

# HEALTH CARE BULLETIN



## Health Plans Must Submit Gag Clause Attestations by Dec. 31, 2023

On Feb. 23, 2023, the Departments of Labor, Health and Human Services and the Treasury (Departments) issued [FAQs](#) on the prohibition of gag clauses under the transparency provisions of the [Consolidated Appropriations Act, 2021 \(CAA\)](#). These FAQs require health plans and health insurance issuers to **submit their first attestation of compliance with the CAA's prohibition of gag clauses by Dec. 31, 2023.**

Effective Dec. 27, 2020, the CAA prohibits health plans and issuers from entering into contracts with health care providers, third-party administrators (TPAs) or other service providers that would restrict the plan or issuer from providing, accessing or sharing certain information about provider price and quality and deidentified claims.

Plans and issuers must annually submit an attestation of compliance with these requirements to the Departments. The first attestation is due by Dec. 31, 2023, covering the period beginning Dec. 27, 2020, through the date of attestation. Subsequent attestations, covering the period since the last attestation, are due by Dec. 31 of each following year.

### Action Steps

Employers should ensure any contracts with TPAs or other health plan service providers offering access to a network of providers do not violate the CAA's prohibition of gag clauses. Also, employers with fully insured or self-insured health plans should prepare to provide the compliance attestation by Dec. 31, 2023. If the issuer for a fully insured health plan provides the attestation, the plan does not also need to provide an attestation. Also, employers with self-insured health plans can enter into written agreements with their TPAs to provide the attestation, but the legal responsibility remains with the health plan.

### Highlights

- Health plans and issuers must ensure their agreements with providers, TPAs and other service providers do not include prohibited gag clauses.
- Health plans and issuers must submit an annual attestation of their compliance with the CAA's gag clause prohibition.
- The Departments may take enforcement action against plans and issuers that do not timely submit the required attestations.

### Important Dates

#### Dec. 27, 2020

The CAA's prohibition of gag clauses became effective on this date.

#### Dec. 31, 2023

Health plans and issuers must submit their first gag clause compliance attestations by this date.



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## Prohibition on Gag Clauses

A gag clause is a contractual term that directly or indirectly restricts specific data and information that a health plan or issuer can make available to another party. Effective Dec. 27, 2020, the CAA generally prohibits group health plans and issuers offering group health insurance from entering into agreements with health care providers, TPAs or other service providers that include certain gag clause language. Specifically, these contracts cannot restrict a plan or issuer from:

1. Providing provider-specific cost or quality-of-care information or data to referring providers, the plan sponsor, participants, beneficiaries or enrollees (or individuals eligible to become participants, beneficiaries or enrollees of the plan or coverage);
2. Electronically accessing de-identified claims and encounter information or data for each participant, beneficiary or enrollee upon request and consistent with privacy rules under the Health Insurance Portability and Accountability Act (HIPAA), the Genetic Information Nondiscrimination Act (GINA), and the Americans with Disabilities Act (ADA); and
3. Sharing information or data described in (1) and (2) above or directing such information to be shared with a business associate, consistent with applicable privacy rules.

For example, if a contract between a TPA and a health 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.

Plans and issuers must ensure their agreements with health care providers, networks or associations of providers, TPAs or other service providers offering access to a network of providers do not contain provisions that violate the CAA's prohibition of gag clauses.

## Gag Clause Compliance Attestations

Health plans and issuers must annually submit an attestation of their compliance with the CAA's prohibition of gag clauses to the Departments. **The first attestation must be submitted no later than Dec. 31, 2023**, covering the period beginning Dec. 27, 2020, through the date of the attestation. Subsequent attestations are due by Dec. 31 of each following year, covering the period since the last attestation.

According to the Departments' FAQs, health plans and issuers that do not submit their attestations by the deadline may be subject to enforcement action.

## Covered Health Plans

The attestation requirement applies to fully insured and self-insured group health plans, including ERISA plans, non-federal governmental plans and church plans. Additionally, this requirement applies regardless of whether a plan is considered "grandfathered" under the ACA. However, plans that only provide excepted benefits and account-based plans, such as health reimbursement arrangements (HRAs), are not required to submit an attestation.

## Relying on Issuers/TPAs to Submit Attestation

With respect to fully insured group health plans, the health plan and the issuer are each required to submit a gag clause compliance attestation annually. However, when the issuer of a fully insured group health plan submits a gag clause



compliance attestation on behalf of the plan, the Departments will consider the plan and issuer to have satisfied the attestation submission requirement.

Employers with self-insured health plans can satisfy the gag clause compliance attestation requirement by entering into a written agreement under which the plan's service provider, such as a TPA, will provide the attestation on the plan's behalf. However, even if this type of agreement is in place, the legal requirement to provide a timely attestation remains with the health plan.

## **Attestation Website**

The Departments launched a [website](#) through the Centers for Medicare and Medicaid Services for health plans and issuers to submit their gag clause compliance attestations. The Departments have also provided instructions for submitting the attestation, a system user manual, and a reporting entity Excel template for plans and issuers to submit the required attestation, all of which are available [here](#).