



Insurance Brokers &
Consultants

EPIC 2023 Compliance Series

End of Emergency Periods
and Gag Clause Attestations

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Presenters



Liz Mann, EPIC Director of Compliance

Liz Mann is EPIC's Internal Compliance Director. Liz and her team are responsible for disseminating information to clients about changing requirements and regulations and reviewing all plan designs and programs for compliance with Federal and State regulations. Liz is embedded into our account management team to provide timely support and guidance as ERISA-related regulations or concerns emerge in the marketplace. As a client, you have the option of directly accessing Liz or accessing her traditionally through your account team. Liz graduated Magna Cum Laude from Saint Mary's College in Notre Dame, IN with Bachelor of Arts degrees in History and French. She graduated with her law degree from University of Toledo, College of Law in Toledo Ohio in 2007. She has accumulated over 14 years of experience working in employee benefits and offers expertise in ERISA, IRS, COBRA, FMLA and ACA compliance.



Andreena Norfleet, EPIC Compliance Consultant

Andreena Norfleet is EPIC's Internal Compliance Consultant. Andreena assists clients by providing updates with the latest news from State and Federal regulators as well as reviewing plan designs for compliance. Andreena Norfleet is a double Panther - graduating magna cum laude from Georgia State University with a Bachelor of Arts degree and in 2022, she obtained her law degree from Georgia State University College of Law. Prior to law school, Andreena managed a private urgent care clinic with 3 locations across the metro-Atlanta area, overseeing the company's compliance and revenue-cycle management departments.

Background

On January 31, 2023, President Biden announced that the **Public Health Emergency (PHE)**, declared by the Department of Health and Human Services, and the **National Emergency (NE)** declared by the President will both end on May 11, 2023.

Public Health Emergency

- Originally declared on January 31, 2020, in response to the COVID-19 pandemic
- Renewed every 90 days, more than a dozen times since January 2020

National Emergency

- Originally declared on March 1, 2020, in response to the COVID-19 pandemic
- Renewed in 2021 and 2022



End of Public Health Emergency

Public Health Emergency

Current Requirements under the PHE

- COVID-19 Testing
 - Plans and issuers are required to cover COVID-19 testing and related services without cost-sharing or prior authorization both in-network and out-of-network
 - Includes over-the-counter tests (OTC)
 - HDHPs with HSAs have special IRS relief to allow for testing without first satisfying the deductible under IRS Notice 2020-15
- COVID-19 Vaccines
 - Plans and issuers must cover COVID-19 vaccines at no cost-sharing both in-network and out-of-network
- Employee Assistance Programs
 - EAPs that provide coverage for COVID-19 testing and/or vaccines are not considered to provide "significant medical care" and can maintain excepted benefit status under ACA

Public Health Emergency

Current Requirements under the PHE

- Stand Alone Telemedicine
 - Employers may offer stand alone telemedicine to employees who are not eligible for the employer's medical plan without implicating ACA requirements
- HDHP Relief for Telemedicine
 - HDHPs with HSAs can provide telemedicine at a cost lower than fair market value (FMV) without jeopardizing HSA eligibility
- Summary of Benefits and Coverage
 - Departments consider a plan to have satisfied its obligation to provide notice of material modification if the plan previously notified individuals of additional changes or provides notice within a reasonable timeframe before reversal of changes

Public Health Emergency

Post PHE Changes

- COVID-19 Testing
 - Plans and issuers are no longer required to cover COVID-19 tests and related services with no cost-sharing
 - May continue to cover at no cost or require cost-sharing
 - May continue to cover OTC tests or choose to not cover
 - It is unclear how the end of the PHE affects the relief for HDHPs with HSAs to provide testing at no cost without first satisfying the deductible, but the conservative approach is to require cost-sharing on these services after the end of the PHE
- COVID-19 Vaccines
 - No longer required to cover the vaccine at no cost-sharing out-of-network
 - May continue to cover out-of-network at no cost-sharing
 - Non grandfathered plans must cover vaccines in-network at no cost-sharing under ACA preventive services requirements
 - COVID-19 preventive services must be covered within 15 days of recommendation
- Employee Assistance Programs
 - Plans that provide “significant medical benefits” will no longer be excepted benefits under ACA

Public Health Emergency

Post PHE Changes

- Stand Alone Telemedicine
 - Plans that stay in place after the end of the PHE will be subject to ACA provisions
- HDHP Relief for Telemedicine
 - The relief was extended in 2022 from April 1, 2022-December 31, 2022
 - CAA 2023 extends relief from the FMV requirement starting plan years beginning January 1, 2023, for another two years
 - Gap in relief for mid-year renewals
 - Relief is permitted and not required
- Summary of Benefits and Coverage
 - Relief ends

Next Steps

Public Health Emergency

- COVID-19 Testing
 - Amend the plan if needed
 - Send notice of reversal of benefits to plan participants
 - HDHP plan sponsors should discuss potential HSA implications with ERISA counsel
- COVID-19 Vaccines
 - Amend the plan if needed
 - Send notice of reversal of benefits to plan participants
 - Monitor developments on COVID-19 preventive services

