



SALUS GROUP

Deadline for Submitting Gag Clause Attestation Is Dec. 31, 2024

Effective in 2020, the [Consolidated Appropriations Act, 2021 \(CAA\)](#) prohibits health plans and health insurance issuers from entering into contracts with health care providers, third-party administrators (TPAs) or other service providers that contain gag clauses (i.e., clauses restricting the plan or issuer from providing, accessing or sharing certain information about provider price and quality and de-identified claims).

Plans and issuers must annually submit an attestation of compliance with the CAA's gag clause prohibition to the Departments of Labor, Health and Human Services, and the Treasury (Departments). The first attestation was due on Dec. 31, 2023. **The next attestation is due Dec. 31, 2024**, covering the period since the last attestation.

Action Steps

Employers should review their contracts with issuers, TPAs or other health plan service providers to confirm they do not contain prohibited gag clauses. Also, employers should review what actions they may need to take to comply with the gag clause attestation requirement:

- Employers with fully insured health plans do not need to provide an attestation if their plan's issuer provides the attestation; and
- Self-insured employers can enter into written agreements with their TPAs to provide the attestation, but the legal responsibility remains with the health plan. While some TPAs are willing to submit attestations on behalf of their self-insured groups, other TPAs may be unwilling to do so.

Employers who submit their own attestations should review the latest instructions and user manual for submitting attestations electronically through the Centers for Medicare and Medicaid Services (CMS).

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 was due on Dec. 31, 2023, covering the period beginning Dec. 27, 2020, through the date of the attestation. Subsequent attestations are due on Dec. 31 of each following year, covering the period since the last attestation. **The deadline for submitting the next attestation is Dec. 31, 2024.**

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, nonfederal governmental plans and church plans. Additionally, this requirement applies regardless of whether a plan is considered "grandfathered" under the ACA. However, plans that provide only 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. Also, some service providers have indicated they are unwilling to submit attestations for their self-insured groups. In this case, employers need to submit the attestations for their health plans.

Submitting Attestations

Gag clause attestations must be submitted electronically by completing a CMS web form. The Departments have provided instructions for submitting the attestation, a system user manual and FAQs, all of which are available [here](#).

Resources

- [FAQs](#) from the Departments regarding the CAA's prohibition on gag clauses in provider agreements
- CMS [website](#) for submitting gag clause attestations
- The latest instructions and user manual for submitting attestations available [here](#)

Provided to you by Salus Group

This Compliance Bulletin is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice. ©2024 Zywave, Inc. All rights reserved.

This information is not meant to be legal advice and is for consultative purposes only. Please contact Valerie Bruce Hovland, Salus Group's V.P. of Compliance at vbrucehovland@thesalusgroup.com if you need additional information.