are not subject to this attestation.

Delegating the attestation

An employer who sponsors a self-insured or partially self-insured group health plan can delegate the attestation for its group health plan to a TPA, pharmacy benefit manager (PBM), or other service provider. The employer must enter into a written agreement with the service provider to delegate responsibility for the attestation. Even with a written agreement, the employer with a self-insured or partially self-insured plan, as plan sponsor, remains ultimately responsible for the attestation.

In addition, the FAQs indicate that an insurer that offers both group health plan insurance and acts as a TPA for self-insured group health plans may submit a single Gag Clause Prohibition Compliance Attestation on behalf of itself, its fully insured group health plan policy holders, and its self-insured

group health plan clients. The Departments ask the vendors to coordinate with their clients to ensure that a duplicate submission does not occur. When an insurer submits, the sponsor of the insured group health plan also is considered to have satisfied this requirement.

A plan or insurer may authorize any appropriate individual within the organization to attest. A TPA attesting on behalf of its clients may authorize any appropriate personnel within the TPA's organization to attest.

How to submit the attestation and reference material

CMS has established a new submission system for collecting Gag Clause Prohibition Compliance Attestations, which is available [here](#).

To complete the attestation, the submitter must access a user interface, which requires an authentication code. **Reporting entities should carefully review the materials in the Gag Clause Prohibition Compliance Attestation website, including the instructions for submitting the attestation, user manual for the system, and FAQs, available [here](#).**

Next steps for employers

Confirm with TPAs and insurers that gag clauses have been removed or invalidated

Employers should contact their plans' insurers, TPAs, PBMs, and other vendors to seek assurances of compliance with the prohibition on gag clauses.

Determine who will submit attestation

Employers who sponsor self-insured group health plans should begin by confirming whether each of their medical TPAs, PBMs, or other carve-out vendors will be completing the attestation on their behalf. If there are any vendors who will not submit an attestation on behalf of the plan, the employer should designate a responsible party internally and set up access to the CMS submission system ahead of the December 31, 2023, deadline.

Enter into written agreement with party responsible for attestation

Employers should have a written agreement with the TPA, insurer, or other vendor who will submit the attestation on behalf of the employer's plan. Vendors may have sample agreements, but if not, employers should offer their own written agreement in consultation with their counsel.

Resources

ACA and CAA 2021 FAQs Part 57 is available [here](#).



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