Next Steps

Public Health Emergency

- Stand Alone Telemedicine
 - Stop providing stand alone coverage
 - Send notice to employees before reversal
- HDHPs with Telemedicine
 - Decide whether to offer coverage at less than FMV
 - Send notice of changes to plan participants
 - Midyear plans will have a gap in coverage
 - Monitor developments on telemedicine legislation
- Summary of Benefits and Coverage
 - Review prior communications to determine if sufficient notice was previously provided and provide additional advance notice of reversal if necessary
 - Conservative approach is to provide advance notice within a reasonable amount of time before reversals
 - Standard rule is 60-day advance notice for changes to an SBC

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End of National Emergency

National Emergency

Current Requirement under the NE

- During the NE, certain deadlines are “tolled” (disregarded/paused) for either one year from the date of the triggering event or the end of the “Outbreak Period” whichever is sooner
 - Each individual has their own one-year tolling period based on their qualifying event
- The “Outbreak Period” will end 60 days after the declared end of the NE
- Deadlines will begin running on **July 10, 2023**
- Example
 - Qualified beneficiary receives a COBRA election notice on 3/1/22 and has one year tolled before the 60-day election window starts
 - Must elect COBRA by April 30, 2023.

National Emergency

End of NE

- COBRA
 - Qualifying event notice
 - Election notice
 - Election
 - Payment
- ERISA claims and appeals
 - Time to file a claim
 - Time to appeal an adverse claim determination
- HIPAA special enrollment rights
 - Birth or adoption
 - Marriage
 - Loss of other health coverage
 - Loss of eligibility for state assistance
- ERISA plan notices
 - Employer distribution for certain plan notices

National Emergency

End of NE - Example

- Plan participant gets married on April 1, 2023, and wants to add their spouse to the plan (HIPAA special enrollment right)
 - Normally the participant has 30 days to add the new spouse (May 1, 2023)
 - Under NE tolling participant has one year or until the end of the outbreak period disregarded, whichever is sooner, starting on April 1, 2023
 - National emergency ends on May 11, 2023
 - Outbreak period ends July 10, 2023
 - 30-day timeframe to enroll the spouse on the plan begins on July 11, 2023
 - Must add the new spouse by August 10, 2023 or lose the HIPAA special enrollment right

Next Steps

National Emergency

- COBRA
 - Revise notices to remove tolling provisions
 - Send election notices
 - Send communication to qualified beneficiaries regarding new deadlines for election and payment
- ERISA claims and appeals
 - Send communication to plan participants regarding end of deadline extensions
- HIPAA special enrollment rights
 - Send communication to plan participations regarding end of deadline extensions
- ERISA plan notices
 - Send notices as soon as administratively practicable

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Gag Clause Attestation

Background

As part of the CAA 2021, group health plans are prohibited from entering into agreements with service providers (such as carrier and TPAs) that contain gag clauses restricting provider-specific cost or quality information or claims data sharing information with plan sponsors. Effective in 2023, plan sponsors are required to attest to compliance with the CAA gag clause prohibition. The first attestation is due December 31, 2023, and it is an annual requirement.

Gag Clauses Generally

- Provision that directly or indirectly restricts information that a plan or issuer can disclose to another party
- May exist in agreements between the plan and:
 - Health care providers
 - Network of health care providers
 - TPAs
 - Other service providers offering access to a network of providers

Background

Examples of Prohibited Gag Clauses

- Contract between a TPA and a group health plan states that the plan will pay providers at rates designated as “Point of Service Rates,” but the TPA considers those rates to be proprietary and therefore includes language in the contract stating that the plan may not disclose the rates to participants or beneficiaries, that language prohibiting disclosure would be considered a prohibited gag clause.
- 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 contractual provision would be considered a prohibited gag clause.
- Note that a term in a contract that either directly or indirectly, prevents a plan or issuer from providing, accessing, or sharing the information or data, as provided for under the statute violates the gag clause prohibitions
- Reasonable restrictions on public disclosure of this information are allowed

Requirement

Prohibited Actions

- Disclosures of provider-specific cost or quality-of-care information
- Electronic access to de-identified claims and encounter information (in accordance with applicable privacy protections)
- Sharing the information described above with a business associate

Applicable Plans & Entities

- Small and large employers, fully insured and self-funded, ERISA, church & government, grandmother & grandfathered
 - Does NOT apply to excepted benefits
 - Does NOT apply to account-based plans
- Health insurance issuers of group and individual plans

Deadline

- Annually by December 31
 - The first year must attest with compliance from December 27, 2020 through December 31, 2023

Next Steps

Who is Responsible?

- The employer plan sponsor is ultimately responsible for compliance
- But... many employers should be able to rely on their TPAs and carriers to complete the attestation
 - Confirm in writing with the vendor
 - Recent FAQ guidance states that third parties can report on behalf of the plan
- Employers that have their own provider or network agreements will need to complete their own attestation

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Air Ambulance Reporting

It's Not Happening... yet

Background

As part of the CAA 2021, No Surprises Act, carriers and health plans must report information regarding air ambulance service claims to CMS for two years. The intent is for the government to use the information to issue public reports to assist in understanding what drives the high costs of these services.

Requirement Deadline

- Proposed rules were issued in 2021 and were expected to have been finalized in 2021
 - Proposed rules provided an initial due date of March 31, 2023, for the first report
 - BUT the proposed rules state that the first report be **due 90 days after one full calendar year following the release of final regulations**
- If final rules are released this year the first report will be due March 31, 2025



Questions?