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Benefits Alert

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No gag clauses — attestation is due by year-end

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For the first time, group health plans and other reporting entities must document their compliance with the prohibition on gag clauses.



What's the Impact?

- / No heavy lifting required—group health plans are permitted to delegate the attestation to service providers
- / Now is the time to connect with administrators, providers, and advisors to ensure compliance with the gag clause prohibition and attestation of that compliance

Group health plans (and other reporting entities) must, for the first time, submit to the Departments of Labor, Treasury, and Health & Human Services (Departments), by December 31, 2023, an attestation of their compliance with the prohibition on gag clauses. The attestation is part of the transparency initiatives of the Consolidated Appropriations Act, 2021 (CAA, 2021). The CAA, 2021 prohibits “gag clauses” in contracts that health plans and insurance issuers enter with health care providers, networks of providers, third-party administrators (TPAs), or other similar service providers.

The first attestation will cover the period beginning on December 27, 2020 (or, if later, the effective date of the plan or health insurance coverage) through the date of attestation.

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Subsequently, plans must file attestations annually by the end of each year. Below, we discuss recently issued guidance on the attestation process provided in a set of tri-agency FAQs.

Good news

Plans sponsors already dreading yet another reporting obligation may breathe easy here. The Departments permit group health plans to delegate the gag clause attestation to their service providers (e.g., their claims administrator, TPA, or pharmacy benefits manager (PBM)). Each vendor may file an attestation on behalf of all of its clients, including plans with fully insured coverage and self-insured plans. However, a self-insured plan remains legally responsible for satisfying the attestation requirement on time and accurately. An attestation by an insurance issuer on behalf of its insured clients will satisfy the client-plan's obligation.

Not completely off the hook

The attestation is not the end of the story for employers sponsoring group health plans. Even though their providers will be filing an attestation, the employers must ensure that their health plan vendor contracts in fact do not contain any gag clauses. By now, sponsors should have reviewed and modified their agreements with service providers to identify and remove the gag clauses. However, another review of agreements may be warranted now that the Departments have issued additional guidance on what types of provisions are gag clauses (previously, plans were expected to use a good faith, reasonable interpretation of the statutory language). When the gag clauses are out, plan fiduciaries would likely have an obligation to ensure that plan vendors abide by those agreements. So, what are the gag clauses?

Gag clauses

Gag clauses are provisions that directly or indirectly prohibit plans from:

- / Disclosing provider-specific cost and quality of care information to referring providers, participants, beneficiaries, enrollees, and individuals eligible to become participants, beneficiaries, or enrollees
- / Electronically accessing (i) de-identified claims and encounter information for each participant, beneficiary, or enrollee upon request, including financial information (e.g., the allowed amount) in the provider contract; (ii) provider information, including name and clinical designation; (iii) service codes; or (iv) any other data element included in claim or encounter transactions
- / Sharing the information in the two preceding bullets with a business associate

The only limitations on the information sharing are the privacy protections under 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).

For example, a contract term that treats rates payable to providers at a point of service as proprietary would be a prohibited gag clause. If an agreement authorizes disclosures only at the discretion of the vendor or is subject to any requirement that functions as a restriction, such

provision would also be a prohibited gag clause. However, the Departments note that public disclosure of information may be subject to “reasonable restrictions.”

The mechanics

For plans or their vendors that will be reporting compliance with the gag clause prohibition, the Departments launched a new [website](#) where reporting entities can find the filing instructions, the system user manual, a Reporting Entity Excel Template, and a set of FAQs. The attestation must be submitted on an annual basis through the established [portal](#). Unless plan sponsors decide to file an attestation themselves, reporting entities will be the ones working through the attestation mechanics.

Takeaways

It is time for plan sponsors to contact their claims administrators, TPAs, PBMs, healthcare providers (in the case of direct contracting), and legal advisors to arrange for both compliance with the gag clause prohibition and attestation of that compliance. Employers should also take advantage of the easier access to claim and encounter information to streamline and optimize their health plan coverage and find potential costs saving opportunities.

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