

PUBLICATION

Surprise! Gag Clause Attestation Due by 12/31/2023

Authors: Andrea Bailey Powers
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As part of the No Surprises progeny of legislation seeking transparency in health care, the Consolidated Appropriations Act of 2021 prohibits the use of "gag clauses" in group health plan agreements. All group health plans are required to submit an attestation by 12/31/2023, and each 12/31 thereafter, that the plan is not, and has not, been subject to any "gag clause" since 12/27/2020.

This attestation requirement applies to all fully insured health plans, self-insured health plans, both Employee Retirement Income Security Act of 1974 (ERISA) and non-ERISA plans, non-federal governmental plans, and church plans. The only exceptions are for stand-alone dental and vision plans, and plans that consist solely of health reimbursement arrangements (HRAs) or other account-based group health plans.

A gag clause is a "contractual term that directly or indirectly restricts specific data and information that a plan or issuer can make available to another party." Gag clauses might be found in agreements between a health plan and: (1) a health care provider; (2) a network or association of providers; (3) a third-party administrator (TPA); or (4) another service provider offering access to a network of providers.

For example, if a 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, that language prohibiting disclosure would be considered a prohibited gag clause.

Plans are permitted to contract with their TPA or insurance carrier to complete the gag clause attestation on behalf of the plan. Employers should coordinate with their TPAs and carriers to make sure that their attestation is complete. Employers might also consider amending services agreements to make clear who has the responsibility to make the attestation.

The gag clause compliance attestation must be filed using the Health Insurance Oversight System (HIOS) system website established by the U.S. Department of Health and Human Services at <https://hios.cms.gov/HIOS-GCPCA-UI>. The instructions for the online submission portal are found at: <https://www.cms.gov/files/document/gag-clause-prohibition-compliance-attestation-instructions.pdf>. A user manual providing guidance on the HIOS system and the Gag Clause Prohibition Compliance Attestation is available at: <https://www.cms.gov/files/document/hios-gcpc-usermanual-020000.pdf>.

For more information about this requirement, please contact [Andrea Bailey Powers](#) or any member of Baker Donelson's [Tax Group](#).