COMPLIANCE ALERT

Gag Clause Attestation Guidance Released

April 3, 2023

Quick Facts

- The Consolidated Appropriations Act of 2021 (CAA) prohibits group health plans and health insurance carriers from entering into agreements with providers, TPAs, or other service providers that include language that constitutes a "gag clause."
- The gag clause prohibitions became effective on December 27, 2020, but the attestation requirement was delayed pending the release of further guidance.
- The gag clause compliance attestation is due by December 31, 2023.
- Subsequent attestations are due annually by December 31.

Background

The Internal Revenue Service (IRS), Department of Labor (DOL), and Department of Human Services (HHS) [collectively, "the Departments"] recently released guidance regarding the requirement for employer-sponsored health plans and health insurance carriers to submit an attestation of compliance with the gag clause prohibitions contained in The Consolidated Appropriations Act of 2021 (CAA). The first attestation must be submitted by December 31, 2023. Most employers will be able to rely on their carrier or a third-party administrator (TPA) to submit the required attestation.

The CAA amended the Employee Retirement Income Security Act (ERISA), the Public Health Services Act (PHSA), and the Internal Revenue Code to prohibit group health plans and health insurance carriers (referred to as "issuers" in the rules) from entering into agreements with providers, TPAs, or other service providers that include language that constitutes a "gag clause." A gag clause is contractual language that contains any of the following:

(1) Restrictions on the disclosure of provider-specific cost or quality of care information, or data to referring providers, plan sponsors, participants, beneficiaries, or enrollees;
(2) Restrictions on electronic access to de-identified claims and encounter information, or data for each participant, beneficiary, or enrollee (consistent with the privacy regulations included in the Health Insurance Portability and Accountability Act (HIPAA), the Genetic Information Nondiscrimination Act (GINA), and the Americans with Disabilities Act (ADA); and
(3) Restrictions on sharing information or data described in (1) and (2), with a business associate (as defined by HIPAA privacy regulations).

The gag clause prohibition requirements apply to virtually all employer-sponsored health plans, including fully insured and self-funded group health plans subject to ERISA, non-Federal governmental plans, church plans, and grandfathered plans.

The Attestation Requirement

Plans and issuers must annually submit an attestation of compliance with these requirements to the Departments. The gag clause prohibitions became effective December 27, 2020 (the date of enactment of the CAA), but, the attestation requirement was delayed pending release of further guidance. With the release of this guidance, the first gag clause compliance attestation is now due by December 31, 2023. Subsequent attestations are due annually by December 31.

Health Reimbursement Arrangements (HRAs), Health Flexible Spending Accounts (HFSAs), and other account-based plans are exempt from the attestation requirement.

Completing the Attestation on Behalf of the Employer Plan Sponsor

Employers typically rely on their carrier, TPA, or network to contract with the medical providers who provide services to health plans offered to employees. The Departments recognize that employers rarely enter into agreements with healthcare providers directly, so the guidance makes it clear that if specific requirements are met, employers can rely on their carrier or TPA to submit the attestation on behalf of their employer-sponsored plans.

Self-funded Employer Plans

Self-funded plans may satisfy the requirement to provide an attestation by entering into a written agreement under which the plan's service provider(s), such as a TPA, will submit the required attestation. The guidance does not define what constitutes an acceptable written agreement. However, the Departments point out that if a self-funded plan chooses to enter into such an agreement with the plan's service provider(s), the legal requirement to provide a timely attestation remains with the employer's plan.

Fully Insured Employer Plans

Since carriers are required to submit an attestation regarding the plans they offer, employers may generally rely on the carrier to submit the required attestation. While liability for the submission rests with the carrier, employers should still seek assurance from their carrier that the attestation is being submitted.

Employer Direct Provider Contract Arrangements

Some employers enter direct contracts with providers. In these cases, the employer may need to take responsibility for submitting the attestation on behalf of their plan.

Submitting the Attestation

The Departments have launched a website for submitting the attestation and have issued **instructions**, **frequently asked questions**, a system **user manual**, and an **Excel reporting template** for plans and issuers to submit the required attestation. Plans and issuers should use this **website** to satisfy the requirement to submit an annual attestation.

Summary

Most employers will need to rely on their vendor (health insurance carrier or TPA) to comply with the rules. Fully insured employers will be able to rely on carriers to submit the attestation on behalf of their plan, but this may be more complicated for self-funded employers. In the examples provided, the Departments are clear that if a self-funded employer contracts with their vendor for assistance, the employer is still liable for the compliance of their plan and will need to confirm their vendor is meeting the requirements.

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